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THE MICHIGAN DIGEST ANNOTATED

EMBODYING ALL REPORTED DECISIONS FROM THE EARLIEST PERIOD DOWN TO VOLUME 202 MICHIGAN, INCLUSIVE.

Being a
NEW EDITION OF JACOBS & CHANEY
By
GEORGE F. LONGSDORF
Editor New York Cyclopedic Digest, Illinois Cyclopedic Digest, Ohio Notes, etc.

VOLUME I
ABANDONMENT TO CONTINUITY

CHICAGO
CALLAGHAN & COMPANY
1920

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Publishers' Announcement

The single aim of the publishers has been to make this a complete and accurate Michigan Digest of Michigan case law for Michigan lawyers. Every state has some features in its law that require special treatment in order to avoid submergence of important local law in the topical arrangement.

Arrangement.

The topical arrangement on the whole is based upon that of the Jacobs and Chaney Digest, which was prepared by Michigan lawyers and intended to meet the problems presented by the law in Michigan. Two generations of Michigan lawyers are familiar with it, and it has long been recognized as the best digest the state ever had. Some changes have of course been necessary, new subjects, such as the Workmen's Compensation Law, have come into being, while on the other hand other topics, such as Covenant, Debt and Trover, have become obsolete.

As most legal questions present the application of principles rather than the nature or existence of the principle, treatment in specific rather than general topics has been sought.

Reports Covered.

The volumes digested comprise all Michigan reports to the end of 202 Michigan and every case therein, except those which disclosed no point. In addition many decisions of the United States courts, not only the Supreme Court but also the District, Circuit and Circuit Courts of Appeals, have been digested; either because they passed on the statutes of Michigan or matters of Michigan law or because they were decided on writ of error to judgments of the Michigan courts.

Statute Index.

A feature new to digesting will be found in the references to related statutes under specific sections of the digest. These references direct the user to the particular sections of the Compiled Laws bearing upon the subject. They serve not only as a reminder linking case law to the statute law, but also as a direct citation to the statute. The impracticability of combining in a digest a complete general index to the statutes must be apparent. Indeed in many topics, such as Municipal Corporations and Corporations, the variety of the statutes and the number of the subjects treated forbid any effort to cite the statutes in this manner.

Topical Index.

The Topical Index is commended to the special attention of the user of this digest. Immediately following this preface is the Topical Index,

which is a complete table of contents as well as a cross-index in condensed form to the entire digest and all of the supplements which will follow it. Every topic heading used in any digest of Michigan reports or in any general compendium of law is contained in it with a reference to the topic or topics in the New Michigan Digest where the subject-matter will be treated. So far as known no state digest has ever contained such a finding device and it is offered as a valuable aid, which the user should regularly consult, since it frees him from the necessity of memorizing any particular system of classification by embodying all known systems in one alphabetical sequence.

General Index.

The Topical Index described above must be distinguished from the general index to the work which will appear in the last volume of the set. This index will be far more comprehensive and by way of analogy will bear the same relation to the Topical Index that an index in a textbook bears to the table of contents.

Cross-References.

The cross-references will be found very complete and exhaustive. Wherever possible they refer specifically to the section or paragraph to which reference is directed. In this connection care must be taken to distinguish references to sections from paragraph references. The former carry the section mark, thus, "See § 472, ante"; while the paragraph mark is used in connection with the latter, thus, "See ¶ 224, post."

To save space and reduce the bulk of the work as far as possible many cross-references have been grouped under comprehensive cross-reference heads. Thus under the head "Abatement to Absence" will be found a complete index to subjects which could be included under an alphabetical arrangement within the first and last word of the cross-reference head.

Where the title of a topic contains more than one word, as a rule only the first word is referred to in making a cross-reference. Thus the topic Payment, Tender and Deposit is usually referred to simply as Payment.

Forms and Maxims.

Forms and Maxims are two of the headings used in this digest. Under Forms are collected numerous citations to cases which contain forms which passed judicial scrutiny and received approval. Nearly all of them have been taken from cases decided within the last two or three decades. A large proportion of them are instructions to juries. The paragraph merely describes the subject-matter of the form without attempting to set it out in the digest verbatim. Maxims is made up of paragraphs consisting of the maxim and the citation of the case where it is found and is applied.

Table of Cases.

A full Table of Cases Digested will be found in the last volume of the digest with references to the places in the digest where the case appears. The memorandum cases will also be included in such table, denoted by the abbreviation "mem."

Supplements.

The classification and internal topical arrangement have been adopted with a view to supplements or cumulative digests which are to follow this digest. The same topical arrangement and section numbering will be followed in subsequent digests.

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TOPICAL INDEX.

All of the words or names in general use as names of topics by digesters and writers of encyclopedias, in so far as they have applicability to Michigan case law, are collected below.

Topic headings used in this digest are in BOLD FACE TYPE. Those used in other books, but not in this, are in capitals and small letters followed by references to topic headings in this digest where the matter is treated.

In a very few instances there may be topic headings in this digest under which there will not yet be any decisions, but as the classification plan is designed to be permanent and to be followed hereafter in the supplemental Quarterly and Biennial Digests, they have been provided as reasonably necessary to a complete and systematic classification.

The searcher who is familiar with any system of classification can find the desired topic easily and quickly by means of this index, especially since the topic headings have been chosen with a view to preserving terms familiar to Michigan lawyers and descriptive of the incidents and features of Michigan practice.

Abandonment.

Abatement and Revival (of actions).

Abbreviations, treated in Contracts; Pleading; Indictment; and like topics.

Abductions, treated in Crimes; Indictment.

Abetting Crime, treated in Crimes; Indictment.

Abide the Event, treated in Costs; Payment, etc. (into court); Stay of Proceedings; Stipulations.

Abode, treated in Domicile.

Abortion, treated in Crimes; Indictment.

Absconding Debtors, treated in Attachment; Civil Arrest and Bail; Bankruptcy; Limitation of Actions.

Absent Persons.

Abstracts of Title.

Abuse of Process, treated in Malicious Prosecution (and Abuse of Process).

Abutting Owners, treated in Highways; Eminent Domain; Dedication; Local Improvements and Assessments.

Acceptance, see topics treating of subject-matter, e. g., Contracts.

Accession and Confusion.

Accessories, treated in Crimes; Indictment.

Accident, in equity, treated in Mistake and Accident; negligence cases, treated in Negligence (only general matters); Carriers; Highways; Railroads; Street Railways; and like topics; in insurance, treated in Insurance.

Accommodation Paper, treated in Negotiable Instruments.

Accomplices, treated in Crimes; Indictment.

Accord and Satisfaction.

Account Stated.

Accounting Suits.

Accretion, treated in Waters.

Accumulations, treated in Perpetuities and Accumulations.

Acknowledgments.

Actions and Suits (only general matters).

Act of God, treated in Carriers; Contracts; Insurance; Negligence; etc.

Additional Allowances, treated in Costs; Estates of Decedents.

Ademption of Legacies, treated in Wills.

Adjoining Owners.

Adjournments, treated in Continuances; Indictment.

Administration, treated in Estates of Decedents; Guardianship; Trusts.

Admiralty.

Admissions, as evidence, treated in Evidence; Indictment and Prosecution; in open court, treated in Trial; Indictment; Stipulations; in pleading, treated in Pleading; Equity.

Adoption (of children).

Adulteration (see also Food).

Adultery, treated in Crimes; Divorce.

Advancements, treated in Estates of Decedents; Wills; Trusts.

Adverse Possession.

Advice of Counsel, treated in Attorneys; Malicious Prosecution (and other torts involving malice); Crimes (involving malice); Witnesses (privileged communications).

Affidavits.

Affirmations, treated in Oaths; Affidavits; Witnesses.

Affray, treated in Crimes; Indictment.

Agency, see also Brokers and Factors; Corporations, XVII (officers and agents); Municipal Corporations, XV (officers and employees); Officers.

Agistment, treated in Animals.

Agreed Case, treated in Appeal and Error (agreed case); Arbitration; Submission of Controversy; Stipulations.

Agriculture.

Aider by Verdict, treated in Pleading; Indictment; Harmless Error.

Alibi, treated in Indictment.

Aliens and Citizens.

Alimony, treated in Divorce.

Alteration of Instruments.

Ambassadors and Councils.

Ambiguity, treated in Contracts; Deeds; Wills; Evidence, V (parol).

Amendments, treated in Pleading; Indictment; and like topics.

Amicus Curiae.

Amotion, treated in Association; Corporations; Officers.

Amount in Controversy, treated in Courts; Equity; Justices of the Peace; Costs.

Ancient Documents, treated in Evidence; Restoration of Papers.

Animals.

Annuities.

Another Suit Pending, treated in Abatement and Revival; Courts, V (priority in jurisdiction); Stay.

Answers, treated in Equity; responsiveness of testimony is treated in Examination of Witnesses; Trial.

Antenuptial Contracts, treated in Husband and Wife.

Anti-Trust Laws, treated in Combinations and Monopolies; see also Contracts, IV (restraint of trade).

Appeal and Error.

Appearance.

Application of Payments, treated in Payment.

Appointment, treated in Officers; Estates of Decedents; Trusts; and like topics.

Apportionment Laws, treated in Elections; Officers; Constitutional Law.

Apprentices.

Arbitration and Award.

Architects, treated in Building and Construction Contracts.

Argument of Counsel. In criminal cases, see Indictment.

Army and Navy, treated in Military and Naval Affairs.

Arraignment and Pleas, treated in Indictment.

Arrest, Commitment and Bail. In civil cases, see Civil Arrest.

Arrest of Judgment, treated in Judgments; Indictment.

Arson, treated in Crimes; Indictment.

Assault and Battery.

Assignment of Errors, treated in Appeal and Error.

Assignments. See also topic treating of thing assigned.

Assignments for Creditors.

Assistance, Writ of.

Associations (and Societies).

Assumpsit.

Assumption of Obligations, treated in Novation; Guaranty; Mortgages; Frauds, Statute of.

Assumption of Risk, treated in Master and Servant; but see also Negligence; Carriers; and the like for contributory negligence.

Asylums and Hospitals.

Attachment. For contempt, see Contempt.

Attempts, treated in Crimes; Indictment.

Attorneys and Counselors. Includes Attorney General and Prosecuting Attorneys.

Auctions and Auctioneers.

Audita Querela, see Judgments.

Australian Ballot, treated in Elections.

Automobiles, treated in Highways (motor vehicle regulations, etc.).

Autrefois Acquit, treated in Crimes; Indictment.

Baggage, treated in Carriers; Inns.

Bail, treated in Arrest, Commitment and Bail; Civil Arrest and Bail.

Bailments.

Banking (and Money Affairs).

Bankruptcy.

Bastards.

Beneficiaries, treated in Insurance; Fraternal Beneficiary Associations; Trusts; Wills.

Benevolent Societies, treated in Fraternal Beneficiary Associations; Associations; Charities; Corporations.

Betterments, treated in Accession and Confusion; Ejectment; Quieting Title; Partition.

Betting and Gaming, treated in Crimes; Indictment.

Bigamy, treated in Crimes; Indictment; Divorce.

Bills in Equity, treated in Equity; Discovery; Accounting Suits; and other specific topics.

Bills of Exchange, treated in Negotiable Instruments.

Bills of Lading.

Bills of Sale, treated in Sales; Frauds, Statute of; and see Fraudulent Conveyances; Chattel Mortgages; Assignments for Creditors.

Birth Registry, treated in Census and Statistics; Health; Evidence.

Blackmail, treated in Crimes; Indictment.

Blended Properties, treated in Accession and Confusion; Equity, II (equitable conversion); Trusts; Wills.

Boards, treated in Officers; Municipal Corporations; Counties; Health; Corporations.

Body Execution, treated in Civil Arrest.

Bona Fides, treated in Negotiable Instruments; Notice and Record of Title; Fraudulent Conveyances.

Bonds. See also specific topics treating of the object or occasion for the bond, e. g., Appeal; Attachment; Estates of Decedents; Indemnity; Officers; and the like.

Bought and Sold Notes, treated in Frauds, Statute of; Sales.

Boundaries (and Surveys).

Bounties.

Brands, treated in Forestry and Lumbering; Trade Marks.

Breach of Promise to Marry.

Breach of the Peace, treated in Crimes; Arrest; Indictment.

Bribery, treated in Crimes; Indictment.

Bridges.

Brokers and Factors.

Building and Construction Contracts.

Building and Loan Associations.

Buildings (and Building Restrictions).

Burden of Proof, treated in Evidence, and specifically in topics treating of the issue to be proved.

Burglary, treated in Crimes; Indictment.

Burnt Records, treated in Evidence; Restoration of Papers and Records.

By-Laws, treated in Corporations; Fraternal Beneficiary Associations; Associations.

Calendar.

Canals.

Cancellation of Instruments, treated in Rescission and Cancellation.

Canvass of Votes, treated in Elections.

Capias, treated in Civil Arrest.

Capital, treated in Corporations; Partnership; Joint Adventures; Joint Stock Companies; Taxes; see also Banking; Insurance; Trusts; Wills; Life Estates.

Carlisle Tables, treated in Damages; Death by Wrongful Act; Evidence.

Carriers. See also Railroads; Shipping; Street Railways.

Carrying Weapons, treated in Crimes; Indictment.

Case, Action Upon, treated in Trespass; but see topics treating of torts not amounting to direct wrong.

Case Agreed, Settled or Certified, treated in Appeal; see Agreed Case.

Cash, treated in Payment. See also Capital, ante.

Catching Bargains, treated in Assignments; Estates of Decedents; Fraud; Trusts.

Causes of Action, treated in Actions and Suits, and in specific topics.

Cemeteries.

Census and Statistics.

Certificates of Deposit, treated in Banking; Negotiable Instruments.

Certiorari.

Challenges, treated in Jury.

Chambers and Vacation, treated in Courts; Judges.

Champerty and Maintenance.

Change of Venue, treated in Venue; Indictment.

Character Evidence, treated in Evidence; Indictment; Witnesses.

Charities.

Charter Parties, treated in Shipping.

Chattel Mortgages. As acts of insolvency, see Assignments for Creditors; Bankruptcy.

Chattels, treated in topics treating of rights in tangible personal property, e. g., Chattel Mortgages; Sales; Pledges; Bailments; etc.; and see Property.

Cheats, treated in Crimes; Indictment; see also Fraud.

Checks, treated in Banking; Negotiable Instruments.

Children, treated in Infants; Incompetents and Delinquents; Parent and Child; Divorce (custody of). As heirs, see Descent and Distribution; Wills.

Citations, to appear, treated in Notices; Estates of Decedents; etc.

Cities and Villages, treated in Municipal Corporations.

Citizens, treated in Aliens and Citizens.

Civil Arrest and Bail.

Civil Damage Act, treated in Intoxicating Liquors.

Civil Death, treated in Convicts.

Civil Rights.

Civil Service System, treated in Officers; Municipal Corporations.

Clerks of Courts, treated in Courts.

Cloud on Title, treated in Quieting Title (relief from); Vendors and Purchasers (marketability of title); Notice and Record of Title (notice of clouds and claims); Covenants for Title.

Clubs, treated in Associations.

Codicils, treated in Wills.

Cognovit, treated in Confession of Judgment.

Colleges and Academies, treated in Schools; University of Michigan; Taxes (exemption).

Collision, treated in Shipping (marine collision); Highways (in use of road); Railroads (at crossings); Street Railways (in use of street); Master and Servant (injury to servants from).

Color of Title, treated in Adverse Possession; Quieting Title; Ejectment.

Combinations and Monopolies.

Commerce.

Commitments, treated in Arrest; Contempt; Indictment.

Common and Civil Law. For the common law on any specific subject consult the appropriate topic.

Common Schools, treated in Schools.

Comparative Negligence, treated in Negligence, and in specific topics.

Complaint for Arrest, treated in Arrest; Civil Arrest.

Complaint in Pleading, treated in Equity (bills); Pleading (declaration).

Composition with Creditors.

Compounding Offenses, treated in Crimes; Indictment.

Compromise and Settlement, treated in Accord and Satisfaction; Releases; Discontinuance.

Concealed Weapons, treated in Crimes; Indictment.

Concealment of Birth or Death, treated in Crimes; Indictment.

Condemnation Proceedings, treated in Eminent Domain; Highways.

Conditional Sales, treated in Sales; and see Fraudulent Conveyances.

Confession and Avoidance, treated in Pleading.

Confession of Judgment.

Confessions, treated in Indictment and Prosecution (evidence).

Confiscation, treated in Constitutional Law (due process); Fish and Game.

Conflict of Laws.

Confusion of Goods, treated in Accession and Confusion.

Connecting Carriers, treated in Carriers; and see Railroads.

Consideration, treated in Contracts.

Consolidation and Severance of Actions.

Consolidation of Corporations, treated in Corporations; Railroads.

Conspiracy. See also Crimes; Indictment.

Constables, treated in Sheriffs and Constables.

Constitutional Law.

Consuls, treated in Ambassadors and Consuls.

Contempt. See also Injunctions.

Continuances.

Contracts. See also as to specific contracts: Assignments; Building and Construction Contracts; Chattel Mortgages; Deeds; Gambling Contracts; Guaranty; Implied Contracts; Indemnity; Insurance; Landlord and Tenant; Mortgages; Negotiable Instruments; Novation; Public Contracts; Sales; Stipulations; Subscriptions; Suretyship; Trusts; Vendors and Purchasers; and other topics. As to signing and delivery, see Execution of Instruments. As to writing, see Frauds, Statute of. As to remedies, see also Assumpsit; Contracts, X; Reformation; Rescission and Cancellation; Accounting Suits; Specific Performance; Injunctions; and others. See also Fraud; Mistake; Duress; Infants; Insane Persons; Husband and Wife; and see post, Discharge.

Contribution, treated in Indemnity and Contribution.

Contributory Negligence, treated in Negligence; and with respect to specific things or in specific relationships, see specific topics, e. g., Carriers; Master and Servant; Railroads; Highways; and the like.

Conversion. The doctrine of equitable conversion, see Equity, II.

Conveyances, treated in Deeds of Conveyance.

Convicts.

Copyright, treated in Literary Property.

Coroners. For inquest of death, see Corpses.

Corporations. See also Banking; Joint Stock Companies; Railroads; Street Railways.

Corpses and Burial.

Corpus Delicti, treated in Crimes; Indictment.

Corroborative Evidence, treated in Witnesses; Indictment (accomplice or complaining witness); Rape; Seduction; Divorce; and as to cumulative evidence, see Trial (exclusion of further testimony); New Trial.

Costs and Allowances. See also Security for Costs.

Counterfeiting, treated in Crimes; Indictment.

Counties.

Counts, treated in Pleading.

Coupling Cars, treated in Master and Servant (injuries to servants); Carriers (injuries to passengers); Railroads (regulation of equipment).

Coupons, treated in **Municipal Bonds**; Corporations, XII, C; Railroads, VI.

Court Commissioners, treated in Courts.

Courts.

Covenant, Action of, treated in Actions; see also Covenants for Title.

Covenants for Title.

Coverture, treated in Husband and Wife.

Credit Insurance, treated in Insurance; see also Guaranty; Indemnity.

Creditors' Suits.

Criminal Conversation, treated in Husband and Wife.

Crimes and Punishments. Includes the substantive law of crimes in general and also that of the particular crimes with the exception of those comprehended in the following topics, separately treated for convenience: **Assault and Battery; Combinations and Monopolies; Fish and**

Game; Food; Health; Homicide; Intoxicating Liquors; Larceny; Libel and Slander; Nuisance; Rape; Seduction.

Arrest for crime, including complaint, examination and commitment, and bail, is treated exclusively in Arrest, Commitment and Bail.

Indictment or information and trial for crime, both the general practice and evidence and that pertaining to the specific crimes except those above named and review of conviction on error, is treated in Indictment and Prosecution.

Related topics to be consulted are: Extradition; Habeas Corpus; Prisons and Jails; Pardons and Paroles; False Imprisonment; Malicious Prosecution.

The prosecuting attorney, his functions and assistants, are treated in Attorneys and Counselors, III.

Crops, treated in Agriculture; Landlord and Tenant; Mortgages; Chattel Mortgages; Sales; Executions; Vendors and Purchasers.

Cross-Bills, treated in Equity.

Crossings, treated in Highways; Railroads.

Cruel and Unusual Punishments, treated in Constitutional Law; Crimes.

Cruelty, see Crimes (to animals); Divorce (ground for).

Cumulative Evidence, treated in Trial (limiting additional evidence); New Trial (ground for); Indictment (in criminal cases).

Cumulative Punishments, treated in Crimes; Indictment (sentence).

Cumulative Voting, treated in Corporations.

Curative Acts, treated in Constitutional Law (validity); Statutes (enactment and construction); specific topics (application of).

Curtesy.

Custom of Paris, treated in Common and Civil Law.

Customs and Usages.

Customs Laws, treated in Internal Revenue and Customs Laws.

Damages. See also Values; Death by Wrongful Act.

Damnum Absque Injuria treated in Actions; Torts; Negligence.

Dams, treated in Mills and Milling; Waters.

Date, see topics treating of the act or instrument respecting which the date is the question; as to computation of time, see Time.

Days, treated in Holidays; Sunday; Time.

Dead Bodies, treated in Corpses and Burial; Cemeteries.

Deaf and Dumb Persons.

Death and Survivorship.

Death by Wrongful Act.

Death Certificates, treated in Census and Statistics; Health; Fraternal Beneficiary Associations; Insurance.

Debt; Debtor and Creditor. These words signify a great variety of applied law incapable of any general treatment. See specific agreements based on debt: Account Stated; Accord and Satisfaction; Assignments; Bonds; Contracts; Chattel Mortgages; Mortgages; Negotiable Instruments; Non-Negotiable Paper; Implied Contracts; Sales; Vendors and Purchasers; Pledge; etc. See as to the capacity to become debtor or creditor and the rights dependent on a limited capacity: Associations; Corporations; Husband and Wife; Infants; Insane Persons; Guardianship; Estates of Decedents; Trusts; Agency; Partnership; etc. See as to transfers of debt or its evidences and dealings in credits: Assignments; Negotiable Instruments; Banking; Novation. See as to devolution or succession in right or liability: Descent and Distribution; Estates of Decedents; Wills; Corporations; Partnership. See as to representative authority to incur or act with respect to debts: Agency; Corporations; Partnership; Estates of Decedents; Guardianship; Trusts; Husband and Wife; Parent and Child. See as to public indebtedness: Constitutional Law; Counties; Municipal Corporations; Townships; Municipal Bonds; Railroads (aid bonds and bonuses). See as to discharge of debts and liquidation of estates of insolvent debtors: Assignments for Creditors; Corporations, XXIII; Bankruptcy; Partnership; Payment, Tender and Deposit; Accord and Satisfaction; Composition with Creditors; Releases; Rescission and Cancellation, etc. See as to primary and secondary or joint and several liability: Guar-

anty; Suretyship; Negotiable Instruments; Partnership; Agency; Estates of Decedents, etc. See as to remedies and procedure: Assumpsit; Contracts, X; Creditors' Suits; Foreclosure of Mortgages; Fraudulent Conveyances; Accounting Suits; Negotiable Instruments; and other topics above referred to. See as to defenses: Duress; Fraud; Mistake; and other topics above referred to. See as to taxation: Taxes.

Deceit, treated in Fraud and Deceit.

Declarations, as evidence against or for declarant, see Evidence; of trust, see Trusts; Frauds, Statute of; as pleadings, see Pleading; and also topics treating of the particular action or cause of action to be pleaded.

Decoying, as fraud, see Fraud; Process (service); as defense to crime, see Crimes; Indictment.

Dedication.

Deeds of Conveyance.

Defaults.

Definiteness in contracts, see Contracts; etc.; in pleadings, see Pleadings; etc.; in statutes, see Statutes; in wills, see Wills.

Del Credere Agency, treated in Brokers and Factors.

Demand, treated in topics dealing with rights or remedies of which demand is or may be an element, e. g., Bailments; Conversion; Replevin; Negotiable Instruments.

Demurrage, treated in Carriers; Shipping.

Demurrers, treated in Pleading; Equity.

Demurrer to Evidence, treated in Directing Verdict and Demurrer to Evidence.

Departure, treated in Pleading.

Depositaries, treated in Bailments; Banking (safe deposits); Warehousing; Escrows (of instruments for conditional delivery).

Depositions.

Deputies treated in Officers; Sheriffs; etc.

Descent and Distribution.

Detectives, treated in Municipal Corporations, XV (police organization); Licenses; Witnesses (credibility and impeachment); Indictment (weight and sufficiency of evidence).

Detinue, treated in Replevin.

Deviation, treated in Insurance (marine policies); Shipping.

Dilatory Pleas, treated in Equity, VII; Pleading, III, B; and see also Abatement and Revival.

Directing Verdict and Demurrer to Evidence.

Discharge of Contract, treated in Accord and Satisfaction; Contracts; Payment; Releases; Rescission and Cancellation; Novation; Bankruptcy; Composition with Creditors; Former Adjudication (bar and estoppel by judgment); and see Limitations of Actions; Equity (laches); Estates of Decedents (delay in presenting claim); Election and Waiver; Estoppel.

Disclaimers, treated in Equity (pleading); Costs.

Discontinuance, Dismissal and Nonsuit.

Discovery and Inspection.

Discretion, treated in topics dealing with the act or proceeding in which discretion is exercised. Review of judicial or official discretion, see Appeal and Error; Certiorari; Mandamus; Injunctions; and see Constitutional Law and Courts, as to what are judicial administrative and legislative functions; Officers; Municipal Corporations, as to liability dependent on misdoing as distinguished from errors in discretion or judgment.

Disfranchisement, treated in Constitutional Law; Elections.

Dismissal, treated in Discontinuance, etc.; Equity; Judgments; Former Adjudication.

Disorderly Conduct; Disorderly Houses, treated in Crimes; Indictment.

Dissolution, treated in Corporations; Partnership.

Distraint, treated in Animals.

Distress, treated in Landlord and Tenant.

Disturbance of Assemblages, treated in Crimes; Indictment.

Dividends, treated in Corporations; Banking; Assignments for Creditors; Bankruptcy.

Division of Opinion, treated in Appeal and Error, XIII, D; Courts, IV (force and extent of precedent).

Divorce.

Dockets, treated in Calendar; Judgments (docketing and entry).

Documents in Evidence, treated in Evidence; Indictment; and see Discovery and Inspection; Witnesses (subpoena duces tecum).

Domicile.

Dower.

Drains. As to urban sewerage systems, see Local Improvements and Assessments; Municipal Corporations.

Druggists; Drugs, treated in Medicine and Surgery; Poisons; Intoxicating Liquors.

Drunkenness, treated in Incompetents; Intoxicating Liquors; Divorce.

Due Process, treated in Constitutional Law.

Duplicity, treated in Pleading; Equity; Indictment.

Duress.

Dying Declarations, treated in Homicide; but see Indictment, VIII, B, and Evidence, VII, as to such declarations admissible as res gestae or because against interest.

Dying Without Issue, treated in Wills; Deeds; Perpetuities.

Easements.

Ecclesiastical Law, treated in Religious Societies.

Eight-Hour Law, see Master and Servant; Constitutional Law (validity); Public Contracts; Officers and Public Employees (hours of service).

Ejectment.

Election and Waiver.

Elections.

Electricity.

Elevators, treated in Buildings; Master and Servant (injury to servant); Warehousing (grain elevators).

Embezzlement, treated in Crimes; Indictment.

Emblements and Natural Products, treated in Agriculture (crops, and see ante "Crops"); Real Property; Waste.

Embracery, treated in Crimes; Indictment.

Eminent Domain.

English Land Grants, treated in Public Lands.

Entry, Right of, treated in Adverse Possession; Ejectment; Life Estates; Landlord and Tenant.

Equitable Rights and Remedies, treated generally in Equity, II, and specifically in topics treating of the subject of the right or remedy, e. g., Assignments; Liens; Mortgages; Trusts; Accounting Suits; Creditors' Suits; Injunctions; Reformation of Instruments; Rescission and Cancellation; Specific Performance; and the like.

Equity.

Error Coram Nobis (or Coram Vobis); Writ of Error. The review of judgments on the ordinary writ of error is treated in Appeal and Error. The statutory procedure to correct an error in the judgment in the same court is treated in Judgments.

Escape, as crime, treated in Crimes; Indictment; as tort, see Civil Arrest; Sheriffs (liability for allowing).

Escheats.

Escrows.

Estates of Decedents.

Estates Tail, treated in Real Property.

Estoppel. By judgment, see Former Adjudication.

Evidence. In criminal cases, see Indictment.

Examination Before Trial, treated in Depositions; Discovery and Inspection.

Examination of Witnesses (both civil and criminal trials).

Exceptions and Objections, treated in Saving Questions for Review; Appeal and Error (bill of exceptions).

Exchange of Property.

Exchanges and Boards of Trade. See also Brokers.

Execution of Instruments.

Executions.

Executors and Administrators, treated in Estates of Decedents; Wills.

Exemplary Damages, treated in Damages.

Exemptions. See also Homesteads.

Exhibitions and Shows.

Exhibits, in pleading, see Equity; Pleading; in evidence, see Trial (introduction and marking); Appeal and Error (inclusion in record).

Experiments, in evidence, see Evidence, IX; Indictment, VIII, B.

Expert Evidence, treated in Evidence; Indictment, VIII, B.

Explosives and Combustibles.

Ex Post Facto Laws, treated in Constitutional Law; and see Crimes.

Express Companies, treated in Carriers; Corporations; Joint Stock Companies.

Extortion, treated in Crimes; Indictment.

Extradition.

Factors, treated in Brokers and Factors.

Factory Inspection, treated in Master and Servant; and see Crimes.

False Imprisonment.

False Personation, treated in Crimes; Indictment.

False Pretenses and Cheats, treated in Crimes; Indictment; and see also Fraud (civil liability).

False Representations, treated in Fraud and Deceit; and see Estoppel; Insurance (warranties); Sales (warranties); Rescission and Cancellation.

Falsifying Records, as crime, see Crimes; Indictment; effect in evidence, see Evidence.

Family Settlements, treated in Estates of Decedents; Wills.

Fellow Servants, treated in Master and Servant.

Federal Jurisdiction and Procedure, see Admiralty; Courts, V (jurisdiction); Removal of Causes.

Fences. See also Adjoining Owners; Boundaries; Animals.

Ferries.

Fidelity Bonds or Insurances, treated in Indemnity; Insurance.

Filings, treated in topics dealing with the paper to be filed, e. g., Chattel Mortgages; Notice and Record of Title (deeds, etc.; Sales, XII (conditional sale agreements); Pleading; Equity; Appeal and Error.

Final Judgments and Decrees, treated in Appeal and Error; Former Adjudication (estoppel); Judgments.

Finding Lost Property, treated in Property.

Findings, treated in Verdicts and Findings; and see Appeal and Error (review of); Judgments (comformity to); Reference.

Fines, treated in Crimes; Indictment; Municipal Corporations, XVI, B.

Fires.

Fish and Game.

Fixtures.

Food. See also Adulteration.

Forcible Entry and Detainer.

Foreclosure of Mortgages.

Foreign Corporations.

Foreign Judgments.

Foreign Laws, treated in Conflict of Laws; and see as to pleading and proof of laws, Evidence; Pleading.

Forestry and Lumbering.

Forfeitures, treated in Penalties and Forfeitures.

Forgery, treated in Crimes; Indictment.

Former Adjudication.

Former Jeopardy or Conviction, treated in Crimes.

Forms. Forms of action, see Actions; and see Assumpsit; Trespass.

Fornication, element of sexual crimes, see Crimes.

Forthcoming and Delivery Bonds, treated in Attachment; Executions; Replevin.

Forwarders, treated in Carriers; Warehousing.

Franchises.

Fraternal Beneficiary Associations.

Fraud and Deceit.

Frauds, Statute of.

Fraudulent Conveyances.

Free Masons, treated in Associations and Societies.

French Settlers, see Public Lands.

Friendly Suits, see Submission of Controversy; and see Arbitration and Award.

Friend of the Court, treated in Amicus Curiae.

Funds and Deposits in Court, treated in Payment, Tender and Deposit.

Gambling Contracts.

Game Laws, treated in Fish and Game.

Gaming, treated in Crimes; Indictment.

Garages, keeping for hire, see Bailments; buildings used for, see Buildings; liens, see Liens.

GARNISHMENT.

GAS.

General Average, treated in Insurance (marine); Shipping.

General Issue, treated in Pleading; see also topics treating of specific actions, e. g., Assumpsit; Trespass; etc.

Gifts.

Good Will.

Governor, treated in State of Michigan Constitutional Law, II (executive functions).

GRAND JURY.

Ground Rents, see Landlord and Tenant.

Guaranty.

Guardians Ad Litem and Special Guardians.

Guardianship.

Habeas Corpus.

Habitual Criminals, treated in Crimes; Indictment.

Habitual Drunkards, treated in Incompetents; Divorce (grounds); see also Intoxicating Liquors.

Handwriting, proof of, treated in Evidence; Indictment.

Harbors, treated in Navigable Waters; see also Wharves.

Harmless and Prejudicial Error.

Hawkers and Peddlers, treated in Licenses; see also Crimes (violations of law); Municipal Corporations, XVI (violations of ordinances); Commerce (regulation of).

Health.

Hearing, treated in Equity; Trial; Indictment; Constitutional Law (element of due process); and see other topics treating of proceedings wherein hearing is required.

Hearsay, treated in Evidence; Indictment.

Heirs and Next of Kin, treated in Descent and Distribution; Wills.

Highways and Streets.

Holidays.

Homesteads.

Homicide.

Horse Racing, see Agriculture (societies); Crimes (betting and gaming); Highways (misuse of).

Horses, treated in Animals; Sales.

Hospitals, treated in Asylums and Hospitals.

House of Correction, treated in Reformatories; see also Crimes (place for punishment or confinement); Indictment (sentences to).

Husband and Wife.

Ice, treated in Waters (right to ice on surface); Highways (injury caused to traveler).

Illegal Contracts, treated in Contracts; Implied Contracts.

Impairing Obligation of Contract, treated in Constitutional Law.

Impeachment, of witness, treated in Witnesses; Examination of Witnesses of judgment for fraud or mistake, see Judgments.

Implied Contracts.

Implied Trusts, treated in Trusts.

Implied Warranties, treated in Sales; Covenants for Title (to land); Landlord and Tenant (in leases).

Impounding, treated in Animals.

Imprisonment for Debt, treated in Civil Arrest and Bail.

Improvements, additions to another's property, see Accession and Confusion; Ejectment; Quieting Title; Partition; Fixtures; Landlord and Tenant; public improvements, see Constitutional Law (internal improvements); Local Improvements and Assessments.

Incest, treated in Crimes; Indictment.

Incompetents and Delinquents.

Indecency and Lewdness, treated in Crimes; Indictment.

Indemnity and Contribution.

Independent Contractors.

Indians.

Indictment and Prosecution. Includes all of the incidents of accusation and trial for crime, evidence, sentence, and review on writ of error, except the Arrest, Commitment and Bail (which see); Extradition; Jury; Grand Jury; the mode of examining witnesses (Examination of Witnesses), and the competency and credibility and impeachment of them (Witnesses); and except as to certain crimes matters peculiar to them (see

enumeration of these excepted crimes, ante under Crimes). The constitutional rights of persons accused of crime are treated in Constitutional Law, IX.

Indorsing Papers, treated in Equity (pleading); Indictment (names of witnesses); Negotiable Instruments.

Infamous Crimes, treated in Crimes (punishment of); Witnesses (effect on credibility).

Infants.

Informations, treated in Indictment and Prosecution; bill of information, see Equity; Injunctions.

Informers, see Arrest (complaint for crime); Penalties; Witnesses (credibility of).

Injunctions.

Inns, Restaurants and Lodging Houses.

Inquest of Damages, treated in Damages; Defaults.

Inquest of Death, treated in Corpses and Burial; Indictment (use as evidence).

Insane Persons.

Insolvency, treated in Assignments for Creditors; Bankruptcy; Corporations, XXIII.

Inspection Laws. Inspection of papers, see Discovery.

Instructions.

Insurance.

Interest.

Internal Improvements, treated in Constitutional Law.

Internal Revenue and Customs Laws.

International Law, see Conflict of Laws (which law governs); War (effect of); Ambassadors and Consuls; Aliens and Citizens.

Interpleader.

Interpretation, see topic treating of the writing construed.

Interpreters, treated in Examination of Witnesses.

Interstate Commerce, treated in Commerce.

Interurban Railways, treated in Railroads; Street Railways; Carriers.

Intervention, treated in Parties; Equity, VI.

Intoxicating Liquors. See also ante, Drunkenness.

Inventions, treated in Patents and Inventions.

Investments, treated in Estates of Decedents; Trusts; and see Banking.

Islands, treated in Boundaries; Navigable Waters; Public Lands; Waters.

Issue; Issues, treated in Wills (meaning of "issue"); Equity; Pleading; Verdict and Findings.

Jail Liberties, treated in Civil Arrest.

Jeofails, treated in Appeal and Error (presumption as to amendment); Harmless Error (amendable errors or defects); Indictment (criminal cases).

Jeopardy, treated in Crimes; Indictment.

Jettison, treated in Shipping; Insurance (marine).

Joinder of Causes, treated in Equity; Pleading.

Joint Adventures.

Joint Executors and Trustees, treated in Estates of Decedents; Trusts.

Joint Liabilities and Agreements, treated in Contracts; Negotiable Instruments; Judgments; see also Partnership; Joint Adventures.

Joint Stock Companies.

Joint Tenancy, treated in Tenants in Common and Joint Tenants.

Judges.

Judgment Notes, treated in Confession of Judgment.

Judgments and Decrees.

Judicial Notice, treated in Evidence; Indictment; Pleading.

Judicial Sales.

Jurisdiction, treated in Courts, V.

Jury.

Justices of the Peace.

Kidnaping, treated in Crimes; Indictment.

Labels, treated in Commerce (regulations); Food (false labeling); Trade Marks.

Labor Unions, treated in Trade Unions; Injunctions (against strikes, etc.).

Laches, treated in Equity, IV.

Lakes, treated in Waters; Navigable Waters; Boundaries.

Landlord and Tenant.

Land Patents, treated in Public Lands.

Larceny. As to general criminal law, see also Crimes; Indictment.

Lascivious Cohabitation, treated in Crimes; Indictment.

Lateral Support, treated in Adjoining Owners.

Law of the Road, treated in Highways.

Leases, treated in Landlord and Tenant; Sales (lease convertible into sale of chattels).

Legacies and Devises, treated in Wills; Estates of Decedents.

Legal Conclusions, treated in Pleading; Equity.

Legatees, treated in Estates of Decedents; Wills.

Letters, treated in Evidence (letters as evidence); Contracts (offer and acceptance by letter); Postal Law.

Letters of Credit, treated in Banking.

Lewdness, treated in Crimes; Indictment.

Libel and Slander.

Licenses. See also such topics as Intoxicating Liquors.

Licenses to Enter.

Liens.

Life Estates, Remainders and Reversions.

Life Insurance, treated in Insurance; Fraternal Beneficiary Associations.

Light and Air, treated in Adjoining Owners; Easements; Injunctions; Nuisances.

Limitations of Actions.

Limited Partnership, treated in Partnership.

Liquidated Damages, treated in Damages.

Lis Pendens.

Literary Property.

Livery Stable Keepers, treated in Animals (agistment); Bailments (hiring); and see Nuisances.

Live Stock Insurance, treated in Insurance.

Lloyds, treated in Insurance.

Loan and Trust Companies, treated in Banking; Corporations.

Loans, treated in Bailments (chattels); Contracts; Negotiable Instruments (money loans); Mortgages; Chattel Mortgages; Pledge (security); Implied Contracts (implied promise); Assumpsit (remedy for recovery).

Local Improvements and Assessments.

Local Option, treated in Intoxicating Liquors.

Logs and Logging, treated in Forestry and Lumbering; Liens (labor liens); Attachment (under Log Lien Law); and as to sales of standing timber, see Real Property; Vendors and Purchasers; Licenses to Enter; as to sale of logs, see Sales; as to lumbering and sawing contracts, see Contracts.

Lost Instruments, treated in Evidence (secondary proof); Restoration of Papers; Negotiable Instruments (action on lost paper).

Lost Property, treated in Property.

Lotteries, treated in Crimes; Indictment.

Maiming; Mayhem, treated in Crimes; Indictment.

Malice, treated in topics whereof malice is or may be an element, e. g., Crimes; Malicious Prosecution; Damages (aggravation by malice).

Malicious Mischief, treated in Crimes; Indictment.

Malicious Prosecution (and Abuse of Process).

Mandamus.

Mandate, on error or appeal, see Appeal and Error.

Marine Insurance, treated in Insurance.

Maritime Liens, see Shipping for Liens Under Water Craft Act.

Markets, treated in Municipal Corporations.

Marks, see Trade Marks; Forestry and Lumbering (log marks).

Marriage. As to marital and separate property, see Husband and Wife.

Marshaling Assets and Securities.

Master and Servant.

Masters in Chancery, treated in Courts; Equity; Reference.

Masters of Vessels, treated in Shipping.

Maxims.

Mechanics' Liens.

Medicine and Surgery.

Mercantile Agencies, reports to as fraud, see Fraud; as libel, see Libel and Slander.

Merger, see topics treating of the thing merged or that into which it is merged, e. g., Contracts; Real Property; Former Adjudication (merger of cause in judgment).

Military and Naval Affairs.

Mills and Milling.

Mines and Minerals.

Misjoinder, treated in Equity; Pleading; Parties.

Mistake and Accident.

Money Counts, treated in Assumpsit.

Monopolies, treated in Combinations and Monopolies.

Mortality Tables, treated in Damages; Death by Wrongful Act; Evidence.

Mortgages.

Motions and Orders.

Multiplicity, treated in Equity.

Multiplicity, treated in Equity.

Municipal Aids, to railroads, treated in Railroads.

Municipal and Public Bonds.

Municipal Corporations.

Municipal Courts.

Murder, treated in Homicide.

Mutual Accounts, treated in Accounting Suits; Account Stated; Limitations of Actions.

Mutual Insurance, treated in Insurance; Fraternal Beneficiary Associations.

Names.

National Banks, treated in Banking.

Natural Gas, treated in Gas; Mines and Minerals.

Naturalization, treated in Aliens and Citizens.

Navigable Waters.

Ne Exeat.

Negligence.

Negotiable Instruments.

New Promise, treated in Bankruptcy; Limitations of Actions.

Newspapers.

New Trial. In criminal cases, see Indictment.

Next Friends, treated in Guardians Ad Litem.

Next of Kin, treated in Estates of Decedents; Descent and Distribution; Wills.

Nonnegotiable Paper.

Nonresidence, see topics treating of that whereof nonresidence becomes material, e. g., Process; Limitations of Actions; etc.; and see Domicile.

Notaries Public (and Commissioners of Deeds).

Notice, see topic treating of that whereof notice is given or is required, e. g., Negotiable Instruments (of nonpayment); Foreclosure (notice of sale); etc.; see also Notices.

Notice and Record of Title. As to personalty, see Chattel Mortgages (filing); Sales, XII (filing conditional bill of sale).

Notices.

Novation.

Nuisances.

Oaths.

Obscenity, treated in Crimes; Indictment.

Obstructing Justice, treated in Crimes; Indictment.

Occupation Taxes and Licenses, treated in Taxes; Licenses.

Offer and Acceptance, treated in Contracts, III.

Offer of Judgment, treated in Confession of Judgment; Costs; Default (entry by consent).

Officers and Public Employees. As to corporate officers, see Corporations; Municipal Corporations.

Official Bonds, treated in Officers.

Opening and Closing, treated in Argument of Counsel; Indictment; Trial (opening proofs).

Opening Judgments, treated in Judgments; Defaults.

Opinions of Court, treated in Appeal and Error; Courts, IV (precedents); Verdicts and Findings (conclusions of law).

Options, treated in Contracts, III; Vendors and Purchasers, I.

Oral Contracts, treated in Contracts; Frauds, Statute of; and see specific contract topics like Negotiable Instruments.

Order of Proof, treated in Trial; Indictment.

Orders for Payment, treated in Nonnegotiable Paper.

Orders of Court, treated in Motions and Orders; Appeal and Error (appealability); Former Adjudication (conclusiveness).

Ordinances, treated in Municipal Corporations.

Pardons and Paroles.

Parent and Child.

Parks and Commons.

Parliamentary Law.

Parol Evidence, treated in Evidence; Indictment.

Parties.

Partition.

Partnership. As to Partnership Associations, see Joint Stock Companies.

Party Walls.

Passengers, treated in Carriers.

Patents and Inventions.

Paupers, treated in Poor Persons.

Pawnbrokers, treated in Pledge.

Payment, Tender and Deposit.

Peddling, see Licenses; Commerce (regulation of); Crimes (misdemeanors); Municipal Corporations, XVI, B; (violation of ordinance).

Pedigree, declarations as to, see Evidence.

Penalties and Forfeitures.

Pensions, see topic treating of the person pensioned, and see also Exemptions.

Performance, treated in Contracts; and see specific contract topics and Specific Performance.

Perjury, treated in Crimes; Indictment.

Perpetuation of Testimony, treated in Depositions.

Perpetuities and Accumulations.

Personal Injuries, treated in topics descriptive of the relation out of which duty and negligence arose, e. g., Carriers; Master and Servant; or in topics descriptive of a thing or business out of which the danger arose, e. g., Electricity; Railroads; Highways; and as to direct injury, see Assault and Battery. Damages and the measure and proof of same, and pleading damages, see Damages.

Personal Property, treated in Property and in the specific topics dealing with personal property transactions, e. g., Bailments; Chattel Mortgages; Sales; Pledges. Taxation of, see Taxes. Levy and sale, see Attachment; Executions.

Petitions, treated in Equity.

Pews, treated in Religious Societies.

Photographs, as evidence, see Evidence; Indictment.

Physicians and Surgeons, treated in Medicine and Surgery.

Place for Trial, see Venue.

Plank Roads, treated in Toll Roads and Bridges.

Plats, treated in Dedication; Boundaries.

Pleading.

Pledges.

Pointing Weapons, treated in Crimes; Indictment.

Poisons. Criminal liability, see Crimes; Indictment; regulation of drug sales, see Medicine and Surgery.

Policemen, treated in Municipal Corporations, XV; and see also Officers. Arrests by, see Arrest; False Imprisonment.

Police Power, treated in Constitutional Law; and see also topics treating of specific subjects of regulation.

Pollution of Waters, treated in Waters.

Poor Persons.

Posse Comitatus, treated in Arrest.

Possession, Writ of, treated in Ejectment; Forcible Entry; and see Assistance, Writ of.

Postal Law.

Postponement, of trial, treated in Continuances; Indictment.

Powers.

Prayers, treated in Equity; Pleading; and see Damages, X, as to pleading damages.

Precatory Trusts, treated in Trusts; Wills; Charities.

Preliminary Examination, treated in Arrest, Commitment and Bail.

Prescription, treated in Easements; Highways; and see Adverse Possession; Limitations of Actions.

Presumptions, treated in Evidence, II (civil cases); Indictment, VIII (criminal cases); and see topics treating of specific subjects for presumptions respecting same.

Principal and Agent, treated in Agency.

Principal and Surety, treated in Suretyship.

Principals and Accessories, treated in Crimes.

Priorities Between Creditors, treated in Liens; Marshaling Assets; and see also Attachment; Executions; Chattel Mortgages; Mortgages; Estates of Decedents, VI, D; etc.

Prisons and Jails.

Privacy, treated in Torts; and see Libel and Slander.

Private International Law, treated in Conflict of Laws.

Private Schools, treated in Schools, X.

Private Ways, treated in Easements; Highways, XV (private roads).

Privilege, Privileged Matters, see Libel and Slander; Witnesses, V (incompetency to testify as to confidential communications); Examination of Witnesses, IV (personal privilege of witness). Privilege from arrest or service, see Arrest; Civil Arrest; Process; Witnesses.

Prize Fighting, treated in Crimes; Indictment.

Probate Courts.

Probate of Wills, treated in Wills.

Precedendo.

Process (and Service). See also topics descriptive of specific writs, e. g., Attachment; Executions; Certiorari; Habeas Corpus; Mandamus; Injunction; Replevin; etc.; and see Notices for monitions not amounting to writs or process in the ordinary sense.

Production of Documents, treated in Discovery and Inspection; Evidence, IV, B (notice to produce as foundation for secondary); and see Indictment, VIII (criminal cases).

Profert, treated in Pleading.

Profanity and Blasphemy, treated in Crimes; Indictment.

Prohibition, Writ Of.

Property. For any matter except the most general, see specific topics treating of rights in, transfers of, or incidents of property, e. g., Deeds; Sales; Conversion; Trespass; Descent; Wills; etc.

Prosecuting Attorneys, treated in Attorneys, III.

Prostitution, treated in Crimes; Indictment.

Publication, treated in Process, II, C; and see also Newspapers; Notices; as to defamatory publications, see Libel and Slander.

Public Contracts.

Public Lands.

Public Service.

Public Works, treated in Local Improvements; Constitutional Law (works of internal improvement); and see specific topics dealing with particular public improvements, e. g., Highways; Bridges; etc.

Puis Darrein Continuance, treated in Pleading.

Purchase Money Mortgages, treated in Mortgages; Vendors and Purchasers; Chattel Mortgages.

Questions of Law and Fact, treated in Trial, VI; Instructions, I; Indictment, IX, D (criminal cases); and see topics generally for questions of particular application.

Quieting Title.

Quo Warranto.

Racing, see Agriculture for societies to conduct race tracks; Crimes; Indictment for unlawful betting and gaming.

Railroads.

Rape.

Ratification, treated in Agency; Corporations, XVII (acts of officers and agents).

Real Actions, treated in Ejectment; Forcible Entry; Trespass; Venue (local or transitory).

Real Covenants, treated in Covenants for Title; Buildings (restrictive covenants); Real Property (covenants other than building restrictions).

Real Property. See also topics treating specifically of matters of real property law, e. g., Deeds; Life Estates; Landlord and Tenant; Mortgages; Vendors and Purchasers; Ejectment; Quieting Title; etc.

Reasonable Doubt, treated in Indictment, VIII; and see also Evidence, X, and references there found for rules in civil cases.

Receiptors, to levying officer, see Attachment; Executions; Sheriffs.

Receivers. See also Bankruptcy; Corporations, XXIII.

Receiving Stolen Goods, treated in Crimes; Indictment.

Recitals, as estoppel, see Estoppel; in contracts, see Contracts; Municipal Bonds; and other specific contract tonics; in statutes, see Statutes; in pleading, see Equity; Pleading.

Recognizances, treated in Arrest, Commitment and Bail; Civil Arrest and Bail.

Recording Deeds and Mortgages, treated in Notice and Record of Title.

Records. See also Notice and Record of Title (title records); Appeal and Error (record on appeal or error); Certiorari; Judgments (the judgment roll).

Recoupment, treated in Setoff and Recoupment.

Redemption, treated in Executions; Foreclosure; Mortgages; Chattel Mortgages; Pledges.

Re-exchange, treated in Banking; Negotiable Instruments.

Reference.

Reformation of Instruments.

Reformatories.

Registers of Deeds, treated in Counties; Officers; Notice and Record of Title: Abstracts.

Rehearing, treated in Equity; Appeal and Error.

Releases.

Relief Funds and Associations, treated in Fraternal Beneficiary Associations; and see Master and Servant; Releases.

Religious Societies.

Remainders, treated in Life Estates, Remainders and Reversions.

Remedy at Law, treated in Equity and in specific equity topics, e. g., Injunctions; Creditors' Suits; Specific Performance.

Remittitur, treated in Appeal and Error (conditional affirmance); New Trial; Judgments.

Removal of Causes. As to change of venue, see Venue.

Rendition of Judgment, treated in Judgments.

Repleader, treated in Pleading; Judgments.

Replevin.

Replications, treated in Equity; Pleading.

Reports, of judicial decisions, see Courts; of referees or masters, see Reference; Foreclosure; Judicial Sales; etc.; of banks and corporations, see Banking; Corporations.

Representations, as fraud, see Fraud; as estoppel, see Estoppel; as warranty, see Sales.

Res Adjudicata, treated in Former Adjudication; Crimes (former acquittal or conviction).

Rescission and Cancellation.

Rescue, as crime, treated in Crimes; Indictment; as tort, treated in Civil Arrest; Sheriffs.

Res Gestae, treated in Evidence, VII, D; Indictment, VIII.

Residence, treated in Domicile; Aliens and Citizens; and see ante, Nonresidence.

Restitution, Writ of, see Forcible Entry; condition of rescission, see Rescission.

Restoration of Papers and Records.

Retraxit, treated in Discontinuance, etc.; Pleading.

Returns, to writs, see Process and also topics treating of the specific writs, e. g., Certiorari; Attachment; Executions; Mandamus; Habeas Corpus; Justices of the Peace (return to certiorari or to appeal). Election returns, see Elections.

Revenue Laws, treated in Taxes; Internal Revenue; Licenses.

Reversions, treated in Life Estates, Remainders and Reversions.

Review, treated in Appeal and Error; Certiorari; Equity (bill of review); Mandamus (scope of).

Revival of Judgments, treated in Judgments.

Revivor of Suits, treated in Abatement and Revival; Equity.

Revocation, of agency, see Agency; of license, see Licenses; Licenses to Enter; of will, see Wills; of offer to contract, see Contracts; and see Rescission.

Rewards.

Right of Property, in chattels, trial of, see Replevin, and also Attachment, XI; Executions, XI (claims by third persons); in realty, trial of, see Ejectment; Quieting Title; Trespass; and see Forcible Entry.

Riot, treated in Crimes; Indictment.

Riparian Owners, treated in Waters; and see also Navigable Waters; Wharves.

Robbery, treated in Crimes; Indictment.

Rules of Court, treated in Courts, III; and as to practice under the rules of court, see the topics treating of the particular stage or proceeding in the suit.

Safe Deposit, treated in Banking; Warehousing; Bailments.

Sales.

Salvage, treated in Shipping; Insurance (marine).

Satisfaction and Discharge, treated in Accord and Satisfaction; Contracts; Chattel Mortgages; Mortgages; Judgments; Payment; Releases; and see ante, Discharge.

Saving Questions for Review.

Savings Banks, treated in Banking.

Scandal and Impertinence, in equity pleading, see Equity.

Schools and Education.

Scire Facias.

Seals, treated in Execution of Instruments; and see topics treating of instruments whereon seals are commonly required.

Seamen, treated in Shipping.

Search and Seizure.

Secret Ballot, treated in Elections.

Security for Costs.

Seduction.

Sentence, treated in Indictment; see also Crimes, I, E.

Separate Property, treated in Husband and Wife.

Separate Trials, treated in Trial; Indictment; and see Consolidation and Severance.

Separation, treated in Divorce; Husband and Wife.

Sequestration.

Service, of process or notice, see Process; Notices; and topics treating of particular writs or notices.

Setoff and Recoupment.

Settlement of Case or Exceptions, treated in Appeal and Error.

Settlements, see Accord and Satisfaction (settlements); Estates of Decedents; Guardianship; Trusts; Officers.

Severance of Actions, treated in Consolidation and Severance.

Sewers, treated in Local Improvements; Municipal Corporations.

Sham Pleadings, treated in Pleading; Equity.

Shelley's Case, treated in Deeds; Real Property; Wills; Life Estates.

Sheriff's Sales, treated in Executions; Judicial Sales.

Sheriffs and Constables.

Shipping.

Signatures, form and mode of signing instruments, see Execution of Instruments; Wills; and as to names which may be used, see Names; Trade Marks and Trade Names.

Simultaneous Actions, treated in Abatement and Revival (another action pending); Election and Waiver (election between).

Sleeping cars, treated in Carriers; Railroads; Taxes.

Societies, treated in Associations and Societies.

Sodomy, treated in Crimes; Indictment.

Special Interrogatories and Findings, treated in Verdicts and Findings.

Special Guardians, treated in Guardians ad Litem.

Special Jury, treated in Jury.

Specific Performance.

Spendthrifts, see Incompetents; Trusts; Wills.

Stamps, on documents, see Execution of Instruments.

Standing Timber, see Forestry and Lumbering; Real Property; Contracts; Deeds; Sales; Vendors and Purchasers; and see also Conversion; Trespass; Damages.

Stare Decisis, treated in Courts, IV; and as to estoppel by judgment, see Former Adjudication.

State Lands, treated in Public Lands; Taxes (state tax lands).

Statement of Claim, see Pleading (bill of particulars); Estates of Decedents; Highways, XII, H (claim or notice of injury); Municipal Corporations, XIV.

Statement of Facts, see Appeal and Error (agreed case); and see Stipulations.

State of Michigan.

Statutes.

Stay of Proceedings.

Steam-duty and negligence in use of, see Negligence; Master and Servant (injuries to servants).

Stenographers, as officers of court, see Courts, I; making up transcript, see Appeal and Error, VI, D; admissibility of testimony as to incidents of trial, see Evidence; Indictment.

Stipulations.

Stock and Stockholders, treated in Corporations, XXIV.

Stock Brokers and Exchanges, treated in Brokers; Exchanges.

Stoppage in Transit, treated in Carriers; Sales.

Storage, treated in Warehousing.

Street Railways.

Streets, treated in Highways and Streets; and see also Municipal Corporations; Dedication.

Strikes, see Injunctions; Conspiracy (boycotting); Trade Unions; Building, etc., Contracts (excuse for delay).

Striking Out, see Trial, V (striking evidence).

Struck Jury, treated in Jury; Justices of the Peace.

Submission of Controversy. See also Arbitration; Appeal and Error (agreed case).

Subpoena, treated in Witnesses; Process.

Subrogation.

Subscribing Pleadings, treated in Equity; Pleading.

Subscriptions. See also Corporations, VII (to stock).

Substitution of Attorneys, treated in Attorneys.

Substitution of Parties, treated in Abatement and Revival; Parties.

Succession, in estate, see Descent; Wills; of corporations, see Corporations; Railroads.

Suicide, see Insurance (cause of death).

Summary Proceedings, by landlord for unlawful detainer, see Forcible Entry.

Summary Prosecutions, before inferior courts for misdemeanors, see Indictment, XVIII; but as to prosecutions under ordinances, see Municipal Corporations, XVI, B.

Summons, treated in Process; Justices of the Peace.

Sunday.

Supersedeas, treated in Appeal and Error.

Supplemental Pleadings, treated in Equity; Pleading.

Surcharging and Falsifying, see Accounting Suits; Estates of Decedents; Trusts; Account Stated; Reference; etc.

Suretyship.

Surface Waters, treated in Waters; and see Drains.

Surplusage, treated in Equity; Pleading.

Surveyors. See also Boundaries.

Survivorship, see Death and Survivorship (proof of the fact); Wills; Deeds (interpretation of word).

Suspension of the Power of Alienation, treated in Perpetuities; and see Wills (interpretation as to).

Swamp Lands, treated in Public Lands.

Taking Case from Jury, treated in Directing Verdict.

Taxes. See also Local Improvements and Assessments; Drains.

Telegraphs and Telephones.

Tenants for Life, treated in Life Estates.

Tenants in Common and Joint Tenants.

Tender, treated in Payment, Tender and Deposit.

Terms of Court, treated in Courts; Calendar.

Testamentary Capacity, treated in Wills.

Theaters, treated in Exhibitions and Shows; and see Buildings; Licenses.

Threats, treated in Crimes; Indictment.

Tickets, treated in Carriers.

Time. As to time for particular acts or proceedings, see the topics specifically treating of the subject.

Toll Roads and Bridges.

Torts.

Towage, treated in Shipping.

Townships.

Trade Marks and Trade Names.

Trade Unions.

Transfer of Causes, see Removal of Causes; Venue (change of); Calendar.

Transitory Actions, treated in Venue.

Treaties.

Trespass. Includes trespass de bonis, quare clausum fregit, and case, but as to trespass vi et armis, see Assault and Battery; False Imprisonment.

Trial. In criminal cases, see Indictment and Prosecution.

Trover, treated in Conversion; and see Actions.

Trust Companies, treated in Banking; Trusts (capacity to be trustee).

Trust Deeds, treated in Trusts; but see Assignments for Creditors.

Trusts.

Turnpikes, treated in Toll Roads.

Ultra Vires, treated in Corporations; Municipal Corporations.

Undue Influence, treated in Fraud; Wills; Gifts; and as to transactions between persons in confidential relations, see also Husband and Wife; Parent and Child; Guardianship; Estates of Decedents; Trusts.

Union Stations.

United States. As to Federal Jurisdiction, see Courts, V.

University of Michigan.

Unlawful Assembly, treated in Crimes; Indictment.

Usages, treated in Customs and Usages.

Use and Occupation, treated in Landlord and Tenant.

Usury.

Vagrancy, treated in Crimes; Indictment.

Values. See also Damages.

Variance, treated in Pleading, and the specific remedial topics, or in parts of topics devoted to remedies and procedure.

Vendors and Purchasers.

Venue.

Verdicts and Findings.

Verification, of bill or answer, see Equity; affidavits to support certain issues, see Pleading, IX, A.

View by Jury or Court, treated in Trial.

Waiver, treated in Election and Waiver, and as to waivers of particular rights, see topics treating of such rights.

War.

Warehousing.

Warranties, treated in Sales (chattels); Covenants for Title (land titles).

Warrants of Arrest, treated in Arrest; and as to capias, see Civil Arrest.

Waste.

Waters and Water Supply. See also Navigable Waters; Drains; Bridges; Ferries.

Ways, treated in Easements; Highways.

Weapons, treated in Crimes; Indictment.

Weights and Measures. As to crimes respecting, see Crimes; Indictment.

Wharves.

Wills.

Winding Up Proceedings, treated in Corporations, XXIII.

Withdrawing Evidence, treated in Trial; Harmless Error (cure by withdrawal).

Withdrawing Pleadings or Files, treated in Pleading; Records.

Witnesses.

Woods and Forests, treated in Forestry; and see ante, Standing Timber.

Words and Phrases, see Concordance, Words and Phrases at end of alphabet.

Work and Labor, treated in Assumpsit; Contracts; Implied Contracts; Building, etc., Contracts; Master and Servant; Liens (liens for labor); Mechanics' Liens.

Workmen's Compensation Law.

A DIGEST

OF

ALL THE REPORTED DECISIONS OF THE COURTS OF MICHIGAN

VOLUME I

ABANDONMENT.

TREATS of the intentional relinquishment to the public at large of a property or personal right, excluding loss of property or right by surrender or nonclaim towards a particular person.

Abandonment of rights or claims usually is in the nature of a relinquishment or waiver, where the possession of tangible property is not involved, and accordingly specific topics treating of the particular right should be consulted, e. g., abandonment of easements, see Easements, IV.

Abandonment of actions or proceedings therein, see specific topics like Appeal; Discontinuance; Election and Waiver; Motions.

Abandonment and nonsupport of wife or child, see Divorce; Parent and Child; Crimes, II.

Lost property not intentionally abandoned, see Property; Conversion.

Relinquishment of right by waiver, see Election and Waiver.

¶ 1. An intention to abandon logs placed upon a rollway on a river was not established by the mere failure to exercise the right of removal, as both the intention to abandon and actual relinquishment must be shown.—*Log Owners Booming Co. v. Hubbell*, 135 Mich. 65.

¶ 2. In replevin of lumber cut from logs taken from a rollway on a river, the main issue of abandonment was properly left to the jury, where the defendant gave testimony tending to show that the logs had been in such rollway from 20 to 30 years, that they had become imbedded in the sand and earth, and that grass and bushes had grown over many of them, and plaintiff claimed that they were placed upon the rollway with the intention of conveying them to places of manufacture and sale, and that there was no intent to abandon.—*Log Owners Booming Co. v. Hubbell*, 135 Mich. 65.

¶ 3. In replevin to recover lumber made from logs placed upon a rollway on a river, where abandonment was the main issue, testimony by a witness for defendants that he had consulted an attorney about his right to the logs, and that he told defendants that the attorney advised him that he had a right to them, was clearly incompetent.—*Log Owners Booming Co. v. Hubbell*, 135 Mich. 65.

ABATEMENT AND REVIVAL.

TREATS of "the suspension of a suit by any matter arising after its commencement," the survivability of the cause of action, and the continuation of abated actions by proceedings to revive them.

Analysis.

§ 1. In general; definition and nature and effect.
§ 2. Death of party.
§ 3. ——Of one of coparties.
§ 4. Omission, misjoinder or misnomer of party.
§ 5. Termination of party's capacity.
§ 6. Transfer or extinction of party's interest.
§ 7. ——In suits in equity.
§ 8. Extinction of corporate party.
§ 9. Failure of jurisdiction.
§ 10. Pendency of prior action.
§ 11. ——Different parties or issues.
§ 12. ——Different courts; law and equity.
§ 13. ——Suits in federal or foreign courts.
§ 14. Commencement of other proceedings.
§ 15. Causes arising after submission, verdict or judgment.
§ 16. Survival of causes of action.
§ 17. ——In equity.
§ 18. Pleas or suggestions, and procedure thereon.
§ 19. Revival and subsequent procedure.
§ 20. ——In equity.

§ 1. In general; definition and nature and effect.

Effect on attachment or garnishment, see Attachment; Garnishment.
Effect on foreclosure suit based on default in one instalment, see Foreclosure, III, A.
Abatement of claim for rents and profits as incident to abated ejectment action, see Ejectment, VI.
Effect of foreign judgment against ancillary administrator after revival to bind domestic estate and heirs, see Foreign Judgments.

¶ 1. The mere abatement of a suit in equity is a state of suspension with capacity for revival.—Zoellner v. Zoellner, 46 Mich. 511.

§ 2. Death of party.

Death of one of the parties, see post § 3.
What causes survive, see post §§ 16, 17.
Mode of pleading or suggesting fact of death, see post § 18.
Proper person to be substituted, see post §§ 19, 20.
Effect of death of sole party or of all coparties, see Comp L. 1915, §§ 12385, 12387.

¶ 2. While at common law the death of a party to a suit terminated the suit, in equity the suit was simply suspended and might be revived. The equity rule through the adoption of statutes prescribing the practice to be followed in the event of the death of a party has become the rule in the law courts.—Brown v. Fletcher's Estate, 146 Mich. 401; affirmed in 210 U. S. 82, L. ed. 964, 28 Sup. Ct. Rep. 702.

¶ 3. Where an assignee in bankruptcy or a sole administrator is made a defendant in the foreclosure of a mortgage upon lands on which the estate which he represents has a prior mortgage, his death before decree abates the suit as to such estate unless proceedings are renewed against his successor.—Avery v. Ryerson, 34 Mich. 362.

¶ 4. The death of a debtor seems to extinguish, or at least suspend, the right of the creditor to prosecute a creditor's bill, when no lien exists.—Beith v. Porter, 119 Mich. 365.

Death of tortfeasor as abating action for wrongful death, see note, 10 N. C. C. A. 1022-1040.

§ 3. ——Of one of coparties.

See also post ¶¶ 90, 91.

Action by survivor on joint contract or obligation, see Contracts, X; Bonds; Negotiable Instruments, XIV; Officers, VII; and topics treating of specific bonds and contracts.

Right of surviving partner or of winding up partner to sue, see Partnership, VI, A.

Effect of death of one coparty, see Comp. L. 1915, § 12384.

¶ 5. Upon the death of one defendant the cause of action, originally joint, survives against his codefendant alone, and his administrator cannot be joined; and upon the death of the codefendant the cause of action survives only against the latter's executors.—Newberry v. Trowbridge, 13 Mich. 263.

¶ 6. On the death of a defendant in ejectment the action may be carried on against surviving defendants, and the personal representatives or heirs of the deceased defendant cannot be brought in.—People ex rel. Hoffman v. St. Clair Circuit Judge, 40 Mich. 351; Hoffman v. Harrington, 41 Mich. 223.

¶ 7. Where decree was rendered after the death of one of the defendants, whose interest in the premises involved in the suit was held by such defendant and his wife, also a party to the suit, by the entireties, upon default of the defendants after personal service, held that it would be unnecessary to suggest on the record the death of the decedent and such decree would not be void because of his death priod thereto.—Cook v. Wayne Circuit Judge, 197 Mich. 19.

¶ 8. A suit for divorce and injunction against alienation of the husband's property in fraud of the wife, to which is joined as defendant the husband's alleged fraudulent transferree, does not, in so far as it is an injunction bill, abate by the husband's death.—Smith v. Waalkes, 109 Mich. 16.

§ 4. Omission, misjoinder or misnomer of party.

Mode of pleading or objection, see Pleading, III.

Want of parties due to extinction of interest, see also post ¶ 23.

¶ 9. A misjoinder of defendants in an action ex contractu will not, in view of How. St., § 6409, and Cir. Ct. Rule 27, adopted pursuant thereto to prevent such a result, operate to abate the suit, though all were joined in a single count.—Durgin v. Smith, 115 Mich. 239.

¶ 10. Where a widow and her minor children sued as cobeneficiaries upon an insurance policy, the failure to designate her as next friend was held no ground for abatement.—Sick v. Michigan Aid Ass'n, 49 Mich. 50.

§ 5. Termination of party's capacity.

By death of party, see also ante ¶ 3.

Disability to sue state by extinction of office made suable by statute, see State of Michigan.

Harmless error in failing to substitute minor for next friend on attaining majority, see Harmless Error.

¶ 11. The resignation of an administrator party and appointment of his successor abates the suit.—Barnett v. Powers, 40 Mich. 317.

¶ 12. Mandamus against members of the Railroad Crossing Board as officers, to compel official action, did not abate because of the expiration of the terms of office of several of the members, but an order for the writ was directed to run to the existing members.—Wisconsin, M. & N. R. Co. v. State Railroad Crossing Board, 119 Mich. 505.

§ 6. Transfer or extinction of party's interest.

In equitable suits, see post § 7.

Necessity of calling to attention of court, see post § 18.

Death of party in divorce suit, see post § 17, ante ¶ 8.

¶ 13. Where, pending action upon a demand resting upon an implied assumpsit or an express contract, such demand is assigned, the suit may go on in the assignor's name.—Peters v. Gallagher, 37 Mich. 407; Moon v. Harder, 38 Mich. 566.

¶ 14. An action of ejectment is not abated by plaintiff's conveying the premises, but it may still be prosecuted by plaintiff or his representative, and a judgment against defendant will inure to the grantee's benefit.—McKenzie v. A. P. Cook Co., 113 Mich. 452.

¶ 15. The expiration of plaintiff's title pending suit in ejectment and before trial operates in partial abatement of the action.—Hurd v. Raymond, 50 Mich. 369.

¶ 16. The sale of negotiable paper pending suit thereon does not abate the suit or affect the issue.—Newberry v. Trowbridge, 13 Mich. 263; Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456.

¶ 17. Where, pending suit on an implied assumpsit, plaintiff assigns all his interest in the claim to a third party, defendant cannot object to the suit's going on in the assignor's name.—Peters v. Gallagher, 37 Mich. 407.

¶ 18. An assignment of plaintiff's claim for damages in a pending suit, to secure her attorneys for their services, is not a bar to its continued prosecution in her name.—Rajnowski v. Detroit, B. C. & A. R. Co., 78 Mich. 681.

¶ 19. A pending suit is not abated by a release obtained from plaintiff in her attorney's absence, by duress and fraud, of her

claim for damages; where, for example, she was induced by threats, to release, for a consideration, such claim, in order to save her son from a criminal prosecution.—Welser v. Welch, 112 Mich. 134.

¶ 20. Though an assignee would ordinarily be entitled to prosecute the garnishment proceedings begun by his assignor on the claim, it abates where the garnishee thereupon pays the claim to the assignee.—Burnham v. Home Ins. Co., 119 Mich. 588.

§ 7. ——In suits in equity.

At law, see ante § 6.

¶ 21. When a defendant in chancery is once lawfully impleaded he cannot, by disposing of his interests, step out of the position of defendant, but he continues, usually, for the purposes of the suit, to represent his original interests.—Mickle v. Maxfield, 42 Mich. 304.

¶ 22. Dismissal of a bill in equity does not necessarily follow the expiration pending suit of a right alleged therein, if it also seeks to enforce some other right which has not expired.—Holcomb v. Mosher, 50 Mich. 252.

¶ 23. A court of equity must have the real parties before it. As soon as a complainant assigns his right the suit ceases as to him, and becomes as defective for want of a complainant as if it had abated by his death. It can be restored to activity only by bringing the rights of the assignee before the court.—Wallace v. Dunning, W. 416; Webster v. Hitchcock, 11 Mich. 56; Brewer v. Dodge, 28 Mich. 359.

¶ 24. When one defendant assigns to complainant, this is equivalent to a dismissal of the bill as to that defendant, and if the principal relief was sought as to that defendant—all other matters being subsidiary—the suit goes down entirely.—Widner v. Olmstead, 14 Mich. 124.

¶ 25. One of several defendants to a bill in equity to enforce a vendor's lien assigned his interest in the property in controversy to the complainant, and, with such defendant's consent, an order was entered taking the bill as confessed against him. Held, that this arrangement was equivalent tot a dismissal of the bill as to him; and as the purchase-money was only alleged to be due from him, and not from the other defendants, no lien could be enforced as to any of them.—Widner v. Olmstead, 14 Mich. 124.

¶ 26. Complainant in a bill to remove cloud from title conveyed the premises by warranty deed to a third person after the commencement of suit and before the hearing, who retained, however, part of the consideration to be paid when the title should be cleared; no question of complainant's right to prosecute the suit after such conveyance was raised until the hearing. Held, that she had not parted with her whole interest in the subject-matter of the suit, and that she should have relief.—Begole v. Hershey, 86 Mich. 130.

¶ 27. A plea that complainant has parted with his interest in the suit presents a good objection to a suit for foreclosure.—Wallace v. Dunning, W. 416.

§ 8. Extinction of corporate party.

The effect of the dissolution, insolvency or expiration of a corporation, including its effect on pending actions and causes of action, involves the questions of succession to the properties of such corporations and the rights of creditors to such a degree that all such matters are treated in Corporations, XXIII.

§ 9. Failure of jurisdiction.

Failure because of pendency of another action, see post §§ 10-13.
Ouster by commencement of other superior proceedings, see post § 14.
Pleading abatement for service procured by fraud, see Pleading, III.
Second suit where first is lacking in jurisdiction, see also post ¶ 50.

¶ 28. There is an abatement of replevin by justice's removal from his township without a legal transfer of his docket.—Kidder v. Merryhew, 32 Mich. 470.

§ 10. Pendency of prior action.

Necessity that two actions be identical, see post §§ 11-13.
As to modes of commencing actions and the time when they are deemed commenced and when they are terminated, see Actions, § 6; Limitations of Actions, V; Process; Discontinuance; etc.
Requisite allegations of plea, see Pleading, III.
Effect of pending garnishment on right to sue garnishee, see Garnishment, VIII.
Effect of pending foreclosure suit on right to sue for debt, see Foreclosure, VI.
Cross-replevin suits, and abatement of the second one, see Replevin, I.
Concurrent remedies in equity and at law, and right to maintain one pending the other, see Equity, and see also specific topics treating of the several remedies involved.
Priority of jurisdiction of another court over the suit, see Courts, V.
Judgment in another action as bar or estoppel, see Former Adjudication.
Continuance or stay because of other action, see Continuances; Stay of Proceedings.
Pendency of plea of former action pending as preventing hearing of motion to dismiss second suit, see Discontinuance, Dismissal and Nonsuit.

¶ 29. While a suit is pending, no new suit can be commenced for the same cause of action.—Gray v. Jones, 80 Mich. 504.

¶ 30. Pendency of a prior suit in which there could be no recovery because it was prematurely brought cannot be pleaded in abatement.—Blackwood v. Brown, 34 Mich. 4.

¶ 31. There can be no presumption of the identity of causes of action in different suits between the same parties where the later suit is for a cause that did not legally accrue in time for the earlier.—Hart v. Lindley, 50 Mich. 20.

¶ 32. Pendency of another suit involving the same subject-matter is not a bar; if relied on at all, it must be pleaded in abatement.—Near v. Mitchell, 23 Mich. 382; Sullings v. Goodyear Dental Vulcanite Co., 36 Mich. 313.

¶ 33. A plaintiff who, after entering rule for discontinuance, should refuse to pay the taxed costs when demanded, would lose the benefit of his rule, and a second suit begun for the same cause of action would be abated —the costs being still unpaid—by the first.—Slocomb v. Thatcher, 20 Mich. 52.

¶ 34. The entry of a rule in the common rule book to discontinue a suit, together with notice of the rule to the defendant, accompanied by an offer to pay costs when taxed —it not appearing that the costs had been taxed—is sufficient to justify a verdict for the plaintiff in a suit brought upon the same cause of action, and in which the issue was joined upon the plea of another action pending.—Slocomb v. Thatcher, 20 Mich. 52.

¶ 35. Parties to a suit to foreclose a mortgage stipulated that "the same is hereby discontinued without cost to either party and without prejudice." No order of discontinuance was entered. After the filing of said stipulation complainant started a new suit. Defendant filed a plea of abatement on the ground of suit already pending. Held, the plea was properly overruled since by the stipulation the suit was discontinued, no order being necessary.—Chronowski v. Zielinski, 168 Mich. 590.

§ 11. ——Different parties or issues.

Difference between scope of legal and equitable suits, see post § 12.

¶ 36. It is necessary for the parties seeking the abatement of a present action by reason of the pendency of one already commenced to plead and prove the connection of the former action with the same subject-matter; the relations of the parties must be the same in both actions and the relief sought practically identical.—Reis v. Applebaum, 170 Mich. 506.

¶ 37. A party cannot demand abatement of a present action by reason of the pendency of one already commenced, where the second cause of action decides much more than can be decided by the first.—Reis v. Applebaum, 170 Mich. 506.

¶ 38. A vendor's action for the price of goods sold is not abated by the pendency of an action by the vendee to recover for defects in the goods, where the vendor has not asserted his claim by way of set-off in the vendee's suit.—Jennison Hardware Co. v. Godkin, 112 Mich. 57.

¶ 39. Ejectment by an infant suing by his mother, as his next friend, to recover a homestead interest, was not subject to abatement because of the pendency of a like action by the mother, as the sole plaintiff, although she claimed the right to possession on behalf of herself and her infant children.—Upton v. Gerber, 136 Mich. 72.

¶ 40. The fact that other suits are pending against a corporation involving the same questions is no reason for quashing quo warranto proceedings brought to test the right of the corporation to exercise its franchise as a corporation, where none of the other suits were brought for that specific purpose. —People ex rel. Attorney General v. Detroit, G. H. & M. Ry. Co., 149 Mich. 122.

¶ 41. Plaintiff was an agent of defendant having charge of defendant's retail departments and receiving, as compensation, a commission on the sales made. The contract between defendant and the owner of the store in which one of said departments was located was canceled, defendant receiving a bonus for releasing its rights under the contract, and agreeing, according to plaintiff's claim, to give plaintiff his commission upon said bonus. In a suit to recover the commission upon the bonus thus agreed upon, held, that the pendency of a prior action by plaintiff upon his first contract with defendant is not a bar to this suit, the causes of action being distinct.—Muir v. Kalamazoo Corset Co., 155 Mich. 624.

§ 12. ——Different courts; law and equity.

Power of equity to assume jurisdiction when another action is pending at law on the subject-matter, see Equity, III, A.

Action on debt pending suit to foreclose mortgage, see Foreclosure, VI.

¶ 42. Where a civil and criminal action both lie, the law regards the injury as double, and one action cannot be plended in abatement or bar of the other.—Elliott v. Van Buren, 33 Mich. 49.

¶ 43. An action at law is not, as a general rule, abated or barred by the pendency of a suit in equity.—Joslin v. Millspaugh,

27 Mich. 517; Goodrich v. White, 39 Mich. 489; Kinney v. Robison, 52 Mich. 389; Drain Commissioner v. Baxter, 57 Mich. 127; Wheeler v. Hatheway, 58 Mich. 77.

¶ 44. A plea in abatement to a declaration on the ground of pendency of another action for the same cause on the equity side of the court is not good, since plaintiff may choose the form of action which will best promote the ends of justice.—Monier v. Mizner, How. N. P. 61.

¶ 45. Pendency of a chancery suit by a partnership for an accounting and to restrain a sale of a portion of the partnership property under a levy upon the half of one partner in such property, and offering to consent to a sale and to the holding of the property subject to the levy if found valid, is consistent with and not ground for abating a subsequent replevin suit to recover the property taken under the levy.—Ernest v. Woodworth, 124 Mich. 1.

¶ 46. The pendency of a bill against waste by cutting timber in excess of the tenant's right, and for an accounting of its sale and for a sale of logs on hand under decree of the court, is no bar to replevin for the logs which remained, where, pending final hearing, defendant attempted to cut the logs into firewood.—Hogan v. Hogan, 102 Mich. 641.

§ 13. ——Suits in federal or foreign courts.

¶ 47. The pendency of a state suit may be pleaded in abatement of one in the federal courts, and vice versa.—People ex rel. Granger v. Wayne Circuit Judge, 27 Mich. 406, dictum approving Earl v. Raymond, 4 McLean 233.

¶ 48. Proceedings in one court should not be stayed on account of a suit pending in another, unless the two suits are identical; therefore a suit in rem in admiralty does not suspend a common-law action on the same subject in a state court.—People ex rel. Granger v. Wayne Circuit Judge, 27 Mich. 406.

¶ 49. A plea in abatement to a suit in a state court because of the pendency of a prior action in the federal court should be sustained where the bill in the first case was by two heirs of a testator against one heir individually and in his administrative capacity to secure a portion of the real estate of decedent on the ground that they were unintentionally left out of the will by testator and knew nothing of their rights thereunder until long after probate of the will, and the bill in the case in the state court was by such defendant in the former case individually, and as executor of testator's estate, against another heir who was not party to the first suit, for an accounting and partition of the real estate, and alleged therein that complainant and defendant were entitled to all of such real estate. —Pinel v. Campsell, 190 Mich. 347.

¶ 50. The dismissal of a bill in equity for the cancellation of an order of the Michigan Railroad Commission was affirmed on appeal, and a writ of error to the Supreme Court of the United States denied both by the state Supreme Court and a judge of the United States Supreme Court; thereafter, a new bill seeking the same relief was filed in the federal court and dismissed on the ground that the complainant having selected the state court as his forum must abide the result, from which decision an appeal is now pending in the Supreme Court of the United States. Held, that as the federal court was without jurisdiction, the proceedings therein would not prevent the issuance of a writ of mandamus by the state court to put such order of the Railroad Commission into immediate effect.—Michigan Railroad Commission v. Detroit & M. Ry. Co., 182 Mich. 234.

¶ 51. Where, on the same day that a receiver was appointed in Indiana for a mutual benefit association organized in that state but having local branches here, a member of a local branch brought suit in this state upon his certificate, taking out also an ancillary writ of garnishment, the pendency of the proceedings in which the appointment of the receiver was made did not in the absence of proof that such appointment preceded the commencement of the action here, deprive plaintiff of the remedy he was seeking to enforce at law.—Cohen v. Supreme Sitting of Order of Iron Hall, 105 Mich. 283.

§ 14. Commencement of other proceedings.

Various proceedings like corporate insolvency, bankruptcy, and the like, have the effect of transferring the title or custody of the property or management of the estate of the party affected, and in that way may work an abatement. Such matters are treated in specific topics, e. g., Assignments for Creditors, § 37; Corporations, XXIII; Estates of Decedents, V, XI; Receivers. See also ante this topic §§ 6, 7.

¶ 52. An action to recover damages for an illegal occupancy is not abated by subsequent proceedings to condemn the land for railway purposes.—Callanan v. Port Huron & N. W. R. Co., 61 Mich. 15.

¶ 53. An attachment suit was held not abated ab initio by the pendency of a suit commenced on the same day against the same defendant for the same cause of action, but would be made good by a discontinuance of the other suit before plea in abatement.—Wales v. Jones, 1 Mich. 254.

§ 15. Causes arising after submission, verdict or judgments.

See also post ¶¶ 78, 89.

Death after referee's report and before judgment, see also post ¶ 87.

Effect of matter of abatement upon the judgment, see generally Judgments, VIII-X; and as to rendition of verdicts, see Verdicts.

Abatement of ancillary proceeding in ejectment for recovery of rents and profits by reason of vacation of judgment of ouster and grant of new trial, see Ejectment, VI.

¶ 54. Payment before decree in foreclosure for a single instalment abates the suit, and payment after would have the same effect but for Comp. L. 1871, § 5157, How. St., § 6712.—Brown v. Thompson, 29 Mich. 72.

§ 16. Survival of causes of action.

Death as abating action or suit, see ante §§ 2, 3.

Effect of death of respondent to mandamus, see ante ¶ 12.

Causes constituting assets of estate and right of personal representative to sue, see Estates of Decedents.

Right of personal representative to sue on survivable cause of action, see Estates of Decedents, XI, A.

Distinction between statutory right of action for instantaneous death caused by wrongful act and that for injuries resulting in death, which by statute survives, see Death by Wrongful Act.

Actions which survive, see Comp. L. 1915, § 12383.

¶ 55. The Survival Act (Comp. L. 1897, § 10117) applies to rights or causes of action as well as to actions.—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

¶ 56. Under the rules of the common law a cause of action does not survive where the person alone is affected by the injury, and no property interests are affected.—People v. Kemppainen, 163 Mich. 186.

¶ 57. What actions survive at common law and by statute (Comp. L. 1871, § 5828).—Dayton v. Fargo, 45 Mich. 153.

¶ 58. The death of a defendant in ejectment abates the action; the defendant's right descends to his heir, against whom a new cause of action arises.—People ex rel. Hoffman v. St. Clair Circuit Judge, 40 Mich. 351, and see Hoffman v. Harrington, 41 Mich. 223.

¶ 59. Where a defendant in an ejectment suit dies, the suit as to him abates and a new suit must be instituted under Comp. L. 1897, § 9723, against his heirs.—Conley v. Sinclair, 163 Mich. 306.

¶ 60. The death of the defendant in ejectment abates the action; but plaintiff may bring a new action for the same cause at any time within one year thereafter (How. St., § 8707).—McKenzie v. A. P. Cook Co., 113 Mich. 452.

¶ 61. The death of the plaintiff in ejectment does not abate the action.—McKenzie v. A. P. Cook Co., 113 Mich. 452.

¶ 62. The right of action for treble damages for cutting timber, given under Comp. L. 1897, § 11204, would pass to the personal representative of the deceased owner, and is assignable, since the injury, if any, is to the estate and not to the person of the owner.—Holmes v. Loud, 149 Mich. 410.

¶ 63. A right of action based wholly upon the destruction by a widow of unrecorded deeds of lands to her husband, the title to which she afterwards secures in her own name in fraud of the rights of his heirs, sounds in fraud, and does not survive at common law or under How. St., § 7397, providing that actions "for damages done to real or personal estate" shall survive.—Stebbins v. Dean, 82 Mich. 385.

¶ 64. Since a right of action for an injury to the business of a person as the result of an unlawful combination of business rivals is not one for "fraudulent representations or conduct" injurious to "the person, property or rights of another, for which an action on the case for fraud or deceit" will lie, it does not survive under Section 2 of Act No. 195, Pub. Acts 1897, How. Ann. St., 2nd Ed., § 13955 (affirmed by equally divided court).—Frohlich v. Deacon, 181 Mich, 255.

¶ 65. The right to rescind the transfer of a promissory note because of fraud in procuring such transfer survives to the personal representatives of him who transferred the note.—Coon v. Dennis, 111 Mich. 450.

¶ 66. Where a mortgagee had been induced by the mortgagor's fraudulent representations to apply in part payment upon his mortgage a note and mortgage owned by the mortgagor, and where, upon the mortgagee's discovering the fraud the mortgagor, in settlement, had promised to pay to the mortgagee the amount of the note and mortgage if he failed to collect it by suit which he agreed to bring upon said note, and which was brought without making collection, the cause of action thus arising against the mortgagor was not based upon the fraud practiced by him, and therefore survived against his estate upon his death.—Bryant v. Rich's Estate, 104 Mich. 124.

¶ 67. By How. St., § 7397, which provides for the survival of actions for negligent injuries to the person, an action against a physician for negligent malpractice survives against his executors.—Norris v. Kent Circuit Judge, 100 Mich. 256.

¶ 68. In case of the death of a person who has been injured by a defective highway, his right of action survives to his administrator, How. St., § 1446g (Laws 1887, Act No. 264), did not prevent survival.—Roberts v. City of Detroit, 102 Mich. 64; Racho v. City of Detroit, 90 Mich. 92.

¶ 69. Act No. 104, Public Acts of 1909, relating to the liability of railroads for injuries to employees, does not repeal the Survival Act, as to railroad employees.—Habitz v. Wabash R. Co., 170 Mich. 71.

¶ 70. The right of action given by Act 104, P. A. 1909, to the injured employee of a common carrier railroad survives his death and may be begun by his personal representative under C. L., 1897 § 10117, How. 2nd Ed., § 12761, but no double liability is thereby created.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

Survival of award under compensation acts upon death of beneficiary, see note, 13 N. C. C. A. 713-731.

§ 17. ——In equity.

See also ante ¶ 2.

Legal causes of action, see ante § 16.

Effect of transfer of rights, see ante § 7.

As to creditors' suit, see also ante ¶ 4.

Survival of bill for divorce and injunction on death of one defendant, see also ante ¶ 8.

¶ 71. A divorce suit abates by the death of either party before decree.—Wilson v. Wilson, 73 Mich. 620.

¶ 72. Death of defendant husband pending suit for divorce, does not abate suit so as to preclude awarding permanent alimony.—Selbly v. Ingham Circuit Judge, 105 Mich. 584.

¶ 73. The death of the complainant in divorce extinguishes the suit and the whole ground of action, and, though the action itself survives, a defendant who has taken no appeal from a decree granted therein cannot obtain by petition a standing in court for the purpose of attacking such decree.—Zoellner v. Zoellner, 46 Mich. 511.

¶ 74. The death of a wife who is complainant in a suit to protect a homestead right makes no difference if children survive.—Shoemaker v. Collins, 49 Mich. 595.

¶ 75. The death of the judgment debtor puts an end to a creditor's bill where no lien has attached.—Jones v. Smith, W. 115; German-American Seminary v. Saenger, 66 Mich. 249.

¶ 76. A creditor's bill, which sought the setting aside of a conveyance to the debtor's wife of land bought and paid for by the debtor, must be dismissed where the death of the debtor is pleaded in abatement, no levy having been made and the proceedings in the case having in no way placed the property in the custody of the court (German-American Seminary v. Saenger, 66 Mich. 249; Jones v. Smith, Walk. Ch. 115, followed).—Beith v. Porter, 119 Mich. 365.

¶ 77. Where on a creditor's bill the debtor is enjoined from interfering with or making any disposition of any of his property, and a receiver is appointed for all such property, clothed with the usual powers and authorized to take immediate possession, the assets of the debtor are so impounded and held by the court as to create a lien which survives the death of the debtor and prevents an abatement of the suit against him upon such death.—Saginaw County Sav. Bank v. Duffield, 157 Mich. 522.

¶ 78. Where a person brings a petition under section 69 of the General Tax Law (1 Comp. L. 1897, § 3892), to set aside a tax sale on the ground of her mental incompetency, and the petition is filed, proofs taken, and the case submitted in her lifetime, the right to a decree in her favor does not perish with her death, but will be entered thereafter at the instance of her representatives.—Young v. Blanchard, 165 Mich. 340.

§ 18. Pleas or suggestions, and procedure thereon.

Necessity of suggestion of death of coparty, see also ante ¶ 7.

Mode of pleading generally and order and kind of pleas, see generally Pleading, III; Equity, VII.

New practice under the Judicature Act, see also Pleading, III.

Procedure on appeal or error, see Appeal and Error.

Review of proceedings on error and appeal, see Appeal and Error.

Discontinuance as to some of parties, see generally Discontinuance.

Pendency of plea as preventing discontinuance, see Discontinuance.

Procedure under the statute, see Comp. L. 1915, § 12384 et seq.

¶ 79. The suggestion of plaintiff's death is not issuable; and whether defendant should have notice is a question that cannot be raised, save on motion to set aside the proceeding for irregularity.—Larned v. Wilcox, 4 Mich. 333.

¶ 80. Notice of the suggestion of plaintiff's death need not be given to defendant; the latter cannot intervene.—Vickery v. Beir, 16 Mich. 50.

¶ 81. An assignment by complainant cannot affect the proceedings if not appearing of record or brought to the court's knowledge.—Bigelow v. Booth, 39 Mich. 622.

¶ 82. The failure of defendant in error to suggest the death of his coplaintiff was, as to the survivor so affected, an irregularity, which he could waive.—Seymour v. Bruske, 140 Mich. 244.

¶ 83. Suggestion of the death of one of the coparties to a suit may on error be made after judgment as of the time of such death.—Seymour v. Bruske, 140 Mich. 244.

¶ 84. A discontinuance as to a deceased party is unnecessary to proceed against the others.—Howe v. Lemon, 47 Mich. 544.

§ 19. **Revival and subsequent procedure.**

See also ante ¶¶ 2, 3, 23.

Continuance of ejectment after transfer of title, see ante ¶ 14.

Bringing in administrators, see also ante ¶ 6.

Continuing action in name of assignor for assignee, see also ante ¶ 13.

The proper parties to be brought in will depend on the nature of the rights in the cause of action, its nature, and the devolution thereof; and accordingly topics treating specifically of the cause of action should be consulted, and especially Estates of Decedents, IV, V.

Revival of attachment proceedings, see Attachment, VII.

Right to revive garnishment proceedings, see Garnishment, VII.

Revivor of judgments and decrees, and supplemental proceedings thereon, see Judgments, X; Equity, XI.

Motion to dismiss after improper revival, see Discontinuance, Dismissal and Nonsuit.

Mandamus to compel vacation of erroneous proceedings, see Mandamus.

Nunc pro tunc entry of revival, see Judgments, XII.

¶ 85. The proceedings to revive a suit after plaintiff's death are matter of statutory regulation. Revivor should not be ordered until proof is on file of the death and of the appointment of an administrator.—Vickery v. Beir, 16 Mich. 50.

¶ 86. The suggestion of a party's death upon the record is enough, if undisputed, to have all the proceedings construed with it without amending the declaration. But the latter proceedings must be properly entitled.—People ex rel. Stimpson v. Seventh Circuit Judge, 41 Mich. 3.

¶ 87. On the death of plaintiff after a referee's finding in his favor but before judgment the cause should be revived before judgment.—Botsford v. Sweet, 49 Mich. 120.

¶ 88. The omission of plaintiff's administrators to revive a suit before taking out an execution after his death is only an irregularity, and may be cured by an order nunc pro tunc.—Jenness v. Lapeer Circuit Judge, 42 Mich. 469.

¶ 89. On nonresident defendant's death after entry of judgment, suit may be revived in name of executor appointed on probate here of foreign will, though it does not appear that testator had property here.—Hubbell v. Blandy, 87 Mich. 209.

¶ 90. Upon the death of one partner a cause of action belonging to the firm survives in favor of the other.—Teller v. Wetherell, 9 Mich. 464.

¶ 91. A suit against two partners is on the death of one of them properly revived against the survivor, the administrator of the deceased not being a necessary party.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 92. A debt due to two or more persons jointly must, after the death of one of them, be sued by the survivor or survivors.—Cote v. Dequindre, W. 64; Teller v. Wetherell, 9 Mich. 464.

¶ 93. When an action is brought against two or more defendants, and one dies, the suit cannot be revived against the administrator of such deceased defendant, and the case must proceed, if at all, against the surviving defendant, the proceedings to revive being statutory and not authorized in such cases.—Baudrig v. Powers, How. N. P. 10.

¶ 94. Ejectment cannot be revived against the legal representatives of a deceased defendant.—People ex rel. Hoffman v. St. Clair Circuit Judge, 40 Mich. 351.

¶ 95. Where a defendant in ejectment dies, the action may be carried on against surviving defendants.—People ex rel. Hoffman v. St. Clair Circuit Judge, 40 Mich. 351.

¶ 96. A writ of error in ejectment was dismissed because one of the defendants had died before the writ issued, and his heirs, instead of his executors, were brought in to represent him.—Hoffman v. Harrington, 41 Mich. 223.

¶ 97. Where a cause of action survives, the fact of the death of any of the plaintiffs cannot enter into the merits of the trial nor interfere with its progress, and the exclusion of evidence of such fact is not error.—Mason v. Finch, 28 Mich. 282.

¶ 98. After the death of one defendant, indorsers on a note, a joint cause of action survives against the other; and upon his death it survives only against his represen-

tatives; and accordingly demands due to him alone may be set off.—Newberry v. Trowbridge, 13 Mich. 263.

¶ 99. Under sections 10113 and 10114, Comp. L. 1897, there is the same power of amendment in actions revived by or against an administrator as in ordinary cases.—Jones v. Pendleton, 151 Mich. 442.

§ 20. ——In equity.

Chancery practice on bill or petition to revive or substitute, see Equity, XI.

¶ 100. While the statutory suggestion of the death of a party answers the purpose of a bill of revivor, the rules controlling the action of the court in a particular case are not different in the cases where revival of a suit is by suggestion and where it is by bill of revivor; in neither way can parties be brought into the suit who do not claim by operation of law as a consequence of the death of the original party, for in such case an original bill is necessary.—Haines v. Kent Circuit Judge, 155 Mich. 417.

¶ 101. Comp. L. 1871, § 5102, How. St., § 6656, allowing a suit to be revived against the representatives of a deceased party, is not meant to allow any independent right to be asserted without proper allegations.—Barnett v. Powers, 40 Mich. 317.

¶ 102. A petition to permit the revival of a cause of action in which an injunction was granted against the interference with a perpetual easement in an office building by substituting for the former parties their successors in interest to the end that the injunction in such former suit may be dissolved will not be granted where petitioners acquired their rights, not only with full knowledge of the deed conveying the easement, but also with full knowledge of the construction given to the deed by the supreme court in the prior case.—Ives v. Edison, 191 Mich. 461.

¶ 103. Where complainant in foreclosure proceedings dies before a final decree in the cause, the note and mortgage in suit represent unadministered assets of the estate, and, upon proper suggestion, the personal representative of deceased will be admitted to proceed with the suit.—Haines v. Kent Circuit Judge, 155 Mich. 417.

¶ 104. Parties who have purchased an interest in mortgaged premises and whose rights have accrued pending the abatement of the foreclosure suit by the death of the mortgagee, although they took their titles with notice of the pendency of the suit, should be brought upon the record in such manner that they may under proper pleadings have their rights adjudicated, where a long period of time has elapsed between the abatement of the suit and the attempt to revive it.—Haines v. Kent Circuit Judge, 155 Mich. 417.

¶ 105. Upon an application to revive a suit made by one who has no standing for that purpose, the court should not decide the merits of the controversy.—Haines v. Kent Circuit Judge, 155 Mich. 417.

¶ 106. Revivor of a partition suit as against the administrators of an estate on death of their intestate after decree and solely for purposes of an accounting left open by the decree, does not affect the heirs' rights in a subsequent partition of the inheritance.—De Mill v. Port Huron Dry Dock Co., 30 Mich. 38.

ABATEMENT to ABSENCE.

Cross-References.

Abatement of—
- Legacies, see Wills.
- Nuisances, see Nuisances.
- Writs, see topics treating of the various writs, e. g., Attachment; Mandamus; etc.
- Taxes, see Taxes; Local Improvements and Assessments.
- Rents, see Landlord and Tenant.

Abbreviations—
- In writings, see topics treating of the writing in which the abbreviation is used.
- In names and signatures, see Names; Execution of Instruments.
- Judicial notice of, and evidence to explain, see Evidence; Indictment, VIII.
- In pleading, see Pleading.

Abduction—
- See Crimes, II; Indictment.

Abettors—
- In crime, see Crimes; Indictment.

Abiding Event of Action—
- Test suits, see Consolidation and Severance; Stipulations; Judgments.
- Condition in contract, see Contracts.

Ability—
- As factor in negligence, see Negligence; and see Highways; Carriers; etc.

Abode, see Domicile.

Abortion—
- See Crimes, II: Indictment.

Absconding—
- Ground for attachment, see Attachment.

Absence—
- See specific topics treating of the right, remedy, defense, or liability affected by absence, e. g., Limitations of Actions; Continuance.
- Presumption of death based on, see Death and Survivorship.

ABSENT PERSONS.

TREATS of the administration of the estates of missing or absent persons under statute (Comp. L. 1915, §§ 13840, 13841).

Absence or nonresidence as affecting the rights and liabilities of the absent person or of those opposed in interest, or affecting the procedure in actions to which such a person is or should be a party, is treated in the specific topics dealing with such rights, liabilities or procedure, e. g., Divorce; Homesteads; Attachment; Limitations of Actions; Equity (laches); etc.

Absent witnesses, see Continuance; Depositions; Witnesses; Contempt.

Presumption of death of person long absent, see Death and Survivorship.

ABSOLUTE DEEDS to ABSTRACT QUESTIONS.

Cross-References.

Absolute Deeds—

As mortgages, see Mortgages.

Absolute or Conditional Sale, see Sales; and see Chattel Mortgages.

Absolute Rule, see Motions and Orders.

Abstract Instructions, see Instructions; Indictment.

Abstract of Record, see Appeal and Error.

Abstract questions, see Appeal and Error; Certiorari; Harmless Error; Mandamus; Indictment, XVI.

ABSTRACTS OF TITLE.

TREATS of such abstracts and their like, and of the duties and liabilities of persons preparing abstracts, but not of the rights of Vendors and Purchasers to abstracts as incidents of their contracts.

Analysis.

§ 1. In general.
§ 2. Duties and liabilities in preparing abstracts.
§ 3. ——Persons entitled to use or rely on abstract.

§ 1. In general.

Sufficiency of abstract to satisfy terms of land contract, see Vendors and Purchasers.

Taxability of abstract books, see Taxes.

Cross-examination of abstractor testifying as to title shown by abstract, see Examination of Witnesses.

¶ 1. The construction of an abstract of title and accompanying affidavits is for the court.—Frederick v. Hillebrand, 199 Mich. 333.

§ 2. Duties and liabilities in preparing abstracts.

Damages for neglect and measure of value of services in making abstract, see Damages; Values.

¶ 2. Where one has agreed to prepare and furnish a full abstract of title to lands which the other party is intending to buy from a third person, damages arising from an omission to mention therein a particular incumbrance are recoverable.—Smith v. Holmes, 54 Mich. 104.

¶ 3. Damages are recoverable against a register of deeds who undertakes to furnish plaintiff a full abstract of the title to lands which the latter desires to purchase, if, in consequence of the careless omission therefrom of any mention of a particular incumbrance, the purchaser is put to additional expense to perfect his title.—Smith v. Holmes, 54 Mich. 104.

¶ 4. Having agreed to furnish an intending purchaser with a full abstract of title the register is liable for the damages caused by his negligent omission to mention an incumbrance.—Smith v. Holmes, 54 Mich. 104.

Liability for negligence in making abstract of title, see note, 6 N. C. C. A. 965-975; 13 N. C. C. A. 431-445.

§ 3. ——Persons entitled to use or rely on abstract.

¶ 5. The liability of an abstractor to the purchaser of the abstract, for damages resulting from defects in the abstract, extends only to the person for whom the abstract is made, and not the grantee.—Kenyon v. Charlevoix Improvement Co., 135 Mich. 105.

ABUSE to ACCESS.

Cross-References.

Abuse of Discretion, see topics treating of the proceeding which is the subject of discretion; and as to review of abused discretion, see Appeal and Error; Certiorari; Mandamus; Indictment, XVI.

Abuse of Office, see Officers.

Abuse of Process, see Malicious Prosecution.

Abusive Language—

As slander, see Libel and Slander.

As provocation to crime, see Assault and Battery; Homicide.

Abutting Owners, see generally Highways; Local Improvements; Dedication; Eminent Domain.

Academies, see Schools, X.

Acceptance, see generally topics treating of the subject of the acceptance, or of that whereof acceptance is a material act.

Acceptance of Benefits, see Agency (ratification); Election and Waiver; Estoppel; Rescission.

Access—

Easements of, see Easements; Highways; Navigable Waters.

To public records, see Records.

Evidence as to nonaccess of husband or putative father, see Witnesses; Bastards.

ACCESSION AND CONFUSION.

TREATS of the integral addition to or commixture with specific property of other property or elements of value not belonging to the same person.

Analysis.

§ 1. Accessions to personal property or its value.
§ 2. ——Making into another kind of property.
§ 3. Confusion of goods.
§ 4. ——Rights of parties.
§ 5. Improvements or crops on another's land.

§ 1. Accessions to personal property or its value.

Crops planted on another's land, see post ¶ 29.

Improvements on land, see post § 5; and see also Fixtures; Ejectment, VI; Quieting Title (allowance for); Partition, IV (adjustment of rights); Tenants in Common; Life Estates.

Accessions and increment as part of mortgaged chattels, see Chattel Mortgages, I, B.

Increase in hands of fraudulent grantee as subject to creditors' demands, see Fraudulent Conveyances, IV.

¶ 1. Where new material is brought into a printing establishment to supply the wear, decay and destruction of the old, and is so mingled with the old as to be indistinguishable, it will be held a part of the property by accession; but not if distinguishable.—Fowler v. Hoffman, 31 Mich. 215.

¶ 2. A property right in a mare with foal will include and hold the colt, which, if unweaned, may be sold with the mare.—Kellogg v. Lovely, 46 Mich. 131.

¶ 3. A wilful trespasser who expends money or labor upon another's property acquires no title therein, and the owner may reclaim it.—Wetherbee v. Green, 22 Mich. 311; Isle Royale Min. Co. v. Hertin, 37 Mich. 332.

§ 2. ——Making into another kind of property.

¶ 4. Where by expending labor in good faith, though by mistake, upon another's property, one destroys its identity or converts it into something substantially different and of greatly enhanced value, he acquires title, and the original owner may recover the value as before the conversion.—Wetherbee v. Green, 22 Mich. 311; Isle Royale Min. Co. v. Hertin, 37 Mich. 332.

¶ 5. The conversion of trees into logs by a trespasser does not change the title to the property or destroy the identity thereof.—Gates v. Rifle Boom Co., 70 Mich. 309.

¶ 6. Where trees are cut into logs by wilful trespassers and sold, the vendees cannot claim the benefit of any increased value put upon them by their vendors.—Tuttle v. White, 46 Mich. 485.

¶ 7. Where trees taken from another's land by an innocent trespasser were cut into cord-wood, which was hauled to a lake and piled, and was then seized by the owner of the land, it was held that title had not passed to the innocent trespasser, nor could he recover for his labor; the value of the converted property not having been very greatly increased nor its identity substantially changed.—Isle Royale Min. Co. v. Hertin, 37 Mich. 332.

¶ 8. One who by unintentional trespass had taken from another's land young trees of the value of $25, and converted them into hoops worth $700, was held, because of the great disparity in value, to have made the property in its changed form his own, though the identity of trees and hoops could be traced.—Wetherbee v. Green, 22 Mich. 311.

§ 3. Confusion of goods.

¶ 9. Whether there was confusion of goods in a stock of general merchandise is a question of fact for the jury.—Cadwell v. Pray, 41 Mich. 307.

¶ 10. In an action of replevin, where the defendant admits that he authorized plaintiff to remove his property, and only claims he took away a few dollars worth of defendant's material, the court did not err in refusing an instruction on the theory of confusion of goods.—Patterson v. Spooner, 143 Mich. 698.

§ 4. ——Rights of parties.

Addition of labor or materials to property, see ante § 1.

Rights of conditional seller reserving title in goods where levy is made on commingled mass, see Sales, XII.

Deliberate confusion as affecting right to question excessiveness of damages, see New Trial.

¶ 11. In cases of accidental intermixture of personal property, the general quality and character of the property being the same, neither loses his own.—Wetherbee v. Green, 22 Mich. 311; Gates v. Rifle Boom Co., 70 Mich. 309.

¶ 12. Where logs bearing the same mark are commingled not unlawfully, one who owns a portion only cannot claim all.—Hance v. Tittabawassee Boom Co., 70 Mich. 227.

¶ 13. The owner of logs which have been sold by road commissioners under mistake as to their right thereto, and have been manufactured into lumber by the purchaser and commingled with lumber cut from other logs, does not obtain title to the whole of the lumber under the theory of confusion of property, but can recover only the proportionate share.—Keweenaw Association v. O'Niel, 120 Mich. 270.

¶ 14. Where logs cut in good faith by A. from trees on B.'s land are by A. commingled not maliciously with his own logs, A. must lose the labor spent in converting the trees into logs; but B. cannot take more logs than belong to him, nor can he keep A.'s logs from him longer than the time reasonably required for selection and separation, or charge A. with storage and expense thereafter.—Busch v. Fisher, 89 Mich. 192.

¶ 15. That logs, for the value of which plaintiff sues, had been mingled by him with defendant's logs, would not prevent a recovery if there was no fraudulent admixture, which is a question for the jury, and the court cannot charge, as matter of law, that plaintiff shall not recover for any logs.—Johnson v. Ballou, 25 Mich. 460.

¶ 16. If goods, though put in among a defendant's stock without effort to keep them separate, are capable of identification, there is no such intermixture as places him in the attitude of a wrongdoer so as to shift from plaintiff to him the burden of proving which such goods are.—Bethel v. Linn, 63 Mich. 464.

¶ 17. Whether a party guilty of a fraudulent admixture of logs owned by himself with those owned by another, so that it is impossible any longer to identify his own, thereby loses all interest in them, and becomes remediless if such other person appropriates the whole mass to his own use, quere.—Stephenson v. Little, 10 Mich. 433.

¶ 18. Identification being impossible, he whose property has been confused with another's by the latter's mistake, may take so much of the common mass as he owns therein. So held where logs from trees which A. had cut on B.'s land, supposing it to be his, were mixed by A. with his logs; B. could select a quantity equal to that taken from his land and of an average quality with his own.—Gates v. Rifle Boom Co., 70 Mich. 309.

¶ 19. If a mortgagor mingles other goods with those mortgaged, so as to be indistinguishable by the mortgagee, and refuses to separate them, the mortgagee may take the whole.—People v. Bristol, 35 Mich. 28.

¶ 20. In the case of a confusion of goods, the right of possession is somewhat different from that in other cases, and steps taken by a defendant in replevin to enable the officer to distinguish the property may be shown.—Sleight v. Henning, 12 Mich. 371.

§ 5. Improvements or crops on another's land.

General law of fixtures, see Fixtures.

Rights between life tenant and remaindermen, or landlord and tenant, or vendor and purchaser, see Fixtures; Landlord and Tenant, IV, E; Life Estates, Remainders and Reversions, II; Vendors and Purchasers, VIII.

Allowance in ejectment or suit to quiet title, see Ejectment, VI; Quieting Title, III.

¶ 21. If one makes improvements on the lands of another who is not in fault about it, the former, as a general rule, loses both his property and his labor.—Morrison v. Berry, 42 Mich. 389; Holmes v. Bronson, 43 Mich. 562.

¶ 22. One who goes upon and improves land which he knows another owns, cannot, upon the failure of his title, recover the value of the improvements he has made.—Lemerand v. Flint & P. M. R. Co., 117 Mich. 309.

¶ 23. A rightful owner who has repossessed himself of his property without resorting to legal remedies is not liable in an action at law for the value of improvements made by another.—Lemerand v. Flint & P. M. R. Co., 117 Mich. 309.

¶ 24. A claim for improvements made by the occupant of land is based upon equitable grounds, and the character of the improvements must be such as to make the land more valuable in the future for the ordinary purposes for which such property is owned and used.—Robinson v. Batzer, 195 Mich. 235.

¶ 25. Equity may allow the value of improvements made on land by one who made them as a purchaser without knowledge of complainant's judgment, where a decree in aid of complainant's execution is awarded, although the purchaser took under a quitclaim deed; and a lien superior to that of the execution may be decreed to work out his rights.—Cleland v. Clark, 123 Mich. 179.

¶ 26. An occupant of land cannot recover for improvements as against the title holder, except in a case of ejectment when the owner brings suit, and not as a personal judgment, but as a condition to obtaining a writ of possession.—Robinson v. Batzer, 195 Mich. 235.

¶ 27. Where a person who by fraudulent dealing had obtained colorable title built a cellar in and fences on another's lands, he was considered as having immovably annexed them in his own wrong, and as not entitled to indemnity.—McCredie v. Buxton, 31 Mich. 383.

¶ 28. Ownership of buildings erected by grantor after conveyance vests in grantee in absence of agreement.—Kruger v. Le Blanc, 75 Mich. 424.

¶ 29. Crops planted in and growing on the land of another belong to the owner, where the planter was a mere intruder without right.—Heilwig v. Nybeck, 179 Mich. 292.

ACCESSORIES to ACCOMPLICES.

Cross-References.

Accessories, see Crimes; Indictment.

Accident—

As actionable tort or breach of contract, see Negligence, and specific topics treating of negligence such as Carriers; Highways; Master and Servant; Railroads; Street Railways; etc; Contracts, VII, D; Building Contracts, II, III.

As ground for equitable relief, see Mistake and Accident.

As casualty insured against, see Insurance.

Liability under Workmen's Compensation Law, see Workmen's Compensation Law.

Accommodation Paper, see generally Negotiable Instruments.

Accomplices, see Crimes; Indictment; Examination of Witnesses; Witnesses.

ACCORD AND SATISFACTION.

TREATS of the satisfaction of a claim in dispute or not liquidated by an agreement for such satisfaction and by the payment of an agreed sum or the performance of the agreement in lieu of the original claim.

Analysis.

§ 1. In general; definition; requisites.
§ 2. ——Intention of parties.
§ 3. ——Assumption or payment by third person.
§ 4. Original claims subject to accord or settlement.
§ 5. ——Uncertain or disputable character.
§ 6. Consideration for accord.
§ 7. ——Compromise or avoidance of litigation.
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§ 9. ——Different thing or obligation.
§ 10. Scope and effect; claims covered.
§ 11. ——Executory accord without satisfaction.
§ 12. ——Sufficiency of performance or payment.
§ 13. ——Conclusiveness, revocation and avoidance.
§ 14. ——Grounds to avoid, revoke or rescind.
§ 15. Remedies or defense, and pleading.
§ 16. Burden of proof, presumptions and evidence.
§ 17. ——Sufficiency and weight of evidence.
§ 18. Law and fact questions; instructions; judgment.

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§ 1. In general; definition; requisites.

Other modes of discharging obligations and claims by agreement of the parties, see Account Stated; Release; Contracts, VIII (modification and merger); Novation.

Satisfaction by payment or performance, see Payment; Contracts, VI, VII.

Election and waiver of rights and their effect, see Election and Waiver.

Compositions and discharge in bankruptcy, see Bankruptcy.

Settlements by submission to third persons, see Arbitration and Award; Building and Construction Contracts, VI; Contracts, VII, A; Insurance, XVI.

Adjustment and settlement of losses under insurance, see Insurance.

Audit and settlement of claims against the public, see Health; Counties; Municipal Corporations; Townships; Officers.

Arbitration and compromise under Workmen's Compensation Law, see Workmen's Compensation Law, VIII.

Capacity or authority to enter into agreements for settlement, see topics treating of the person or corporation or representative whose capacity is questioned, e. g., Agency; Corporations; Estates of Decedents; Guardianship; Guardians ad Litem; Husband and Wife; Infants; Insane Persons; Trusts.

The general requisites of contract, such as parties, mutuality, offer and acceptance, legality of its object, consideration, etc., and enforcement, are treated in Contracts.

Writings of release under seal, and instruments equivalent thereto, see Releases.

Scope of agency to adjust or settle, see Agency, § 37.

Agreement as to amount due as basis for estoppel to claim more, see Estoppel, III, B.

Approval or order of court for compromise by personal representative, guardian or trustee, see Estates of Decedents; Trusts.

Payment of admitted sum into court, see Payment.

Necessity of bona fide dispute or uncertainty, see post §§ 4, 5.

Necessity that accord be executed or performed, see post §§ 11, 12.

Avoidance for fraud, mistake or duress, see post § 14.

Evidence of accord, see post §§ 16, 17.

¶ 1. Settlements of disputed matters and compromises of unsettled claims are favored by the law.—Booth Fisheries Co. v. Alpena Circuit Judge, 170 Mich. 611.

¶ 2. A partial payment or tender of payment is inconsistent with a creditor's rights, and can only be operative when he consents to receive it.—Coots v. McConnell, 39 Mich. 742.

§ 2. ——Intention of parties.

Sufficiency of evidence, questions of fact, and instructions, see post §§ 17, 18.
Effect of knowledge that more was due, see also post ¶ 18.
Mental reservation of dispute, see post ¶ 20. See also post ¶¶ 41, 111.

¶ 3. It is the intention of the parties to an account that has not been paid in full which determines whether an alleged settlement was meant to dispose of the entire account. Words "in settlement of account" printed on check held to mean no more than "applied on account."—Widner v. Western Union Tel. Co., 51 Mich. 291.

¶ 4. To be a valid accord and satisfaction what is given or agreed to be performed, must be offered as a satisfaction and extinction of the original demand, and the creditor must have accepted it with the intention that it should operate as a satisfaction.—Henderson v. McRae, 148 Mich. 324.

¶ 5. There can be no settlement, in the legal sense, where one of the parties surrenders a right that he claims, under protest, and with the understanding that he reserves his defense to any claim upon it.—Jennison v. Stone, 33 Mich. 99.

¶ 6. It is not an offer of property in satisfaction to say to another that whatever he takes is at his own peril.—Ward v. Beecher, 56 Mich. 616.

¶ 7. A railroad employee injured by a collision continued to accept payment at the usual rate while disabled from pursuing his regular employment. Held, that this did not of itself amount to an accord and satisfaction so as to estop him from suing the company for damages.—Hewitt v. Flint & P. M. R. Co., 67 Mich. 61.

¶ 8. The payment to the president of a corporation of an amount due him for services rendered to the corporation, and the assignment of his stock to a person in trust for the corporation, and his withdrawal from all connection therewith, upon discovery of the fraud practiced by such president in selling property to the corporation, do not amount to a settlement of the tort, where none of the parties regards it as such.—Stoney Creek Woolen Co. v. Smalley, 111 Mich. 321.

¶ 9. In an action to recover a balance of wages due, on the theory that the defendant agreed to pay $25 per week, if the plaintiff satisfactorily performed certain work and that the plaintiff did perform and received only $20 per week, with the additional $5 in continual controversy, a waiver is not made out by the acceptance of a check for $20 for the last week in full settlement to date, where the plaintiff immediately refused to accept it as such and the defendant promised to investigate the matter and let him know.—Stevens v. Michigan Soap Works, 134 Mich. 350.

¶ 10. Where plaintiff and defendant had entered into a contract whereby the former was to be paid a stipulated salary, and such contract had never been rescinded nor abrogated, the receipt by him of a check for a certain sum accompanied by the statement of the treasurer of the defendant that it pays the balance due on the account, does not constitute an accord and satisfaction where the books of the defendant were kept with the idea that the original contract had been rescinded, and there was nothing to show that he knew how the books were kept, and he shortly thereafter took the matter up with the superintendent of the defendant.—Detlaff v. Ideal Mfg. Co., 144 Mich. 342.

¶ 11. The payment of costs by a prisoner, to avoid being sent back to jail, does not operate as a compromise and settlement of a claim for the previous malicious prosecution.—Cascarella v. National Grocer Co., 151 Mich. 15.

§ 3. ——Assumption or payment by third person.

As consideration for accord, see post § 9.
Sufficiency of dispute, see also post ¶ 22.
Compromise with other person where claims are distinct, see post ¶ 50.

¶ 12. A settlement by substitution of debtors need not be in writing.—Glover v. First Universalist Parish of Dowagiac, 48 Mich. 595.

¶ 13. Assumption of debts by a third person does not discharge the debtor from liability to his creditor.—Johnson v. Fowler, 68 Mich. 1.

¶ 14. A debtor is not discharged by the fact that his creditor knows that a third person has engaged to pay the debt, unless the creditor has accepted such third person as debtor in his place.—Blanchard v. Tittabawassee Boom Co., 40 Mich. 566.

¶ 15. Plaintiff sued to recover money invested in a corporation upon the fraudulent representations of the defendants, its officers. The defendants caused the corporation to be dissolved and sent plaintiff a check for his share. Held, the acceptance of this check by plaintiff did not destroy his right of action for the fraud.—Massey v. Luce, 158 Mich. 128.

¶ 16. A compromise agreement was entered into by the owner of premises, a contractor and a lienor, primarily to adjust the claims

of the lienor, who had instituted foreclosure proceedings. A recital therein stated that the owner owed the contractor a certain sum, but they both admitted some of the items included were incorrect. Held, that it did not operate as a compromise between the owner and the contractor.—Fisher v. Burroughs Adding Machine Co., 157 Mich. 126.

¶ 17. An agreement between two lien claimants and the owner of property, contemplating the purchase and settlement of outstanding liens, dismissal of the lien suits, and the protection generally of the parties thereto, and containing various stipulations looking to that end, was not a conclusive settlement and adjustment between one of the claimants and the owner, such as to preclude the former from recovering a balance due him under his contract after the carrying out of the agreement.—Fisher v. Burroughs Adding Machine Co., 157 Mich. 126.

§ 4. Original claims subject to accord or settlement.

Consideration to support settlement for lesser sum, see post § 8.

Liquidated claim in litigation, see also post ¶ 21.

Claim for money applied to fictitious transaction, see post ¶ 27.

¶ 18. A settlement of an unliquidated claim is not rendered void because, when the agreement for settlement was made, it was also agreed that the amount of the demand exceeded the amount to be paid in settlement.—Wheeler v. Baker, 132 Mich. 507.

§ 5. ——Uncertain or disputable character.

See also post ¶ 80.

Unliquidated sums, see ante § 4.

Necessity of honest dispute, see also post § 6.

Avoidance of dispute or litigation as consideration, see post § 6 et seq.

Evidence and instructions, see post §§ 16-18.

¶ 19. A claim, part of which is in dispute, cannot be said to be liquidated so as to require a consideration to make part payment effective as a discharge in full.—Tanner v. Merrill, 108 Mich. 58.

¶ 20. Where there is an honest difference of opinion in reference to the terms of the contract, or where the buyer, in good faith, objects to the quality of goods purchased as not being up to the standard of the contract of purchase, and there is then an adjustment of differences and settlement, the seller cannot reserve an intention of instituting a suit upon a claim of being defrauded in the settlement so made, and recover from the purchaser damages for an alleged fraud in the settlement.—Johnson v. Fisher & Wilson Co., 80 Mich. 431.

¶ 21. Pendency of a new trial motion made after judgment, with circumstances favoring it, and the existence of other disputed claims covered by the settlement, will take a settlement out of the rule that a liquidated obligation cannot be compromised by payment of less than its face.—Line v. McCall, 126 Mich. 497, per Grant, J., others dissenting on different grounds.

¶ 22. Where a creditor filed with the debtor's surety for settlement a claim for a certain amount as due the creditor from the debtor, including a certain note for a part of the debt taken by the creditor from the debtor, the amount of which note the surety deducted from the claim as not within the surety's liability and paid the balance of the claim, which the creditor accepted and receipted for as in full satisfaction held that such claim as filed by the creditor with the surety was not at the time it was paid by the surety past due, liquidated and undisputed so as to entitle the creditor to recover the amount so deducted therefrom.—People v. Fidelity & Deposit Co., 195 Mich. 738.

§ 6. Consideration for accord.

Existence of dispute or uncertainty, see ante §§ 4, 5.

Prepayment as consideration for payment by less sum, see post § 8.

Evidence and instructions, see post §§ 16-18.

General law as to consideration, see Contracts, V.

¶ 23. An agreement to settle an existing suit is sustainable without reference to the merits of the controversy, unless under very peculiar circumstances; and it has the same rule of consideration that applies to other contracts.—Sanford v. Huxford, 32 Mich. 313.

¶ 24. An unliquidated debt may be discharged by a part payment when based on a new consideration, such as payment before maturity, the giving of a new security, a composition with creditors, or a payment made by a stranger.—Cunningham v. Irwin, 182 Mich. 629.

¶ 25. A receipt obtained by improper means and assuming to discharge any indebtedness not honestly in dispute between the parties, and known by the debtor to be owing, is to that extent without consideration and ineffectual.—Hackley v. Headley, 45 Mich. 569.

¶ 26. If an insurer waives his right to delay payment of loss for sixty days after proof of loss is furnished as agreed in the policy, prepayment of part of the insurance cannot be regarded as a consideration to support an alleged compromise for the amount due.—Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 27. A promise to pay money to a bank in discharge of a cashier's liability asserted by it and admitted by him, growing out of the carrying of a supposed note for a loan which had no existence, is as valid as if the liability had been disputed.—Lansing National Bank v. Coleman, 117 Mich. 177, per Grant and Moore, JJ., others dissenting.

¶ 28. An agreement by a creditor with his debtor to discharge his demand at a future day cannot be treated as an absolute discharge as against third persons whose rights intervene, where it appears that there was such a failure in the consideration for the agreement as would entitle the creditor to treat it as void.—Stone v. Welling, 14 Mich. 514.

§ 7. ——Compromise or avoidance of litigation.

¶ 29. If there is a bona fide dispute as to the amount due from one person to another, or if the debt is unliquidated and uncertain in amount, a compromise and payment of an agreed sum as a satisfaction of the whole is valid.—Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

§ 8. ——Lesser sum than claimed.

See also ante ¶ 18.

Intent to accept in satisfaction, see ante § 2.

Dispute as to part only of claim, see ante § 5.

Receipt in full as evidence, see post § 17.

¶ 30. A new and valuable consideration is required to support an agreement of a creditor to accept from his debtor as payment in full a sum less than that admitted to be owing.—Goldsmith v. Lichtenberg, 139 Mich. 163.

¶ 31. The doctrine that the receipt of part payment, to be effective in discharge of the entire debt, must rest upon a valid consideration, is limited to cases where the debt is liquidated, by agreement or otherwise.—Tanner v. Merrill, 108 Mich. 58.

¶ 32. An unliquidated claim can be settled by the payment of an amount smaller than the actual value.—Wheeler v. Baker, 132 Mich. 507.

¶ 33. Part payment when the debtor is bound to pay the whole debt furnishes no consideration for the creditor's promise to discharge him, and is treated in law as payment pro tanto only.—Leeson v. Anderson, 99 Mich. 247; Cunningham v. Irwin, 182 Mich. 629; People v. Fidelity & Deposit Co., 195 Mich. 738.

¶ 34. Where a certain sum is due from one person to another, a release of the entire sum upon payment of a part is without consideration, and the creditor may still sue and recover the residue.—Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 35. Prepayment of part of a claim may be a good consideration for the release of the residue if the parties so agree.—Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 36. Payment of an insurance policy in advance of the time when it would become due, without discount for interest, is a sufficient consideration, if it was understood as such, for a waiver by the insured of further claim on the policy.—Fire Ins. Ass'n v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 37. Retaining and cashing a check which was accompanied by a letter, stating that it was payment in full, does not preclude an action to recover the balance claimed to be due.—Goldsmith v. Lichtenberg, 139 Mich. 163.

¶ 38. The acceptance and use by an employee of a check intended to cover his salary up to the date of his discharge, only, about which there was no dispute, does not operate as a full satisfaction of the claim of such employee, in an action for damages for his discharge in violation of contract; even though the letter containing the check states that it is for "settlement in full up to the time you left our employ."—Proctor v. Hobart M. Cable Co., 145 Mich. 503.

¶ 39. The acceptance by a creditor of a less sum in satisfaction of a debt of a greater amount is binding, where payment is voluntarily made by a parent with his own money, without legal obligation and without authority from the debtor, in full satisfaction of a debt of his adult son.—Cunningham v. Irwin, 182 Mich. 629.

§ 9. ——Different thing or obligation.

See also ante ¶¶ 22, 24.

Payment by other person or assumption of debt, necessity of intent to settle, see ante § 3.

Necessity that substitution of debtors be effected, see ante § 3.

Prepayment as consideration, see also ante ¶ 26.

¶ 40. Payment made on his behalf by some one else may be adopted by the debtor, and an arrangement to accept the debtor's debtor by the creditor may be valid if clearly made out.—Glover v. First Universalist Parish of Dowagiac, 48 Mich. 595.

§ 10. Scope and effect; claims covered.

Effect of release, see Releases.

Settlement as acceptance of performance of contracts, see Contracts, VII, C; Building and Construction Contracts, II; Sales, V.

Effect of settlement as waiver of warranty of goods sold, see Sales, VI, D.

Settlements by principal debtor as affecting liability of guarantor or surety, see Guaranty; Suretyship.

Amount paid in settlement of claim as element of damages by dealer against wholesaler for furnishing defective goods, see Damages, II, B.

Necessity and sufficiency of intent to settle, see ante § 2.

Payments not intended or accepted as satisfaction, see ante §§ 2, 3.

Burden of proof, presumptions and evidence as to what covered, see post §§ 16, 17.

Fact questions and instructions, see post §§ 17, 18.

Construction as to being executory or executed, see also post ¶ 54.

Effect as against rights of others where consideration is lacking, see also ante ¶ 28.

¶ 41. A settlement between parties by "jumping accounts," and receipting accordingly, does not, of itself, and without evidence that such was the intent, include items for money afterwards paid by one on account of claims against them jointly, notwithstanding such claims originally accrued before the settlement.—Whipple v. Parker, 29 Mich. 369.

¶ 42. Where a settlement of an alleged case of fraud is admitted, the controversy being whether it was a full accord and satisfaction, or confined to so much of the property as plaintiff paid for with his own money, and there being no evidence that it was expressly agreed to leave some portion of the controversy outside the settlement, there is no error in charging that if there was a full accord and satisfaction of plaintiff individual claim, and he released any claim or demand he had in his individual name, there could be no recovery.—Allison v. Connor, 36 Mich. 288.

¶ 43. A settlement evidenced by the execution of mutual receipts of "one dollar, in full for all debts, dues and demands to this date," except as to certain specified items, is conclusive, in the absence of fraud or mistake, as to all prior dealings between the parties not covered by the excepted items.—Pratt v. Castle, 91 Mich. 484.

¶ 44. Where a testator's heirs at law threatened to attack, on the ground of incompetency and undue influence, a codicil to his will bequeathing certain moneys to his wife, and a deed conveying to her certain lands, and thereafter came to a settlement with her with respect to the bequest, nothing being said about the land, they were not precluded by the settlement from suing in chancery to set aside the deed.—Markillie v. Markillie, 115 Mich. 658.

¶ 45. Any item presumably covered by a settlement, though not specifically mentioned, is properly disallowed by a referee on accounting.—Mason v. Peter, 58 Mich. 554.

¶ 46. One may lawfully settle for that for which he might lawfully recover without sanctioning the original wrongdoing.—Kreiter v. Nichols, 28 Mich. 496.

¶ 47. Recoupment of damages due to a failure to deliver logs before a certain time is properly excluded in an action on an agreement of settlement between two parties where the sole question left, subject to litigation, is the reasonableness of the price of the work performed by the plaintiff.—Escanaba Boom Co. v. Two Rivers Mfg. Co., 118 Mich. 452.

¶ 48. A general settlement is conclusive as to a particular claim which was presented and considered, even though disallowed entirely when deductions and concessions were made by the other party in arriving at the settlement.—City of Detroit v. Detroit Ry., 134 Mich. 11.

¶ 49. A compromise in a suit for misrepresentation in the sale of lands made with a corporation, after affirmance of the judgment by a Canadian court, is a bar to a subsequent suit against the officers of the corporation in this state for the same alleged misrepresentations.—Krolik v. Curry, 148 Mich. 214.

¶ 50. Where a purchaser of standing timber, under a conditional contract of sale, sold the same to the plaintiff for manufacture at mills, both in Michigan and in Wisconsin, but the buyer had failed to pay for the stumpage, and the owner had seized the manufactured lumber in Michigan and presented a claim against the buyer's assignee in Wisconsin, which was later compromised, this compromise did not settle a replevin suit brought in Michigan for lumber seized by the owner, nor did it operate to transfer title to the Michigan lumber to the plaintiff. —Van Buren v. Stubbings, 149 Mich. 206.

¶ 51. A settlement between a corporation and the representatives of the estate of a deceased officer whereby the corporation acknowledges payment in full and releases and discharges all claims of the corporation against the estate covers outstanding "kited" paper which was illegally issued by deceased but which an audit of the books had disclosed, and it is immaterial that the successor of deceased renewed or kept alive such obligation.—Holland Furniture Co. v. Knoolhuizen, 195 Mich. 241.

¶ 52. In settling a claim under a fire insurance policy, a reservation of a right to recover any balance due is ineffectual, where

one takes payment from an agent whom he knows to be instructed to deliver the draft only upon condition of the plaintiff's signing and delivering a receipt in full.—Kern Brewing Co. v. Royal Ins. Co., 127 Mich. 39.

¶ 52a. Four large stockholders in four newspaper corporations made an agreement to act together and control the corporations for their own personal profit. One of the parties, one Sweeney, was, by the agreement, to hold certain offices at lucrative salaries in the corporations, and was to have the right to buy twenty shares of treasury stock in one of the corporations at a figure far below their real value. Sweeney quarrelled with the other parties, and was discharged. He started suit to compel the sale to him of the twenty shares. He later made a contract with them by which he agreed to sell out all his stock and interest in the aforesaid corporations, and to drop his suit. Held, that by implication this agreement terminated all his rights under the original agreement.—Scripps v. Sweeney, 160 Mich. 148.

¶ 52b. Upon the discontinuance of a condemnation proceeding brought by defendant against plaintiff, the court held that defendant had not discontinued same for proper cause, and ordered defendant to pay plaintiff a certain sum for costs. Later the parties signed an agreement to discontinue all litigation pending between them without cost to either party, and at a still later date plaintiff's attorney entered into a like stipulation with defendant's attorney as to the said condemnation suit. Held, plaintiff was not entitled to recover in an action of assumpsit the sum of money decreed to be paid to it as costs upon the discontinuance of the condemnation proceedings.—A. Backus, Jr., & Sons v. Detroit River Tunnel Co., 167 Mich. 613.

§ 11. ——Executory accord without satisfaction.

Sufficiency of execution and performance, see post § 12.

Burden of proving satisfaction, see post § 16.

¶ 53. A mere agreement to accept a composition, or part of a debt in discharge of the whole, will not operate as a release of the debt if the composition is not duly paid.—Harrison v. Gamble, 69 Mich. 96.

¶ 54. An agreement reciting that "the parties hereto, being desirous of settling all matters of difference between them, of whatever name or nature, have agreed as follows," etc., "and it is further mutually agreed that the parties hereto shall meet . . . on Thursday to execute necessary papers to carry out and fulfil the terms of this agreement," is complete in itself and needs no explanation; and where it has been executed and performed, neither party can be heard to contend that it was only a partial settlement and did not include a matter in suit.—Freeman v. Freeman, 68 Mich. 28.

§ 12. ——Sufficiency of performance or payment.

Payment or tender generally, see Payment, Tender, Deposit.

Necessity of intentional acceptance, see ante § 2.

Ratification of agreement by acceptance of part due thereunder, see post ¶ 69.

See also ante § 11.

¶ 55. An accord cannot be made a successful defense unless fully performed.—Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co., 142 Mich. 417.

¶ 56. There was no binding settlement of all matters between a son who had rendered services and his mother, where the son gave a receipt to the mother for all demands, and the mother made out a like receipt in favor of the son but did not execute it, and there was at the time no going over of the accounts, or a determination of balances, or a payment of any money by either to the other.—In re Teller's Estate, 200 Mich. 181.

¶ 57. Where creditors received a note from his debtor, with collateral security, agreeing that, if paid when due, the original debt consisting of four notes otherwise secured, should be discharged, otherwise of force; and, after the compromise became overdue, sold and transferred it, with the collaterals and the original debt but not the security for it, it was held that they thereby affirmed the compromise, and in effect took payment of it, and that the purchaser could not claim the amount of the original debt on the ground of forfeiture of the compromise agreement before he purchased.—Hale v. Holmes, 8 Mich. 37.

¶ 58. An agreement to pay a disputed balance due on a contract for the sale of logs if a certain number of butt logs sorted out from the mass did not go 70 per cent culls, was not binding where the intended average of the logs was not accomplished by plaintiff's method of selecting the best logs only.—Boyce v. Barker, 119 Mich. 157.

§ 13. ——Conclusiveness, revocation and avoidance.

See also ante §§ 10, 11, post § 14.

Time for acceptance or withdrawal of offer to compromise, see Contracts, III, A.

Revocation of offer to settle by making assignment for creditors, see Contracts, III, A.

Right to rescind and conditions upon rescission, see Rescission and Cancellation.

Necessity of returning amount received in order to sue on original obligation, see Rescission and Cancellation, III.

Fraud, mistake or duress as destroying conclusiveness, see post § 14.

Impeachment of settlement by personal representative, see Estates of Decedents, V, A.

That a receipt in full is not conclusive and can be contradicted, see Evidence, X.

Affirmance of accord by acceptance of performance, see ante § 12.

In agreements among three or more parties, see also ante ¶¶ 16, 17.

¶ 59. A contract whereby one of the parties agrees to accept a specified amount "in full satisfaction of all claims of every nature" against the other is conclusive as to any existing claim, where there is no evidence of fraud or mutual mistake.—Lauzon v. Belleheumer, 108 Mich. 444.

¶ 60. A complainant on a bill for an accounting, having intelligently accepted a fair payment as a full settlement of all claims, ought not to be permitted to repudiate the settlement.—Eccard v. Brush, 48 Mich. 3.

¶ 61. A fair settlement of conflicting claims is binding upon the parties, even though they may have yielded legal rights. —Converse v. Blumrich, 14 Mich. 109.

¶ 62. The courts will not go back of the deliberate compromise of an apparently bona fide claim outstanding against a debt to inquire into the reasonableness of the compromise or the merits of the disputed claim, when action is brought on the debt by the assignee of the creditor.—Hull v. Swarthout, 29 Mich. 249.

¶ 63. In the absence of fraud, duress or oppression, a client's settlement with an attorney for moneys collected and in the latter's hands subject to a lien for services is binding.—Dowling v. Eggemann, 47 Mich. 171.

¶ 64. Where the vendor of machinery, sold under a warranty that it would do a specified amount of work, which the purchaser claimed was not fulfilled, convinced the latter that the operative, and not the machine, was at fault, and thereafter, without any fraud or concealment, effected a settlement upon terms suggested by the purchaser, making certain concessions as to freight charges and terms of credit, such settlement was held conclusive in an action on a note given by the purchaser pursuant thereto.—Davis & Egan Mach. Tool Co. v. Souvenir Wheel Co., 114 Mich. 615.

¶ 65. A receipt in full, given without protest upon payment of the undisputed part of a claim, after a refusal to pay another part which is disputed, is conclusive as against the right of the creditor to recover a further sum, in the absence of mistake, fraud, duress or undue influence.—Tanner v. Merrill, 108 Mich. 58.

¶ 66. Where a suit has been discontinued by a stipulation and a settlement made, and the rights of third persons, strangers to the litigation, have intervened, the settlement in the absence of fraud will not be disturbed.—Booth Fisheries Co. v. Alpena Circuit Judge, 170 Mich. 611.

¶ 67. An instruction permitting the recovery of money paid by mistake is erroneous where the evidence shows a settlement of conflicting claims with full knowledge of the claim of each party in regard to it.—Lamb v. Rathburn, 118 Mich. 666.

¶ 68. Parties who have entered into a settlement which necessarily includes a particular claim cannot revive such claim by having the notes that represent it transferred to their wives.—Wilson v. Wright, 116 Mich. 476.

¶ 69. The acceptance of a portion of the consideration for an agreement for the compromise of mutual differences, is a ratification of the contract.—Barras v. Youngs, 185 Mich. 496.

¶ 70. Evidence being sufficient to show the delivery of notes to a defendant mortgagor by an agent of the complainant, they being surrendered with an understanding that a settlement of a mortgage debt was fully consumated, the complainant mortgagee was bound to deliver a discharge of the mortgage, as agreed, and could not repudiate the settlement and foreclosure.—Lindley v. Lupton, 118 Mich. 466.

¶ 71. The act of one who had entered into an agreement for a compromise and settlement in taking a third party into a deal after refusal to execute the compromise cannot affect the rights of the claimant to bring an action on the original contract after he rescinded the compromise.—Henderson v. McRae, 148 Mich. 324.

¶ 72. One who, having the means at hand to determine accurately the condition of accounts between himself and another, instead of availing himself of those means, chose to execute a contract of settlement in ignorance of the facts, after a full discussion, is concluded thereby, and cannot impeach the settlement for mistake after it has been in operation for several years.—Brevoort v. Partridge, 156 Mich. 359.

§ 14. ——Grounds to avoid, revoke or rescind.

See also ante § 13.

What constitutes fraud, mistake or duress, see Fraud; Mistake; Duress.

Rescission as fraud on other creditors, see Fraudulent Conveyances, I, A.

Affirmance or acceptance of performance variant from agreement, see ante § 12.

¶ 73. Where parties have agreed to a settlement of an existing lawsuit, and put it in writing and signed it, such arrangement must stand until set aside for such frauds as should vitiate it, upon a rescission attempted as soon as practicable after the fraud is known, and with no lack of diligence in discovering it.—Lewless v. Detroit, G. H. & M. R. Co., 65 Mich. 292.

¶ 74. Courts cannot disturb a compromise between parties unless on satisfactory evidence of mistake, fraud or unconscionable advantage.—Prichard v. Sharp, 51 Mich. 432; Hart v. Gould, 62 Mich. 262; Nash v. Manistee Lumber Co., 75 Mich. 346; Loud v. Federal Ins. Co., 195 Mich. 60.

¶ 75. The law approves of settlements and compromises of disputed claims, and, when deliberately made, the parties are bound by them; and the law will not sanction any interference with them, without the consent of the parties, except upon the ground of fraud, mistake or duress.—Averill v. Wood, 78 Mich. 342; Dailey v. King, 79 Mich. 568; Pratt v. Castle, 91 Mich. 484.

¶ 76. It will be presumed that parties consult their own interests in making settlements of disputed matters and compromises of unsettled claims; usually they will not be interfered with in the absence of fraud or mutual mistake, and then only when the party who seeks to rescind returns to the other party what he has received by virtue of the settlement.—Booth Fisheries Co. v. Alpena Circuit Judge, 170 Mich. 611.

¶ 77. The law will not look too closely into such arrangements as the parties themselves choose to consider satisfactory, but in the absence of fraud or mistake will encourage parties to settle their own contracts. —Moore v. Detroit Locomotive Works, 14 Mich. 266.

¶ 78. The rule that courts look with favor upon a compromise and settlement made by the parties to a suit, to prevent the vexation and expense of further litigation, only applies where all of the rights and interests of all the parties concerned, both legal and equitable, have been respected, and in good faith observed.—Weeks v. Wayne Circuit Judges, 73 Mich. 256.

¶ 79. A person who knows that another is asserting an invalid claim against him and yet compromises rather than go to law, and does so understandingly, and on equal terms with the other as to capacity to litigate, there being no deception in obtaining the settlement, and the contract of settlement being performed or nearly performed by him with deliberation and not of necessity, cannot have the courts go behind such settlement to ascertain who was right in the original controversy.—Dailey v. King, 79 Mich. 568.

¶ 80. Defendant charged complainant with intentionally burning his own mill, and claimed payment for wheat belonging to defendant which was destroyed with the mill, and complainant gave his note and mortgage for the value of the wheat. On bill filed by complainant to set aside these securities as obtained through threats, fear and duress, it is not necessary for the court either to find that complainant burned his mill or to grant the relief asked; for the settlement must stand if there was no fraud or undue advantage taken to bring it about, and defendant had reason to believe the charge, and did not manufacture it to frighten complainant into a settlement.—Gates v. Shutts, 7 Mich. 127.

¶ 81. An alleged compromise may be contested by showing that the party relying on it had acted unfairly or oppressively, and asserted claims which he knew to be wrongful, for the purpose of getting the terms which have been nominally assented to.—Headley v. Hackley, 50 Mich. 43.

¶ 82. A receipt in full, signed by a party for his share of a claim, upon the faith of a statement made to him that certain outstanding matters had been settled, does not estop him when he discovers that such a statement is untrue in fact.—Hart v. Gould, 62 Mich. 262.

¶ 83. It is against public policy to permit a party to a written settlement to contest his liabilities thereunder on the ground that he had fraudulently contrived it for the purpose, merely, of screening his property from justice.—Bassett v. Shepardson, 52 Mich. 3.

¶ 84. A settlement will not be set aside in a court of equity because one of the parties did not understand it or its legal effect.—Booth Fisheries Co. v. Alpena Circuit Judge, 170 Mich. 611.

¶ 85. An employee who is paid semimonthly in checks, each of which recites that the payment is "in full for services to date," and who, upon the termination of his employment, accepts a check similarly worded for the balance of his salary, giving therefor his receipt in full, cannot avoid the effect of the settlement, and recover for alleged extra services, by showing that he signed such receipt without reading it, on being told that if he did not sign it he would get nothing at all.—Golden v. Bartlett Illuminating Co., 114 Mich. 625.

¶ 86. Existing differences between an agent and his principal that are settled at the time of making a new contract cannot subsequently be the subject of damages.—Stone v. Fox Machine Co., 145 Mich. 689.

¶ 87. Where, pending an accounting, the parties enter into a stipulation providing that whenever complainant shall be relieved from a secondary liability upon certain outstanding obligations, he will receipt to defendant for a given amount, to be applied upon any sum that may be found due from defendant upon such accounting, and, pursuant to such stipulation, the release is secured, the receipt given, and the application made, complainant cannot, upon a second accounting in the same suit, compel defendant to account for

any part of the amount so receipted for and credited, merely because the latter obtained such release for less than the face value of the obligations.—Petrie v. Torrent, 107 Mich. 648.

¶ 88. Where a person made settlement of a claim against an estate asserting that he could establish certain facts, the persons who claim under him cannot have the settlement set aside on the ground that they have obtained the evidence of such facts, and that the prior assertion of ability to establish them was false and so known to all the parties to the settlement.—Macomber v. Cottrell, 171 Mich. 371.

§ 15. Remedies or defense, and pleading.

General law of procedure, see Evidence; Instructions; Pleading; Trial; Judgments; and the like.

Remedy by assumpsit and practice therein, see Assumpsit; and see also Contracts, X, as to actions on contract.

Pleading composition proceedings under bankruptcy act in bar, see Bankruptcy.

Rescission and suit on original obligation, see also Rescission and Cancellation.

Nature of judgment where original debt is sued on but proof showed waiver of delay in performance, see post ¶¶ 129, 130.

¶ 89. Where a creditor is induced, by the fraudulent representations of his debtor, to compromise, and receives a part of his demand, he cannot, on discovery of the fraud, retain the sum paid and sue in assumpsit for the balance. But, without returning the amount paid, he may sue in case for damages sustained by the fraud.—Jewett v. Pettit, 4 Mich. 508.

¶ 90. A creditor who has received part of a debt as payment of the whole, to which he was entitled, need not, before suing for the part unpaid, tender back the amount received and thus repudiate the attempted settlement.—Leeson v. Anderson, 99 Mich. 247.

¶ 91. A court of equity has jurisdiction, upon proper averments, to open and correct a compromise and settlement.—Booth Fisheries Co. v. Alpena Circuit Judge, 170 Mich. 611.

§ 16. Burden of proof, presumptions and evidence.

General law of evidence, and especially competency of evidence, see Evidence.

Admissibility of evidence of offer to compromise, see Evidence, VII, C.

Receipt in writing as an admission of payment, which may be rebutted, see Evidence, VII, C, X; Payment, V.

Burden of proof and presumptions as to duress, fraud or mistake, see generally Duress; Fraud; Mistake.

¶ 92. One who, when sued for his attorney's stipulated compensation, pleads settlement, has the burden of establishing it.—Hitchcock v. Davis, 87 Mich. 629.

¶ 93. A defendant whose case involves proving an accord must follow it with evidence of satisfaction, or of some legal excuse for its absence.—Browning v. Crouse, 43 Mich. 489.

¶ 94. When a plaintiff in making out a case is compelled to establish an accord which has to be disposed of, he must show at least prima facie that there has been no satisfaction.—Browning v. Crouse, 43 Mich. 489; Harrison v. Gamble, 69 Mich. 96.

¶ 95. Plaintiff, suing on the original agreement, cannot succeed by proving an accord without also proving that it remains unsatisfied. The burden of proving the satisfaction in such a situation is not on the defendant.—Browning v. Crouse, 43 Mich. 489.

¶ 96. In an action for the purchase price of a stock of goods, the burden of proof is on the defendant to show that a subsequent transaction covered the prior sale and settled all matters between the parties.—Grabowsky v. Baumgart, 128 Mich. 267.

¶ 97. Where a defendant sued for forcibly evicting his lessees claims a prior settlement and agreement to surrender possession, the burden is upon him to show such settlement.—Baumier v. Antiau, 79 Mich. 509.

¶ 98. A settlement of previous accounts is not to be conclusively presumed from the giving of a note by one party to another. Whether it furnishes a prima facie presumption or is only a question for the jury, quere.—Cotherman v. Cotherman's Estate, 58 Mich. 465.

¶ 99. A settlement of accounts between parties is prima facie a settlement of all accounts; but where there is evidence tending to show that a certain item was excluded in the settlement, it is a proper question for a jury to determine what was settled.—Bourke v. James, 4 Mich. 336.

¶ 100. It is always competent to show, by any relevant testimony, what items enter into a settlement when an item sued for is claimed to be barred by the settlement.—Hicks v. Leaton, 67 Mich. 371.

¶ 101. In a case involving the extent of a settlement between two firms, a receipt in full, given by plaintiffs to one of defendant copartners on a settlement of matters arising before he became a member of the defendant firm, is inadmissible, it not being claimed that it was considered at the settlement in issue.—Hicks v. Leaton, 67 Mich. 371.

¶ 102. Where a note of third persons was given on a compromise of pending litigation, the extent of which compromise was afterwards in issue in a suit upon another item claimed not to have been covered by such compromise, evidence of what was done with the note, and of its present whereabouts, is irrelevant to such issue.—Hicks v. Leaton, 67 Mich. 371.

¶ 103. In an action for the purchase price of a stock of goods in which the defendant claims to have paid for it by a subsequent sale of another stock which the plaintiff claims did not in any way include the debt of the original stock, it is not error to permit the plaintiff to testify as to the condition and value of the stock in order to enable the jury by comparison to determine which of the parties were entitled to belief as to the agreement of the second sale.—Grabowsky v. Baumgart, 128 Mich. 267.

§ 17. ——Sufficiency and weight of evidence.

See also post § 18.

Prima facie case, see also ante § 16.

As to presumption of fair and complete settlement, see also ante § 14.

Evidence of ground to avoid, see also ante § 14.

As to effect of receipt, see also ante ¶ 82.

¶ 104. A receipt or acknowledgment of payment is not conclusive evidence of the fact.—McAllister v. Engle, 52 Mich. 56.

¶ 105. Passing receipts in not conclusive evidence of settlement.—Vyne v. Glenn, 41 Mich. 112.

¶ 106. Receipts in full are not conclusive upon the parties to a settlement.—Hicks v. Leaton, 67 Mich. 371.

¶ 107. A debtor inclosed a check in a letter of transmittal which was merely a printed form with the blanks filled out in writing and containing the printed words "in settlement of account." The letter also inclosed a receipt in similar form and with the same printed words. The creditor refused to sign this receipt but gave an ordinary receipt in place of it without objection from the debtor. Further payments were made before the completion of the contract, and the creditor frequently demanded full payment after the check was received, and at such times the debtor made no claim of a settlement. Held, that the words "in settlement of account" meant no more than "applied on the account."—Widner v. Western Union Tel. Co., 51 Mich. 291.

¶ 108. A man agreed with his daughter-in-law that certain property should be sold and that she should have what was left of the proceeds after certain deductions were made. When the property was sold he directed what should be done with the proceeds, and she received what he gave her. She afterwards brought a claim against his estate based on the agreement. Held, that it was not to be inferred from her receipt of the money paid her that she had agreed to take so much in satisfaction of her claim, or that she supposed she was accounting with her father-in-law as strangers would account with each other.—Fraser v. Fraser's Estate, 42 Mich. 275.

¶ 109. In a controversy involving an agreement signed by a widow and her deceased father-in-law, whereby, in order to reimburse him for outlays for taxes, etc., on property previously given by him to her she had consented to a sale, the fact that, before the sale, he had sent her a statement of an account between themselves, containing items not covered by the agreement, would not bind her to the deduction of so much from the amount due her under it, in the absence of evidence that she had examined the account or consented to such deduction.—Fraser v. Fraser's Estate, 42 Mich. 275.

¶ 110. There was sufficient evidence to support a finding that a suit had been dropped or settled by the plaintiff therein, present defendant's intestate, although he had not consulted with the present complainant who was affected by a contract depending on the result of the original suit nor informed him of the settlement, where outside persons testified that the decedent had stated variously that he had "settled" the case, that he had "compromised" it, and that he had "settled it satisfactorily" and would pay the money called for by the contract, but did not care to have the creditors "insult him any more in his office about this thing."—Davis v. Hammond, 75 Mich. 1.

¶ 111. Defendant was charged by the administrator of his mother's estate with a loan of $500 or $600. In a conference at the probate office, defendant admitted having received only $350, and produced notes for the amount, signed by himself, which he claimed had been returned to him by the deceased upon her receiving payment. There was no positive evidence that the $350 was the same debt as the $500 claim. The probate judge pronounced the notes forgeries, and a new note for $350 was finally given by defendant and accepted by the administrator. Held, evidence of compromise of disputed claims sufficient to go to the jury.—Schulz v. Schulz, 113 Mich. 502.

¶ 112. It is not error to refuse a new trial on the ground that the verdict was against the weight of the evidence, the verdict being for plaintiff, executrix, in an action on a book account, the defense being settlement, where the only evidence of settlement was

that of a daughter of defendant who testified to a "kind of settlement," and a check introduced with a statement that it was in settlement in full written thereon, with conflicting evidence of experts as to whether or not the writing was on the check before it was stamped as paid by the bank.—Blodgett v. Vogel, 130 Mich. 479.

¶ 113. In an action for breach of contract for the purchase of coal where the evidence showed that defendant had received part of the coal and refused to receive the balance, plaintiffs wrote demanding payment for all the coal then shipped, inclosing an itemized account of said shipments, and defendant replied that the coal received did not correspond with the contract, but offered to pay for the coal received if plaintiffs would accept the same in full satisfaction of their claim, to which plaintiffs replied with an attached statement including the shipments rejected, and stating that the amount due was a named amount for the coal accepted to date, and thereupon the defendant sent a check for the amount named, but struck from the statement the rejected shipments, this did not warrant a finding of an accord and satisfaction, although the plaintiffs at once and without protest accepted and used the check, the plaintiffs having a right to understand that defendant by drawing lines through the items for shipments not received, intended to withdraw them from the account which the check was intended to pay. Ginn v. W. C. Clark Coal Co., 143 Mich. 84.

¶ 114. A valid agreement to compromise and settle mutual differences held established by the evidence.—Barras v. Youngs, 185 Mich. 496.

¶ 115. Evidence held to sustain a finding that the parties to a contract for the sale of fruit settled on a certain sum which would put an end to their contract relation.—Grand Traverse Fruit & Produce Exchange v. Thomas Canning Co., 200 Mich. 95.

§ 18. Law and fact questions; instructions; judgment.

For general law, see Trial; Instructions; Judgments.

Sufficiency of evidence for the jury, see also ante § 17.

Instruction as to items covered, see also ante ¶ 42.

¶ 116. If it is doubtful if an accord—an agreement—has been established, the question is for the jury.—Hoey v. Ross, 189 Mich. 198.

¶ 117. Where a claim is unliquidated and a check in settlement offered to the creditor and cashed an accord and satisfaction is established as a matter of law.—Hoey v. Ross, 189 Mich. 198.

¶ 118. A question for the jury is raised in an action of assumpsit, where defendant's testimony tends to show a release or payment of the debt which the plaintiff denies, claiming that the alleged arrangement constituting the release was not concluded and the release never delivered.—Cleveland v. Rothschild, 132 Mich. 625.

¶ 119. Where there is a clear dispute as to the circumstances and reasons for giving a receipt acknowledging full payment, the question whether or not it was given under a promise by the payee that it should have no effect and that he would pay well for the services rendered, is for the jury.—Chapel v. Clark, 117 Mich. 638.

¶ 120. W. having agreed to ship a quantity of pig iron for M., L. & M., together with some of his own, sent it all in his own name to a Cleveland firm and gave M., L. & M. a paper certifying that 884 tons were iron on which they had a first lien, and that all it brought over and above the amount due them, and the charges, was to go to pay his own lien. Nothing being received from the consignees, W. gave M., L. & M., at their request, an order on the firm for the iron, and notified the firm to settle with M., L. & M. without recourse to him. M., L. & M. then gave up the former certificate to W. They afterwards sued him in assumpsit for damages sustained from his failure to perform the agreement under which he had forwarded the iron for them, and the evidence was conflicting as to the nature of the arrangement under which the iron was received and shipped, and as to whether there was an absolute agreement for advances to be paid M., L. & M., and whether such advances as W. had received were on the whole mass of iron or in answer to drafts on specified lots of his own. Held, that a ruling that the reception by M., L. & M. of the order on the firm was a final settlement as between the parties, and left M., L. & M. to their remedy against the firm, could not be sustained, and that the plaintiffs were entitled to have the evidence submitted to the jury under proper instructions.—Maas v. White, 37 Mich. 126.

¶ 121. The acceptance of a check by plaintiff in a suit for breach of contract of employment, sent by defendants in a letter discharging plaintiff and stating that such check was in full settlement for his services from January 25, 1888, to June 12, 1888, did not as a matter of law, bar plaintiff from further recovery, where such contract, although dated January 25, 1888, employed plaintiff at a certain salary for the year 1888, and where plaintiff testified that he commenced work January 3, 1888, and was out of employment from June 12 to July 20, and the whole case was for the jury.—Mortlock v. Williams, 76 Mich. 568.

¶ 122. After an inspection by defendant's agent of railroad ties furnished by plaintiff, the latter accepted a check for the amount claimed by defendant to be due under such inspection and signed a receipt containing the words "in full of above account," but added thereto "on account," and the same day, and after receiving the check, sent a written protest to defendant against the inspection on which the account was based; held, that the whole question whether there was a conclusive and binding settlement was properly left with the jury.—Robinson v. Detroit, L. & N. R. Co., 84 Mich. 658.

¶ 123. By contract between attorney and clients the former was to render certain professional services free of charge, and they were to pay him a share of $10,000 when received from a third person contingently bound to pay such sum to them. Subsequently the attorney sued said clients for professional services, his declaration not referring to said contract; but in settling the suit he receipted "in full of all claims in the above-entitled cause and of all accounts." Correspondence between the parties prior to the settlement showed that the attorney expected nothing would be received from the $10,000 claim, while it also showed defendants still considered the attorney entitled to his agreed share if claim was collected. Counsel who negotiated the settlement for defendants testified the receipt was given to include all the attorney's claims against them. Held, that the receipt by itself would hardly warrant a finding that it included the claim under the contract, but that it was for the jury to determine from the receipt, and from the facts and circumstances attending its execution, what was settled by it.—Hitchcock v. Davis, 87 Mich. 629.

¶ 124. In an action to recover a balance claimed to be due to plaintiff, defendant's testimony that a cash payment, and the giving of a note, which was thereafter paid, constituted a settlement of plaintiff's account in full, entitled defendant to go to the jury, there being a conflict as to whether there was a shortage in goods sold.—Block v. Crawford, 114 Mich. 608.

¶ 125. Evidence held sufficient to go to the jury on the question of the sufficiency of evidence of a consideration for a compromise between the widow of deceased and his mother, whereby a bond was given by the widow to the mother conditioned on the payment of monthly sums to the mother for life, where it appeared that the mother claimed that there was a will in existence, entitling her to a specific sum of money out of the estate and the widow denied its existence and claimed that it had been revoked and that the deceased had requested her to make provision for the mother, and she had agreed to do so.—Chaffee v. Chaffee, 197 Mich. 133.

¶ 126. Where the victim of a railroad accident, after settling her claim for damages, repudiated the settlement for fraud, and sued the company for the injury, a request to charge that an acquiescence in the settlement by using the money or any portion of it after the discovery of the alleged fraud would defeat the plaintiff's right of action was modified by adding the proviso "unless you find that she made a tender or returned the money, or offered to make a tender and was prevented from completing it by the acts of defendant or its agents"; held not error, the addition being necessary to prevent the inference to which the request was open, that a use of the money, although the defendant had refused to receive it back, would operate as a waiver of the fraud and an affirmance of the settlement.—Michigan Cent. R. Co. v. Dunham, 30 Mich. 128.

¶ 127. A stipulation for the discontinuance of an action upon a promissory note against an indorser recited that the suit had been compromised and settled in full. Plaintiff thereafter instituted a new action upon the note, setting up in a special count that he had stipulated to discontinue the former case upon defendant's promise to give him a new note, and that the promise had never been fulfilled. Defendant, upon the trial, claimed that the note sued upon was turned over by him in payment of plaintiff's claim, and that it was never protested, so as to hold him as an indorser; that the agreement to discontinue the former suit was unconditional, except as shown by the stipulation itself. Plaintiff's testimony tended to show that the note was taken merely as collateral security, and that the conditions of the discontinuance of the former suit were as set up in his declaration. The jury were instructed that plaintiff could not recover if the note was taken in payment, or if the controversy had been settled by stipulation; but that if a fraud was practiced upon plaintiff in the settlement, and the note was taken as collateral security merely, he should recover. Held, that the case was fairly submitted under the pleadings and the evidence. —Levy v. O'Leary, 113 Mich. 423.

¶ 128. Where in an action for personal injuries the master pleaded accord and satisfaction, and it appeared from the evidence that two releases and receipts had been executed and the release pleaded was not produced in evidence, the fact that the court had instructed the jury concerning the release, and left the question as to its procurement by fraud to the jury and that there had been a sufficient tender of the consideration for the releases, was more favorable to the defendant than the record warranted and the defendant cannot complain that there should

have been a directed verdict on that issue.—Brockmiller v. Industrial Works, 148 Mich. 642.

¶ 129. A debtor compromised with his creditors, but, as he paid the amount of the compromise irregularly, the creditors refused the last tender and sued for the whole debt. Defendant, having paid part and tendered the rest of the amount agreed on, recovered judgment. The tender, however, had not been kept good. Held, that the recovery was wrong, and that plaintiffs should have recovered the amount owing under the compromise agreement, with costs, the circumstances being such that the original debt was not reinstated.—Browning v. Crouse, 40 Mich. 389.

¶ 130. In an action on a promissory note the plaintiff had to show, in explaining certain memoranda on the note, that a compromise had been made, but he claimed that as it had been only partly fulfilled he was entitled to recover in full. Held, that as he did not show what the terms of the compromise were, or in what the default lay, he was only entitled to recover the amount remaining unpaid on the compromise sworn to.—Browning v. Crouse, 43 Mich. 489.

ACCOUNT STATED.

TREATS of accounts stated or liquidated by agreement on a balance due, and the rights and liabilities on accounts so stated.

Analysis.

§ 1. In general; mutuality of accounts.
§ 2. Admission of correctness or agreement.
§ 3. ——Failure to object; recognition.
§ 4. Effect of account stated; conclusiveness.
§ 5. ——Surcharging and falsifying.
§ 6. ——Matters covered or included.
§ 7. Actions and procedure.
§ 8. ——Pleading and evidence.
§ 9. ——Law and fact questions; instructions.

Making up and stating accounts in fiduciary relations, see Estates of Decedents, XII, B; Guardianship, V; Trusts, XI; and see Agency; Attorneys; etc.

Suits to obtain accounting and to state the account so obtained, see Accounting Suits.

Actions on account for goods sold or for work and labor, see Assumpsit; Contracts, X.

§ 1. In general; mutuality of accounts.

Settlements by "jumping accounts," see Accord and Satisfaction, ¶ 41.

As to consideration, see generally Contracts, V; and see also post ¶ 31.

Necessity and sufficiency of agreement on balance, see post § 2.

Validity of statement of part of accounts, see also post ¶ 28.

Requisites of plea of account stated, see post ¶ 33.

¶ 1. An account stated means a balance struck between the parties on a settlement; and, where the mutual dealings are shown to have been adjusted and a balance struck, the law implies a promise to pay such balance.—Kusterer Brewing Co. v. Friar, 99 Mich. 190; Watkins v. Ford, 69 Mich. 357.

¶ 2. The theory of an account stated is that the minds of the parties have met when it has been rendered by one and received and accepted without objection by the other.—Love v. Ramsey, 139 Mich. 47.

¶ 3. An account is stated whenever, as the result of an accounting between the parties in respect to debts or accounts, a balance has been struck.—Gooding v. Hingston, 20 Mich. 439; Watkins v. Ford, 69 Mich. 357.

¶ 4. The essential element of an account stated is a statement of the account.—Fellows v. Thrall, 85 Mich. 161.

¶ 5. An account stated need not be in writing.—Sperry v. Moore's Estate, 42 Mich. 353; Watkins v. Ford, 69 Mich. 357.

¶ 6. An award of arbitrators may be considered as an account stated.—Gooding v. Hingston, 20 Mich. 439.

¶ 7. A receipt which states its purpose to be for a complete settlement, and which covers the whole period of dealing, is equiva-

lent to an account stated; and though it is open to explanation as to errors or omissions, it cannot be treated as if it had not been meant to cover everything.—Houghton v. Ross, 54 Mich. 335.

¶ 7a. A settlement of an unliquidated claim for damages arising either from the breach of a contract or from a tort cannot become the subject of an account stated so as to permit an action in assumpsit.—Pudas v. Mattola, 173 Mich. 189.

§ 2. Admission of correctness or agreement.

See also ante ¶ 2.
Implication of promise to pay, see ante ¶ 1.
Implied assent, see post § 3.
Pleading and proving assent, see post § 8.
Questions of law and fact, see post § 9.
Instruction as to agreement, see post § 9.

¶ 8. The mere rendering of an account is not an account stated; it must be assented to in some way.—White v. Campbell, 25 Mich. 463; Payne v. Walker, 26 Mich. 60.

¶ 9. There is no account stated where no acknowledgment of indebtedness or promise to pay appears.—Stevens v. Tuller, 4 Mich. 387.

¶ 10. A statement is not, in law, an account stated, if neither party agrees to it.—Raymond v. Leavitt, 46 Mich. 447.

¶ 11. It seems that any admission by one party of a balance, or an acknowledgment that a sum of money is due another, supports a count upon an account stated.—Gooding v. Hingston, 20 Mich. 439.

¶ 12. A plaintiff cannot fix the amount of a contested bill by giving credit for what he claims it should be.—McEwen v. Bigelow, 40 Mich. 215.

¶ 13. An account stated cannot be based on an appraisal where it does not appear that both parties mutually agreed on the appraisers, or recognized them as authorized to bind them by their action.—Chicago & C. S. R. Co. v. Peters, 45 Mich. 636.

¶ 14. Where parties meet to adjust their mutual accounts in a settlement that shall cover all claims, and one of them withdraws while some accounts remain unsettled and refuses to go further, the whole settlement is defeated, and an action on the common counts will not lie to recover upon such items as had been agreed to.—Tioga Mfg. Co. v. Stimson, 48 Mich. 213.

¶15. It is sufficient to constitute an account stated if the items constituting the account are settled upon so that nothing remains but a mere matter of computation.—Wood v. O'Callaghan, 140 Mich. 598.

¶ 16. A confession by a traveling salesman that his arrearages amount to a certain sum does not constitute an account stated where not accepted by his principal as true, the latter continuing to insist that it was not a true statement.—Wheeler v. Baker, 132 Mich. 507.

§ 3. ——Failure to object; recognition.

See also ante ¶ 2; post ¶ 50.
See also generally ante § 2.
Limit of time for objection, see also post ¶¶ 35, 51.

¶ 17. The failure of a debtor to object within a reasonable time to monthly statements rendered to him amounts to an admission by him that the account is correctly stated.—Pabst Brewing Co. v. Lueders, 107 Mich. 41.

¶ 18. Where, in an action to recover the balance claimed to be due on an account covering several years, it is shown that defendant agreed to pay what dealers other than plaintiff charged, which price is shown, the mere rendering of an account from time to time, and entries in defendant's passbook at a greater price, will not make an account stated, or fix the price at the sum charged.—Kusterer Brewing Co. v. Friar, 99 Mich. 190.

¶ 19. An objection to payment tendered for the price of merchandise for not being as much as was due, or not what the goods cost, is enough to entitle the vendor to contest the correctness of the account rendered.—Peter v. Thickstun, 51 Mich. 589.

¶ 20. In an action to recover for goods sold, the defense being that defendant made the purchase for a corporation of which he was manager, plaintiff is not entitled to a verdict as upon an account stated because defendant made no objection to the amount of the account, where he did object that the goods should be charged to the corporation and not to him individually.—Love v. Ramsey, 139 Mich. 47.

¶ 21. Plaintiffs contracted to sell lumber to a certain cedar company. Defendant indorsed the cedar company's two notes given in payment for the lumber. At the direction of the cedar company the lumber was in large part shipped to the defendant. When the second note of $1,250 became due, the defendant paid it and sent a statement of account to plaintiffs by which it credited itself with the amount of the note. Plaintiffs responded to this with a statement by

which they also credited defendant with said amount. Later, plaintiffs took three notes from the cedar company for the balance due from it. The cedar company failed. Plaintiffs sued defendant for the $1,250 item credited in said statements. Held, the statements between plaintiffs and defendant resulted in an account stated, and plaintiffs could not recover.—Harstad v. H. A. Bauman Co., 162 Mich. 162.

§ 4. Effect of account stated; conclusiveness.

Unfinished or partial settlement, see ante ¶ 14.

Statement lacking only computation, see ante ¶ 15.

Recognition of damage claim against account stated as proof of inconclusiveness, see post ¶ 40.

See also post ¶ 29.

¶ 22. Where an account has been stated it is not necessary that the antecedent debt or demand between the parties be proved.—Armitage v. Saunders, 94 Mich. 482.

¶ 23. Where business usage requires a contractor, who was also an employee, to make full showing of his claims against his employer for the purposes of a complete settlement, his deliberate concealment of a claim estops him from relying upon it afterwards, and the arrangement and comparison of mutual demands must be regarded as a final statement of his claims which it would be a fraud to disturb.—Gingrass v. Iron Cliffs Co., 48 Mich. 413.

¶ 24. Where there has been a subsequent accounting and promise, it seems that a party is bound, though the original contract by the statute of frauds may have been void.—Stevens v. Tuller, 4 Mich. 387.

§ 5. ——Surcharging and falsifying.

See also ante ¶ 7.

¶ 25. Matters entering into an account stated may be impeached for fraud or mistake.—Stevens v. Saginaw County Sup'rs., 62 Mich. 579.

¶ 26. A commercial traveler was sued by the firm who employed him as for money which they claimed to have overpaid him in refunding his traveling expenses, which they were in the habit of doing on reports which he presented, and which, in their declaration, they allege to have been falsely padded. Plaintiffs filed a bill of particulars of the debit items against the defendant, which the latter admitted. Held, that, as one of the plaintiffs admitted that the matter to which defendant's admission referred had gone into an account stated, the plaintiffs were bound by this admission, and, without legal evidence of fraud, the plaintiffs were not entitled to recover on the strength of defendant's admission of the items set forth as falsifying the account stated.—Linn v. Gilman, 46 Mich. 628.

¶ 27. A depositor who had been in the habit of checking out all his money shortly after he deposited it was notified of a balance long after he supposed he had exhausted his account, and immediately withdrew it. He made no inquiry or objection, but sued the bank, nearly two years afterwards, for an alleged balance, including sums which had been paid out on checks signed by another in his name. The trial court charged that the bank had the burden of showing that these checks had been signed by authority. Held, that the depositor's course in withdrawing the balance on notification of it was a strong case of acquiescing in an account stated, which required him to bring himself within some rule that would allow him to impeach it, and the court should have charged that he had the burden of impeaching it.—American Nat. Bank v. Bushey, 45 Mich. 135.

§ 6. ——Matters covered or included.

Admissibility of evidence as to included items, see post ¶ 38.

See also ante ¶ 7.

¶ 28. An account stated, or a note given for the amount, need not cover all dealings or dealings on both sides.—Graham v. Chubb, 39 Mich. 417.

¶ 29. Where, in order to arrive at the true situation of the account between the parties, it is necessary to inquire outside of certain writings, which defendant claims amount to an account stated, and on doing so it is found that at the time the writings were made a controversy existed which neither party regarded as settled by the writings, they cannot be held, as a matter of law, to conclude plaintiff.—McColl v. Jackson Iron Co., 98 Mich. 482.

§ 7. Actions and procedure.

General law of procedure, see Evidence; Instructions; Pleading; Judgment; Trial; and the like.

Matters relating to action of assumpsit generally, see Assumpsit.

Limitations of action, see Limitations of Actions.

¶ 30. Either a special assumpsit on the promise or assumpsit on the common counts will lie, as upon an account stated, upon an instrument reciting a settlement between the parties, and an understanding that plaintiff shall receive a stated sum after certain deductions.—Millikin v. Ferguson, 56 Mich. 189.

¶ 31. An action lies under the common counts for a sum agreed upon as due, if

based upon lawful consideration.—Miner v. O'Harrow, 60 Mich. 91.

¶ 32. Where suit was brought against a public officer for stated balances reported against him at three several times, it was held that the action must be deemed to have accrued against him at the date of the last statement of balance and the law then in force applies.—Gorham v. Wing, 10 Mich. 486.

§ 8. ——Pleading and evidence.

Rendition of account as evidence of accord and satisfaction of items therein shown, see Accord and Satisfaction, ¶ 109.
Implied assent from failure to object, see also ante § 3.
Conclusiveness of account and impeachment of it, see ante § 4 et seq.
As to proving component items, see also ante ¶ 22.
As to burden of impeachment of items, see ante ¶ 27.
Admission as to included items, see also ante ¶ 26.

¶ 33. A plea of an account stated must aver that the settlement was of all dealings between the parties; that the accounts were just, fair and due; and these averments must be supported by an answer to the same effect.—Schwarz v. Wendell, H. 395.

¶ 34. One who sues on an account stated with defendant's agent can only recover on proof of a settlement made with defendant or his authorized agent, or, if made by an unauthorized person, on proof of defendant's ratification thereof with a full knowledge of the facts.—Mink v. Morrison, 42 Mich. 567.

¶ 35. "Reasonable time" within which to object to an account rendered is a question for a jury and to be considered in connection with the circumstances of the case.—Peter v. Thickstun, 51 Mich. 589.

¶ 36. It is not necessary, in support of an account stated, to show the nature of the original transaction or indebtedness, or to give the items constituting the account. It is sufficient to prove some existing antecedent debt or demand between the parties respecting which a balance was struck.—Stevens v. Tuller, 4 Mich. 387; Albrecht v. Gies, 33 Mich. 389.

¶ 37. The admission in evidence, in an action upon an account stated, of an account between the parties tending to show dealings between them, is not error where the other evidence tends to show that such dealings had been examined and carried into the balance agreed upon.—Albrecht v. Gies, 33 Mich. 389.

¶ 38. In a suit for claims that entered into an account stated, evidence of claims that arose afterwards is irrelevant.—Hillebrands v. Nibbelink, 40 Mich. 646.

¶ 39. In an action upon an account stated for goods sold the testimony of a third person to whom they had been previously offered is admissible to identify the articles.—Sager v. Tupper, 38 Mich. 258.

¶ 40. Plaintiff had a running account with defendant for beer sold the latter. Plaintiff's agent called upon defendant and after going over accounts a written statement of the sum due plaintiff was signed by defendant. In a suit on such statement, the defendant testified that plaintiff agreed to allow against such statement a claim for damages for defective beer furnished plaintiff. Held, such evidence was admissible to show that the statement signed was not intended as a final statement of account.—Buckeye Brewing Co. v. Eymer, 162 Mich. 294.

¶ 41. A foreign judgment based on the common counts is not evidence of an account stated in an action pleaded in that form.—Gooding v. Hingston, 20 Mich. 439.

¶ 42. A promissory note, given to cover the amount of various items owing by the maker to the payee, is, under the circumstances, prima facie evidence of an account stated between the parties, the burden of rebutting the presumption being upon the payee of the note.—Maybury v. Berkery, 102 Mich. 126.

¶ 43. Where a merchant furnishes goods to workmen on orders from their employer and receives his pay from the employer on presentation of the orders, the amount being fixed by the orders and deducted from the wages of the workman, the arrangement is evidence of an account stated.—Bull v. Brockway, 48 Mich. 523.

¶ 44. Testimony that the parties met for the purpose of a settlement, that the accounts were gone over in detail, that a small balance was due the defendant and that the plaintiff made no further claim for six years, is sufficient to support a verdict of settlement.—Stevens v. Beardsley, 134 Mich. 506.

§ 9. ——Law and fact questions; instructions.

See also ante ¶¶ 27, 29.
Sufficiency of evidence to require submission of credibility to jury, see Instructions; Trial.

¶ 45. Evidence tending to show that the parties met and settled accounts, and that a balance was struck and agreed upon, is admissible to prove an account stated, and is sufficient to authorize the submission of the question as one of fact to the jury.—Albrecht v. Gies, 33 Mich. 389.

¶ 46. There was testimony that defendant asked plaintiff how much it needed to square their account, and said "if I pay you $50 more it ought to make us square," and that plaintiff replied, "if you want to pay me $50 in cash I will call it square." Defendant afterward made payments from time to time, but not to the amount of $50. Held, that it was for the jury to determine whether it was understood between the parties that the account between them was stated at $50. —Burritt v. Villenuve, 92 Mich. 282.

¶ 47. A. sent B. a check for an amount, "As per statement rendered, . . . being in full settlement of all commissions, etc., due you." B. immediately notified A. of a mistake in the amount, and in a suit against A. testified that he accepted the check under protest. Held, that it was for the jury to decide whether there was an account stated between the parties.—Rosenfield v. Fortier, 94 Mich. 29.

¶ 48. It is for the jury to say whether a presumption that a note was given in settlement of numerous items of indebtedness has been overcome, where there was evidence of subsequent payments which the payee endeavored to meet by proof of other indebtedness to which they were applied.—Maybury v. Berkery, 102 Mich. 126.

¶ 49. A firm was sued on an account and admitted its correctness. Plaintiff testified that one of the firm had admitted the correctness of the bill in conversation, but had said that he did not believe he was responsible on it. Held, that there was no evidence to go to the jury.—Harris v. Woodard, 40 Mich. 408.

¶ 50. Where statements of an account are repeatedly sent to a partnership, and are received, and no objection made, and the partners are informed by the vendor of the kinds of goods being bought by a partner's wife on the partnership account, there is evidence to go to jury of an account stated. —P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641.

¶ 51. An instruction requiring a debtor to object to an account stated within a reasonable time, and fixing thirty days as a reasonable time, is not strictly accurate, but the giving of such an instruction is not prejudicial error, where the evidence shows no distinct error in the account and it is presumptively accurate.—Raub v. Nisbett, 118 Mich. 248.

¶ 52. An instruction in assumpsit on an account stated, that in order for the plaintiff to recover it must not only appear that the contract (stated account) was made but that the defendants understood the amount they were to pay plaintiff, was not erroneous as conveying to the jury the thought that, before there could be an account stated, the parties must have agreed upon the amount thereof represented by figures; where plaintiff contended that defendants agreed to reimburse him for the difference between the sale price of his stock in a certain company and the amount he paid therefor, and the defendants denied both having made such agreement and having knowledge of what plaintiff paid for such stock.—Wood v. O'Callaghan, 140 Mich. 598.

ACCOUNTING SUITS.

TREATS of suits to ascertain the accountability between parties having diverse dealings with or for each other, to settle their mutual rights, and to enforce them as so adjusted. Accountings in particular relations, such as Partnership, Trusts and Agency, or in relation to particular rights, such as Mortgages, or of particular things or estates, such as Estates of Decedents, are treated as parts of such topics.

Analysis.

§ 1. In general.
§ 2. Grounds and occasion, and defenses.
§ 3. ——Fiduciary or trust relations.
§ 4. ——Mutual or complicated accounts.
§ 5. ——Contract rights and dealings.
§ 6. Joint interests; partnership, cotenancy, etc.
§ 7. As incident to foreclosure or other suits.
§ 8. Practice and procedure; pleading.
§ 9. Preliminary hearing, evidence thereon, and decree.
§ 10. Reference and report.
§ 11. Taking and stating; basis of the account.
§ 12. Scope and period of accounting.
§ 13. Evidence as to items of charge and credit.
§ 14. Procedure and final decree on the account.

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§ 1. In general.

¶ 1. A suit to recover moneys alleged to have been wrongfully taken cannot be strictly called a suit for an accounting any more than can any action for money had and received.—Bay City Bridge Co. v. Van Etten, 36 Mich. 210.

§ 2. Grounds and occasion, and defenses.

See also post §§ 3-7.

General grounds for equitable relief, see Equity.

Conclusion of party by accord and satisfaction, see Accord and Satisfaction, §§ 13, 14.

¶ 2. A court cannot enter upon an original accounting on a bill which is so deficient in equities as to leave an existing settlement in force.—Churchill Township v. Cummings Township, 51 Mich. 446.

¶ 3. Where a bill for an accounting for personal property fails to show any uncertainty as to the identity of the property or any depreciation thereof, and simply seeks to establish an undivided one-half interest in it, the remedy at law is adequate and equity has no jurisdiction.—Moody v. Macomber, 158 Mich, 209.

¶ 4. Defendants were sureties of a state treasurer for his first term; complainant his surety for the second term. Complainant, claiming that the treasurer's default took place during the first term, filed a bill for an accounting and alleged that the treasurer at the beginning of his second term had given a receipt in full to himself as treasurer of the preceding term. The bill did not set forth the receipt, nor show for what amount it was given or should have been given, or ask for any relief on account of said receipt. Held, equity had no jurisdiction to intervene on the ground of relieving complainant from the effect of said receipt.—Title Guaranty & Surety Co. v. Aetna Indemnity Co., 167 Mich. 535.

¶ 5. Defendant surety companies were sureties for various amounts on a state treasurer's bond for his first term. Claimant was surety for said treasurer for his second term. The treasurer defaulted, and complainant claimed that such default occurred during the first term. Held, equity had no jurisdiction to entertain complainant's bill for an accounting on the ground of multiplicity of suits.—Title Guaranty & Surety Co. v. Aetna Indemnity Co., 167 Mich. 535.

¶ 6. Under the peculiar circumstances of the case a school district was allowed to maintain a bill against another district for an account of taxes belonging to complainant. —Oshtemo School Dist. No. 13 v. Dean, 17 Mich. 223.

¶ 7. Complainant brought a bill against defendant asking for an accounting for money furnished to the defendant to be used in running the business of a corporation.

on the ground that the money was furnished on the fraudulent representations of the defendant. Held, that since, in fact, the alleged representations were made after the money was furnished, the bill would not lie on the ground of fraud.—Monroe v. Bushnell, 158 Mich. 115.

§ 3. ——Fiduciary or trust relations.

In trusts, see Trusts, XI; Estates of Decedents, XII; Guardianship, V; Agency, IV, B; and the like.

By assignee for creditors, see Assignments for Creditors, § 29.

By receivers, see Receivers, V; Corporations, XXIII.

By University of Michigan against officers and agents, see University of Michigan.

¶ 8. The existence of fiduciary relations between the parties is sufficient to confer jurisdiction upon a court of equity whenever the duty rests upon defendant to render an account.—Petrie v. Torrent, 88 Mich. 43.

¶ 9. The right to an accounting in equity is incident to most trust relations, and is not cut off by waiving sworn answer.—Cochrane v. Adams, 50 Mich. 16; Darrah v. Boyce, 62 Mich. 480.

¶ 10. Persons who have the money of other people in their keeping are not relieved from accounting, even in cases where public interests are concerned, on the grounds that the source from which the money came was improper, if no question of public policy is involved.—Richardson v. Welch, 47 Mich. 309.

¶ 11. The court's jurisdiction of an employer's accounting suit is not ousted by the fact that the acts complained of impute to defendant the commission of a criminal offense, and that if he were compelled to render an accounting it might trend towards evidence forming the basis of a criminal accusation.—Warren v. Holbrook, 95 Mich, 185.

¶ 12. In a bill for accounting against the husband brought by the administrator of the wife's estate, equity will not apply the statutes of limitation to defeat the claim of the complainant where it appears that fiduciary relations existed between the defendant and the deceased.—Harper v. Corcoran, 166 Mich. 474.

¶ 13. Where a husband during the lifetime of his deceased wife has obtained possession of certificates of deposit and other property belonging to her, a bill brought by her administrator will lie to compel the husband to account for all property of the deceased retained by him.—Harper v. Corcoran, 166 Mich. 474.

¶ 13a. On bill for an accounting the existence of a bare agency is not sufficient to confer equitable jurisdiction, but equity will take jurisdiction when out of such agency there arise lengthy and complicated accounts, the need of discovery, or the existence of fiduciary or trust relations.—Excelsior Wrapper Co. v. Yund, 176 Mich. 372.

¶ 13b. Where complainant intrusts defendant with money to be expended in his discretion in dealings with various parties unknown to complainant for the purchase of a commodity in which both are materially interested, defendant becomes a quasi trustee of the money so intrusted to him and the property purchased with such money; and he may be required to account in equity, especially where there are many complicated items peculiarly within his knowledge.—Excelsior Wrapper Co. v. Yund, 176 Mich. 372.

¶ 13c. Where fiduciary relations exist, or where fraud is charged, equity has jurisdiction to compel an accounting, and accordingly may call a personal representative to account for fraud on an heir.—Powell v. Pennock, 181 Mich. 588.

¶ 13d. As a general rule equity may compel an accounting where fraud is charged, or fiduciary relations exist.—Parks v. Brooks, 188 Mich. 645.

§ 4. ——Mutual or complicated accounts.

See also post ¶ 20.

¶ 14. To sustain a bill for an accounting there must be mutual demands, a series of transactions on one side and payments on the other, and there can be no accounting where all the items are on one side and the bill shows no items of which the complainant is not fully informed.—Laubengayer v. Rohde, 167 Mich. 605.

¶ 15. Equity has jurisdiction in a bill for an accounting, even though the accounts are all on one side, where the contracts involved are intricate, and the machinery of the law court is for that reason inadequate.—Kimmerle v. Dowagiac Gas Co., 159 Mich. 34.

¶ 16. A suit in equity for an accounting is proper, though the accounts are all on one side, if there are circumstances of great complication or difficulty in the way of adequate relief at law.—Blodgett v. Foster, 114 Mich. 688.

¶ 17. Defendants were sureties of a state treasurer during his first term of office. Complainant was his surety during the second term. Said treasurer defaulted, and re-

signed in the first year of the second term. Complainant brought a bill for accounting, claiming that the default occurred during the first term of office and asking for an accounting as to liability between itself and defendants. Held, equity had no jurisdiction, since there were no mutual dealings between the parties and since each of the parties had a separate legal defense to any suit prosecuted by the state.—Title Guaranty & Surety Co. v. Aetna Indemnity Co., 167 Mich. 535.

§ 5. ——Contract rights and dealings.

Between parties to mortgages or chattel mortgages or pledges, See Chattel Mortgages; Mortgages; Pledges.
Of royalties and profits of mines or patents, see Mines; Patents.
Terminal contracts of railroads and the like, see Railroads, VII.
Under conditional sales, see Sales, XII.
Between vendors and purchasers, see Vendors and Purchasers, IX, XI.

¶ 18. A claim which, in effect, is merely for damages for breach of contract, no actual fraud being charged, and it not being alleged that the defendant is irresponsible, cannot sustain a suit in equity for an accounting. —Linn v. Gunn, 56 Mich. 447.

¶ 19. Equity has jurisdiction to compel an accounting where complainant has, in good faith, paid money to defendant corporation under a contract which he supposed was valid, but which in fact was fraudulent, though complainant, after ascertaining the fraudulent character of the contract and that it was ultra vires, refused to continue payments under the contracts. (Following Edwards v. Michigan Tontine Inv. Co., 132 Mich. 1.)—Bale v. Michigan Tontine Inv. Co., 132 Mich. 479.

¶ 20. A bill for an accounting set out three lumbering contracts, together with two supplemental ones, involving many thousands of dollars, and extending over a long period of time. The lumber was divided into a great variety of grades, each grade having a separate price. The payments made under the contracts were numerous, and extended through a series of years. There was controversy as to whether certain moneys had been properly expended for insurance, and also as to whether other lumber had been shipped in place of a portion burned. Held, that complicated circumstances were shown which justified equity in taking jurisdiction. —Blodgett v. Foster, 114 Mich. 688.

¶ 21. In an action for a fraudulent breach of a contract whereby a defendant corporation agreed to purchase certain patents of the plaintiff and to employ him, paying him a salary and a portion of the profits, it being alleged that the profits were destroyed, and where a large number of books and accounts would have to be examined to determine the plaintiff's damages, it cannot be urged that the case must be tried by a court of equity, as the law court may refer the accounts to a referee (How. St., § 7378), or an auditor (secs. 7386, 7391).—Church v. Anti-Kalsomine Co., 118 Mich. 219.

¶ 22. Persons who have by contract acquired an equitable interest in a machine and the patents thereon, have a right to the protection of that interest by an accounting in equity, regardless of whether the contract is such that it would be specifically enforced or not.—Caulkins v. Lavigne, 156 Mich. 89.

§ 6. Joint interests; partnership, cotenancy, etc.

Between corporation and officers, agents and stockholders, see Corporations.
Between husband and wife, see Husband and Wife, II.
Between joint adventurers, see Joint Adventures.
Between partners, see Partnership, VII, E.
Between tenants in common and joint tenants, see Tenants in Common.
Accounting in partition suits, see Partition.
Pleading jurisdiction of equity, see post ¶ 26.

§ 7. As incident to foreclosure or other suits.

See the specific topics treating of equitable remedies, e. g., Injunctions; Specific Performance; Rescission; etc.
Procedure ancillary to foreclosure, see Foreclosure of Mortgages.
Retention of bill for accounting when principal relief is not grantable, see Equity. X.
To adjust liens and priorities, see Liens.
Incident to bill to redeem, see Mortgages, IX.
Retention of accounting bill to render personal decree, see post ¶ 45.

§ 8. Practice and procedure; pleading.

General equity practice, see Equity.

¶ 23. Complainant's assignor made contracts with one Harrison, a promoter, which the defendant, a newly-organized corporation, assumed. The City Bank acted as trustee of the assets in the reorganization. Held, in a bill for an accounting on the contracts, that the defendant, the bank, and Harrison were properly made parties defendant.—Kimmerle v. Dowagiac Gas Co., 159 Mich. 34.

¶ 24. The defendant, a newly-organized corporation, adopted a contract liability entered into by its promoter, one Harrison, with one Lyle. Lyle's trustee in bankruptcy sought, by bill, for an accounting and the collection of the money due under the contract. Held, the allegation in the bill of insolvency of the defendant was an unnecessary averment.—Kimmerle v. Dowagiac Gas Co., 159 Mich. 34.

¶ 25. Where, in a bill against a defendant corporation for an accounting on a contract liability, an averment that complainant tried to secure a settlement is necessary, an allegation is sufficient for that purpose which states that one Harrison was subtantially the owner of the corporation; that he refused to meet the liability; and that complainant was denied the privilege of examining the books and records, and was informed they had been removed from the state.—Kimmerle v. Dowagiac Gas Co., 159 Mich. 34.

¶ 26. A bill in equity seeking to obtain a decree establishing the rights and interests of parties in real estate held by the complainant as trustee, under a purchase on joint account of certain real estate, which also seeks an accounting between the parties and the prevention of an action at law, need not formally allege that the complainant has not a complete and adequate remedy at law, as the facts stated confer the jurisdiction.—Lieberman v. Sloman, 118 Mich. 355.

¶ 27. In a suit by the heirs of one of two persons who had business dealings together though not as partners, resulting in mutual accounts, which were rendered on one occasion when each included interest on the items, where it appeared that their relation was practically that of debtor and tenant on the one side and creditor and landlord on the other, an agreement to pay interest is sufficiently admitted by an answer and crossbill which prays the court to state the account between the parties and compute interest thereon at the legal rate.—Gay v. Berkey, 137 Mich. 658.

¶ 27a. A bill for an accounting which is demurred to makes out a case for accounting and equitable relief where it is clearly alleged that trust relations are involved, that complainant intrusted defendant with certain money to be expended for a specific purpose for which he has neglected and refused to account, that the dealings involve an account with complicated items and a series of transactions with mutual demands, and that many items and transactions are solely within the knowledge of defendant.—Excelsior Wrapper Co. v. Yund, 176 Mich. 372.

§ 9. Preliminary hearing, evidence thereon, and decree.

Hearing and evidence after accounting is ordered and for purpose of proving and stating items, see post §§ 10-14.

Discovery incident to accounting, see Discovery.

Fraud and evidence thereof to warrant accounting, see Fraud.

¶ 28. A bill for an accounting does not present a case for equitable relief unless the proof shows an agreement sufficiently clear and distinct to support it.—Eccard v. Brush, 48 Mich. 8.

¶ 29. In an accounting by an employee, under a decree therefor in a suit brought by his employer, the defendant cannot be compelled to disclose anything tending to criminate himself, but this does not prevent the trial of the issue, in anticipation of the decree, under the rules of evidence in civil cases.—Warren v. Holbrook, 95 Mich. 185.

¶ 30. On a bill for an accounting for a deficit the rules applicable to proof in civil cases must be observed, and the receipt of the money by the defendant may be shown by any competent testimony fairly tending to prove it, either alone or in connection with other circumstances.—University of Michigan v. Rose, 45 Mich. 284.

¶ 31. A bill for an accounting, brought by the regents of the University of Michigan against the director of the chemical laboratory and his assistants, whose duty it was to pay over to the director the money which he received, though both were responsible to the complainant, charged them with a deficit in their accounts, and it was stipulated that each was to be held accountable for so much money as came into his own hands. The stipulation fixed, also, the amount of the entire deficit. Held, that proof that the assistant had received money would not alone establish liability against his superior, as it would not tend to show that the superior had received the money from the subordinate; and the burden of proving that he had received it was upon the complainant, and, as between the defendants, it was on the subordinate.—University of Michigan v. Rose, 45 Mich. 284.

¶ 32. Evidence consisting principally of the testimony of complainant as against that of defendant, held sufficient to show the acquisition by complainant of the right to use and administer the "Keeley cure" for the entire state of Michigan, and therefore to establish the right to an accounting for royalties from defendants.—Murray v. Fales, 142 Mich. 605.

¶ 33. On a bill to adjudicate a right of property and for an accounting of the proceeds, it is premature, on a trial of the issue as to the character of the property only, to decree that one of the parties, the defendant, is indebted to plaintiff.—Lindsay v. Race, 103 Mich. 28.

§ 10. Reference and report.

Reference practice, see Reference.

Appointment of master or auditors, see Reference.

Denial on ground that law court can appoint auditor or referee, see ante ¶ 21.

¶ 34. It is not necessary that a reference be made to take an account as the circuit judge has a right to hear it.—Roelofs v. Wever, 119 Mich. 334.

¶ 35. Where an order of reference to take proofs necessary to determine the principles upon which the accounting in the case should proceed has been so acted upon as to furnish the basis for a final decree, just to all parties, the technical form of the order will be disregarded, and a final decree entered.—Perrin v. Lepper, 72 Mich. 454.

§ 11. Taking and stating; basis of the account.

Since each of the items of an account might, if separate, be a cause of action in itself, the right to have any given item charged or credited will depend on the law pertaining to that particular cause of action, or on the law of the relationship in which the accounting may be had. Consult the appropriate topics.

Applications of payment, see Payment, III.

Beginning of accountable period, see post § 12.

¶ 36. Where certain saw-mill premises were wrongfully detained and used for several years, their bare rental value, under a bargain entered into before possession was taken, is not a proper basis for an accounting under a decree directing that the defendant be charged "what the use of the property would have been worth to a prudent man, with proper use, after keeping it in reasonable repair."—Eldred v. Ryerson, 27 Mich. 526.

¶ 37. A party rightfully in possession of another's land cannot usually be properly charged with the consequences of accidental fires, but where he is holding wrongfully he cannot insist that he shall account for the value of the premises on the lowest admissible basis, and at the same time leave the party who is wrongfully kept out to take upon himself all risks.—Eldred v. Ryerson, 27 Mich. 526.

§ 12. Scope and period of accounting.

Items included in accord, see Accord and Satisfaction, ¶ 87.

¶ 38. An accounting for rents and profits on one side and for taxes and necessary expenses on the other cannot be so allowed as to cover one period for one party and another for the other.—Hack v. Norris, 46 Mich. 587.

¶ 39. Where the heirs of a grantor obtain a decree setting aside the deed, the accounting for rents and profits to which they may be entitled should date from the grantor's death, when the heirs would have become entitled to the property; but if the deed was obtained by unconscionable means and the defendants purchased with notice, the accounting may properly begin at the date of the deed itself, when the grantor came into possession and enjoyment of the property.—Hack v. Norris, 46 Mich. 587.

§ 13. Evidence as to items of charge and credit.

See also specific topics treating of accountings, e. g., Estates of Decedents; Trusts, as to evidence and burden of proof and presumptions.

Interest and computation thereof, see Interest.

Evidence on right to have accounting, see ante § 9.

Admission of liability for interest, see ante ¶ 27.

¶ 40. In a suit for an accounting defendant has the burden of proving what allowances should be made to him.—Thatcher v. Hayes, 54 Mich. 184.

¶ 41. In a civil proceeding for an accounting the silence of a defendant must be construed most strongly against him.—Warren v. Holbrook, 95 Mich. 185.

¶ 42. Where a party to an accounting claims that there is an error against him in an amount which he has himself previously reported as due to the other party, he has the burden of showing the error.—University of Michigan v. Rose, 45 Mich. 284.

¶ 43. On a bill for an accounting, defendant's account book containing entries in his handwriting, purporting on its face to be a account of receipts and disbursements on account of the property claimed by complainant is properly admitted as evidence of admissions of indebtedness. The objections that it started with a balance brought forward, and was only a continuation of an account, and that it was not shown that every item related to the property in controversy, are immaterial.—Nolan v. Garrison, 151 Mich. 138.

§ 14. Procedure and final decree on the account.

Matters to be decided on preliminary decree, see ante § 9.

Decree for accounting incidental to other suit, see ante cross-references under § 7.

¶ 44. Where a proceeding is had for a mutual accounting and a balance is found due from complainant a cross-bill is not necessary to authorize the court to order payment.—Wyatt v. Sweet, 48 Mich. 539.

¶ 45. A court of equity, having acquired jurisdiction through a bill filed by a secured creditor for an accounting as to the property owned by a copartnership, may, where it ap-

pears upon the accounting that there is no property against which complainant can enforce his demand, retain jurisdiction and render a personal decree against the defendants, notwithstanding complainant has an adequate legal remedy.—McLean v. McLean, 109 Mich. 258.

¶ 46. Where the husband of the deceased wife has obtained possession, prior to her death, of money belonging to her and invested the same in real estate, a court of equity, upon a bill filed by the administrator for an accounting, will decree a lien against the real estate so purchased to secure the repayment of the money of the deceased therein invested.—Harper v. Corcoran, 166 Mich. 474.

¶ 47. Where pleadings present a case of cross claims, and whole account grows out of relations of parties and dealings with each other in view of and with reference to original contract, court is warranted, after ascertaining true balance, to proceed and close the controversy.—Lamoreaux v. Eggleston, 171 Mich. 201.

ACCRETION to ACIDS.

Cross-References.

Accretion, to land on stream, see Boundaries; Waters, IV, A.

Accrual—
- Of cause of action, see Actions, § 4; Limitations of Actions, IV.
- Of right or title under contract, deed or will, see specific topics treating of the right, e. g., Contracts; Deeds; Sales; Wills; Trusts.
- Of right by devolution or succession, see Descent; Estates of Decedents; Life Estates; etc.
- Of rents, see Landlord and Tenant.
- Of interest, see Interest.
- Of costs, see Costs.

Accumulations of Income, see Perpetuities and Accumulations; Wills; Trusts; and as to rights between life tenants and their successors, see also Life Estates.

Accumulative Sentences, see Crime; Indictment.

Accusations—
- Of crime and trial thereon, see Indictment; Arrest.
- As actionable defamation, see Libel and Slander.
- As malicious prosecution see Malicious Prosecution.
- Constitutional rights of accused, see Constitutional Law, IX; Examination of Witnesses, IV (privilege); Jury; Indictment.

Acids—
- Actionable negligence in sale or handling or using, see Negligence; Poisons; Master and Servant; Medicine and Surgery.
- Carriage of dangerous substances, see Carriers.
- Pollution of streams, see Waters, V.

ACKNOWLEDGMENTS.

TREATS of the formal declaration before an officer by a grantor or mortgagor or the attesting witnesses of the authenticity and voluntariness of the execution of a deed, mortgage, or the like, and of the certificate of such officer on or appended to the instrument as to the fact, and of the effect of such acknowledgments.

Analysis.

§ 1. In general; necessity and propriety.
§ 2. ——To bar dower and the like.
§ 3. Attestation and witnesses.
§ 4. Who to make and who to take acknowledgment.
§ 5. ——Disqualification by interest or relationship.
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§ 17. ——Substance and sufficiency of showing.
§ 18. Purpose and effect of acknowledgment.
§ 19. ——Acknowledgments made under earlier laws.
§ 20. ——Impeachment and presumptions.
§ 21. Effect of invalidity or lack of acknowledgment.
§ 22. ——Of acknowledgment cured by statute.
§ 23. Curative legislation.
§ 24. Liability for error or fraud.

The term acknowledgment is often used in the sense of admission, recognition or assent to a fact or claim. As used in these senses, see specific topics treating of the particular fact or claim.
Admissions out of court as evidence, see Evidence, VII, C; Indictment, VIII.
Admission in court, see Trial, V.
Admissions in pleading, see Pleading.
Acknowledgment of existence of relationship, see Agency; Bastards; Marriage; Corporations; Partnership.

§ 1. In general; necessity and propriety.

Necessity and sufficiency of acknowledgment of submission to statutory arbitration, see Arbitration and Award.
Necessity and mode of acknowledgment of plats, see Dedication, II.
Validity of instrument between parties without acknowledgment, see post § 21.
Proper person to acknowledge and officer to take same, see post §§ 4, 5.
For eligibility to record, see Comp. L. 1915, § 11748.
Contracts for sale of land, see Comp. L. 1915, §§ 11770-11774.

¶ 1. A notary public or justice of the peace cannot properly take the acknowledgment of a person to a deed if he believes him mentally incompetent to make a will; nor may he take an acknowledgment through a third person.—Hoban v. Piquette, 52 Mich. 346.

§ 2. ——To bar dower and the like.

Mode of alienating homesteads, see Homesteads.
Certification as to purpose, see post § 14.

¶ 2. Where a married woman's separate acknowledgment is required by statute the deed is void as to her without it, and it is an essential part of the conveyance.—Dewey v. Campau, 4 Mich. 565; Fisher v. Meister, 24 Mich. 447; People v. Marion, 29 Mich. 31.

¶ 3. Under Comp. L. 1897, § 8930, providing that a wife may bar her right of dower by joining in the conveyance and acknowledging the same "as prescribed in the preceeding chapter," a wife's deed without proper acknowledgment will not operate at common law to bar her dower because th "preceding chapter" referred to has bee amended to allow acknowledgment by a mar ried woman the same as by feme sole instea of taking it separate and apart from he husband.—Maynard v. Davis, 127 Mich. 571

§ 3. Attestation and witnesses.

Foreign acknowledged instruments unde curative acts, see post §§ 22, 23.
See also post ¶¶ 17, 49.
See Comp. L. 1915, § 11694, and summary o earlier laws in footnote.

¶ 4. The record of a deed executed by tw grantors and acknowledged by them at differ ent dates and places, and purporting to b witnessed by two witnesses generally, one o whom, whose name appears second, took th first acknowledgment, and also by a thir witness as to the signature of the granto signing last, was held prima facie evidenc of due execution and attestation under th statute requiring two subscribing witnesse —Watson v. Peters, 26 Mich. 508.

§ 4. Who to make and who to take acknow edgment.

Incompetent grantors, see also ante ¶ 1.
Power to take, see generally Comp. L. 191 § 11694.
Power of member of legislature, see Com L. 1915, § 52.
Power of officers in other states, see Com L. 1915, § 11757.
In foreign countries, see Comp. L. 191 §§ 11697, 11760.
Commissioners of deeds and their appoin ment, see Comp. L. 1915, §§ 11761-1176

¶ 5. A justice of the peace of one coun has no authority to take an acknowledgme in another county.—Brown v. McCormic 28 Mich. 215.

¶ 6. Under the statute a notary public one county may take acknowledgments in a other.—Lamb v. Lamb, 139 Mich. 166.

§ 5. ——Disqualification by interest or re tionship.

Effect on validity of deed between parti see post ¶ 81.

¶ 7. A mortgagee cannot certify to the acknowledgment of the mortgage.—Laprad v. Sherwood, 79 Mich. 520.

¶ 8. An officer cannot take the acknowledgment of a deed to himself. But as under the statute parol trusts in land are void, and there is no resulting trust in favor of one who furnishes the consideration money for a conveyance, it is not a valid objection to an acknowledgment that the officer who took it was the real purchaser, but had the deed made to another person for his use.—Groesbeck v. Seely, 13 Mich. 329.

¶ 9. A deed on statutory foreclosure, executed by the under-sheriff who made the sale, pursuant to How. St., §§ 8501, 8505, which empowers either the sheriff or under-sheriff, can be acknowledged before the sheriff, if a notary, since as notary he does not act as sheriff.—Cook v. Foster, 96 Mich. 610.

§ 6. Taking acknowledgment or proofs.

Sufficiency of showing of facts investigated by and known to officer, see post §§ 12-14.
Liability for neglect or fraud, see post § 24.
Witnesses to execution, see ante § 3.
Taking through third person, see ante ¶ 1.
Taking within states, see Comp. L. 1915, § 11694.
Taking in other state, see Comp. L. 1915, § 11695.
Taking in foreign country, see Comp. L. 1915, § 11697.
In case of death, departure or refusal of grantor, see Comp. L. 1915, §§ 11701-11707.

¶ 10. The officer is bound to inform himself of the identity of the parties acknowledging a conveyance.—Cameron v. Culkins, 44 Mich. 331.

¶ 11. There being no statute authorizing the acknowledgment of a conveyance through a sworn interpreter, where the officer is unacquainted with the grantor's language, it cannot be thus taken.—Dewey v. Campau, 4 Mich. 565.

¶ 12. A notary's certificate of acknowledgment is of little force when the person purporting to make the acknowledgment does not understand English and the notary has not explained the effect of the act in such person's own language and seen to it himself that it was understood.—Harrison v. Oakman, 56 Mich. 390.

§ 7. ——By married woman.

Sufficiency of certificate, see post § 13.
Validity of deed as against husband though wife's acknowledgment was defective, see post ¶ 77.
See Comp. L. 1915, § 11698.
Under Uniform Law, see Comp. L. 1915, § 11756.

¶ 13. The statute in regard to conveyances by married women must be strictly complied with.—Dewey v. Campau, 4 Mich. 565.

¶ 14. A notary has no right to certify anything that he does not know of his own knowledge by an intelligent interchange of conversation, and without relying on the aid or statements of others than the person whose acknowledgment he proposes to take. He must get what he certifies directly from the party, and, in the case of a woman, be fully assured of the freedom of her action.—Fisher v. Meister, 24 Mich. 447.

¶ 15. The husband's presence during the wife's acknowledgment is unlawful, and from it coercion is presumed. Failure of the acknowledging officer to ascertain to a certainty that the wife acts freely before he certifies the acknowledgment is a violation of his official oath.—Fisher v. Meister, 24 Mich. 447.

¶ 16. Under the Act of 1855 an acknowledgment apart from her husband is not requisite where a married woman conveys or incumbers her own estate.—Watson v. Thurber, 11 Mich. 457.

§ 8. ——Conflict of laws; foreign acknowledgments.

Curative acts and effects of acknowledgments so cured, see post §§ 22, 23.
In foreign countries and in other states of the union, see Comp. L. 1915, §§ 11695, 11697.

¶ 17. Under the code of 1833, to entitle a deed acknowledged or proved out of the territory to be recorded within it, it was necessary that it be executed and witnessed in the same manner that deeds acknowledged within the territory were required to be, though the proof or acknowledgment might be in accordance with the laws of the state or territory when it was taken.—Galpin v. Abbott, 6 Mich. 17.

§ 9. Official certificate of acknowledgment.

Certification in other state that officer was competent and acknowledgment regular, see post §§ 16, 17.
Validity of certificate conformable to law in force when taken, but lacking matter afterwards made requisite, see post § 19. See Comp. L. 1915, § 11694.
Uniform law (form of certificate), see Comp. L. 1915, § 11755.

¶ 18. A certificate that, "the signer and sealer of the subjoined deed" acknowledged it, is good; if the acknowledgment was somewhere on the same sheet with the deed it is immaterial where.—Munroe v. Eastman, 31 Mich. 283.

¶ 19. Under Michigan Laws 1833, p. 279, § 2, providing that an acknowledgment of a deed might be made before a justice of the peace and that the deed should be entitled to record upon the indorsement on the deed of a certificate of the acknowledgment and signing by the person before whom the same was taken, the evidence of an acknowledgment was complete when the officer before whom it was taken signed a certificate to that effect indorsed on the deed and no authentication of the official character of the officer was necessary, the statement of his official character necessarily including a statement of his official authority.—Elwood v. Flannigan, 104 U. S. 562, 26 L. ed. 842.

¶ 20. A certificate of acknowledgment, beginning "State of Michigan, County of Calhoun," and in the body describing the officer as "a Notary Public in and for Eaton County," then signed by him with "Notary Public in and for Eaton Co.," appended, is not objectionable as failing to show that the notary was such for Eaton County, Michigan, since if he had merely signed his name as notary public it would have been sufficient. —Lamb v. Lamb, 139 Mich. 166.

§ 10. ——Requisites and substance; informalities.

As to particular elements, see also post §§ 11-15.
Effect of informalities on instrument, see post §§ 21-23.
Leaving name blank, see also post § 12.
Calling mortgage "deed," see also post ¶ 30.

¶ 21. It is the policy of the law to uphold certificates of acknowledgment when substance is found, and not suffer conveyances or the proof of them to be defeated by technical or unsubstantial objections.—Morse v. Hewett, 28 Mich. 481.

¶ 22. Certificates of acknowledgment will be upheld wherever possible, and for that purpose a court will resort, if necessary, to the instrument to which the certificate is attached.—Nelson v. Graff, 44 Mich. 433.

¶ 23. Whenever substance is found in a certificate of acknowledgment, obvious clerical errors and all technical omissions and defects will be disregarded, and, in order to uphold it, the certificate will be read in connection with the instrument and in the light of the surrounding circumstances.—King v. Merritt, 67 Mich. 194.

¶ 24. A certificate of acknowledgment was headed "The State of New York, New York county, ss," and signed "Edwin F. Corey. Com. for the State of Michigan in New York." In the body of the certificate the acknowledging officer was described as "a commissioner for the state of Michigan within and for said county." The official seal was a red paper wafer impressed with the words "Edwin ——, Commissioner of Deeds for Michigan." The certificate did not recite that the acknowledging officer was appointed and commissioned by the governor. Held, that it was sufficient to entitle the deed to which it was attached to be admitted in evidence.—Sparrow v. Hovey, 41 Mich. 708.

§ 11. ——Caption, venue and date.

Showing as to county appended to signature, see ante ¶ 20.

¶ 25. The fact that the date of a deed is later than the date of its acknowledgment is no reason for excluding it from evidence; the date is not very important, and the acknowledgment authenticates the instrument. —Munroe v. Eastman, 31 Mich. 283.

¶ 26. Where a deed is dated February 20th, and purports to have been acknowledged on that day, but is indorsed with a certificate of its having been recorded February 18th, the discrepancy is not of itself suspicious, but, in the absence of any showing, is fairly referable to clerical mistake.—Munroe v. Eastman, 31 Mich. 283.

¶ 27. A certificate of acknowledgment in these words, "signed, sealed and acknowledged in my presence the day and year aforesaid," and signed "J. J. K., Notary Public," is insufficient.—Cooper v. Smith, 75 Mich. 247.

§ 12. ——Identification of instrument and parties.

Duty to be assured of identity, see ante §§ 6, 7.
Identification of acknowledging officer in certificate to foreign acknowledgment, see post § 17.

¶ 28. A certificate of acknowledgment containing after the grantor's name the words "to me known to be the same person described in, and who executed, the within instrument," clearly implied that the grantor was personally known to the officer who took the acknowledgment.—Brown v. McCormick, 28 Mich. 215.

¶ 29. A certificate of acknowledgment that certifies that "the signer and sealer of the subjoined deed" personally came before the acknowledging officer, and acknowledged that he executed the deed "for the purpose therein expressed," is in compliance with the statutes in force in 1837 (2 Terr. L., p. 361), which only required that it should "be acknowledged by the party or parties executing the same"; this certificate implies knowledge on the part of the officer that the party acknowledging was the same who executed the instrument. —Munroe v. Eastman, 31 Mich. 283.

¶ 30. The certificate of acknowledgment attached to a deed recited that the grantors came before the officer and acknowledged that they had executed "the foregoing mortgage." Held to be evidently a clerical error, which did not vitiate.—Ives v. Kimball, 1 Mich. 308.

¶ 31. A certificate that the grantor appeared before the officer "and acknowledged that —— —— executed the said deed" does not show an acknowledgment by such grantor, and is fatally defective.—Buell v. Irwin, 24 Mich. 145.

¶ 32. If officer taking acknowledgment is satisfied as to the parties' identity, it seems that his certificate stating that he is "satisfied" that the parties appearing before him "are the grantors," etc., is sufficient.—Culbertson v. H. Witbeck Co., 127 U. S. 326. 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

¶ 33. A certificate of acknowledgment of a deed by a justice of the peace is sufficient where it contains a statement that a certain person, naming him, an Indian chief, came before him and made the necessary acknowledgment, although it contains no statement that the grantor was known to the justice.—Elwood v. Flannigan, 104 U. S. 562, 26 L. ed. 842.

§ 13. ——Showing as to mode of examination.

Duty in making inquiry, see ante §§ 6-8.

¶ 34. A certificate in accordance with Sess. L. 1840, p. 167, except that it did not state the acknowledgment of a married woman to have been on a private examination, was held void.—Sibley v. Johnson, 1 Mich. 380.

¶ 35. Where the statute required the certificate to show that the wife "acknowledged that she had executed the deed separately and apart from her husband," it was held that a certificate that she "stated" she had executed, etc., was insufficient.—Dewey v. Campau, 4 Mich. 565.

¶ 36. The certificate is void unless it shows that the acknowledgment was taken "separately" as well as "apart" from the husband. —Dewey v. Campau, 4 Mich. 565.

§ 14. ——Showing as to voluntariness and purpose of deed.

¶ 37. The Act of 1840 (Sess. L., p. 167) provided that rights of dower should not be conveyed, unless by deed executed by the wife, and acknowledged by her "on a private examination, separate and apart from her husband, that she executed the deed without fear or compulsion from anyone." It was held that a certificate in accordance with the prior law, that the wife acknowledged the execution without any fear or compulsion of her husband, was insufficient to bar dower under this act.—Barstow v. Smith, W. 394.

¶ 38. A certificate of acknowledgment read as follows: "And the said A., being examined by me separate from her husband, acknowledged that she executed the same for the purpose in it specified with fear or compulsion of any person." Held, that the word "with" being clearly a clerical error for "without," the certificate was good.—King v. Merritt, 67 Mich. 194.

§ 15. ——Seal and signature of officer.

See Comp. L. 1915, §§ 11694-11697.

¶ 39. The commissioner's seal is necessary to authenticate the certificate of a commissioner appointed by the governor of Michigan to take acknowledgments of deeds in another state.—Buell v. Irwin, 24 Mich. 145.

¶ 40. Where a deed was acknowledged before a commissioner of deeds of this state, appointed for another state, and the certificate of acknowledgment has his signature and seal to it, it is sufficient, notwithstanding the certificate does not state that it was given under his hand and seal.—Harrington v. Fish, 10 Mich. 415.

¶ 41. The certificate of acknowledgment to a conveyance is not valid unless subscribed. The name written in the body of the certificate is not such a signature as the law requires.—Ryerson v. Eldred, 18 Mich. 12; Marston v. Brashaw, 18 Mich. 81.

¶ 42. The officer need not add the county for which he acts to his official signature when it appears in the caption to the certificate.—Wright v. Wilson, 17 Mich. 192.

¶ 43. A deed by husband and wife had appended to it two certificates, one of the acknowledgment by the husband, and the other of the acknowledgment by the wife. One was directly above the other; and the lower one alone was signed. Held, that they should be regarded as one certificate and were sufficiently signed.—Wright v. Wilson, 17 Mich. 192.

¶ 44. The omission of a notary to sign an acknowledgment to a deed until after the death of the grantor does not render it invalid.—Taft v. Simpson, 125 Mich. 206.

§ 16. Certificate as to foreign acknowledgments.

See Comp. L. 1915, § 11696.

Certificate of the officer to the facts of acknowledgment, see ante §§ 9-15.

Under Uniform Law, see Comp. L. 1915, §§ 11768, 11769 (form).

¶ 45. Authenticating certificate as to notary's official character and genuineness of his signature, and as to execution and acknowledgment according to laws of other state, is prerequisite to recording.—Dohm v. Haskin, 88 Mich. 144.

¶ 46. An assignment of a Michigan mortgage, acknowledged before a commissioner of deeds for Michigan in the state of New York, as evidenced by his official certificate and seal, is entitled to record without any certificate that the instrument is executed according to the laws of the state of New York.—Gray v. Waldron, 101 Mich. 612.

¶ 47. Where a deed is executed and acknowledged in another state the certificate of the clerk to the official character and genuineness of signature of the acknowledging officer, and to the execution and acknowledgment of the instrument according to the laws of the state, must have attached thereto the seal required by statute.—Hoban v. Cable, 102 Mich. 206.

¶ 48. A deed executed and acknowledged in another state could not be recorded in Michigan under the law of 1840, unless the clerk's certificate of its due execution was under seal.—Pope v. Cutler, 34 Mich. 150.

¶ 49. A deed without witnesses, made and executed in another state in 1843, is not sufficiently authenticated by a clerk's certificate, made in 1855, which does not purport to come from a clerk of a court of record.—Donahue v. Klassner, 22 Mich. 252.

¶ 50. A certificate by a county clerk in New York of the due execution of a deed is sufficient, though his status as clerk of a court of record is not set forth; the court will take judicial cognizance, for the purpose of sustaining the certificate, of the constitutional provision in that state by which the clerk of that county is made clerk of the supreme court and the court is given the character of a court of record.—Morse v. Hewett, 28 Mich. 481; Munroe v. Eastman, 31 Mich. 283.

¶ 51. The clerk's certificate of the due execution of a deed executed in another state is no part of the deed, nor is it essential to its validity.—Harrington v. Fish, 10 Mich. 415.

¶ 52. The clerk's certificate of the official character of an officer taking the acknowledgment is no part of the acknowledgment or of the certificate of acknowledgment.—Galpin v. Abbott, 6 Mich. 17.

¶ 17. ——Substance and sufficiency of showi
Effect of curative acts, see post §§ 22, 23.
Under earlier laws, see also post ¶ 63.

¶ 53. A certificate which sets forth th the person "whose name is subscribed to t certificate of the proof or acknowledgment the annexed instrument, and thereon writte was at the time of taking such proof or a knowledgment a justice of the peace in a for said county, elected, sworn and du authorized to take the same," and certifies the genuineness of his signature, and a that "the annexed instrument is executed a cording to the laws of this state," fairly i ports that the identical acknowledgment question was a legal one in the state whe taken, and that the justice was authorized make it.—Morse v. Hewett, 28 Mich. 481.

¶ 54. A clerk's certificate attached to deed executed and acknowledged in Frankl county, Massachusetts, certifying to the of cial capacity of the justice of the peace wl took the acknowledgment, etc., describing t certifying officer as clerk of the judicial cou of the commonwealth of Massachusetts f the county of Franklin, signed by the cle and sealed with the seal of the supreme j dicial court of said commonwealth, is a suf cient compliance with Comp. L. 1857, § 272 Laws 1861, p. 17, § 3 (How. St., §§ 566 5726).—Shotwell v. Harrison, 22 Mich. 41(

¶ 55. The only description of official cha acter of the person acknowledging a deed another state was "J. P." appended to h name. The certificate prescribed by statu in case of the execution of a deed in anoth state was attached in due form, and attest the official character of the acknowledgi officer as a justice of the peace. Held su cient.—Final v. Backus, 18 Mich. 218.

¶ 56. A deed was executed and acknov edged in another state conveying land in t state. The certificate of the proper clerk w made and attached several years afterwar certifying that the deed was executed and knowledged according to the "existing" l of the state. Held a sufficient certificate entitle the deed to record.—Harrington Fish, 10 Mich. 415.

¶ 57. Where a deed was executed in N York in 1839, a proper certificate of the thentication of its due execution, made a attached to it in 1875, removed any previc defects in the proof of its formal executi and makes it admissible in evidence in Mic gan.—Healey v. Worth, 35 Mich. 166.

¶ 58. A deed cannot be excluded from e dence for a supposed ambiguity in the cler certificate in authenticating its execution a acknowledgment as follows: "I further c

tify that the said instrument is executed and proved or acknowledged according to the laws of this state." The word "proved" is surplusage, as there is no certificate of proof to which it can apply.—Nelson v. Graff, 44 Mich. 433.

¶ 59. Where, under the act of April 12, 1827 (Code of 1833), a deed of lands within the territory of Michigan was proved or acknowledged in the state of New York, in conformity with the laws of that state, it was not necessary to entitle the deed to record within the territory that the acknowledgment be accompanied by a county clerk's certificate proving the official character and signature of the officer taking the acknowledgment.—Ives v. Kimball, 1 Mich. 308; Lacey v. Davis, 4 Mich. 140; Galpin v. Abbott, 6 Mich. 17.

¶ 60. Where the conveyance certified is of Michigan land and is executed in another state, it is shown to be valid when there is attached thereto a certificate of the proper clerk certifying to such officer's official character and to the fact that the acknowledgment was made according to the laws of such other state.—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

¶ 61. The certificate of the clerk of a county in a foreign state that the person taking an acknowledgment to an annexed deed was a master in chancery and a notary in and for the county, and that such deed was executed, and the acknowledgment taken, according to the laws of such foreign state, makes valid an acknowledgment in such foreign state by a master in chancery and notary, whose certificate recited that the parties, naming them, personally appeared before him, "who, I am satisfied are the grantors in the within deed of conveyance," under How. St. § 5660, providing that where acknowledgments are taken without the state the clerk certifying to the official character of the officer shall also state "that the deed is executed and acknowledged according to the laws of such state."—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. Ed. 134, 8 Sup. Ct. Rep. 1136.

§ 18. Purpose and effect of acknowledgment.

See also ante ¶¶ 51, 52.
Substantial requisites and mere informalities, see ante § 10.
Eligibility to record and admissibility of acknowledgment cured by statute, see post § 22.
Admissibility where date varies from instrument, see ante § 11.
To make instrument or record thereof self proving, see Comp. L. 1915, § 11696.
Eligibility to record, see Comp. L. 1915, § 11710.

¶ 62. An unacknowledged deed does not prove itself, cannot be recorded, and cannot be proved by the registry though actually recorded.—People v. Marion, 29 Mich. 31.

§ 19. ——Acknowledgments made under earlier laws.

See also ante ¶ 37, post ¶ 82.
Admissibility of deed where acknowledgment cured by statute, see post § 22.
Validity of certificate to officer's capacity and regularity made after lapse of years, see ante § 17.
Admissibility in evidence, see Comp. L. 1915, § 11741.

¶ 63. A deed of Michigan lands executed in New York in March, 1837, before two subscribing witnesses, and acknowledged before a commissioner of deeds, was entitled to record in Michigan under the laws then prevailing, although the clerk's certificate attached to the acknowledgment was not authenticated by a seal.—Hogelskamp v. Weeks, 37 Mich. 422.

¶ 64. It is only necessary that the acknowledgment conform to the law existing when it was made; hence an objection to the introduction in evidence of the record of a deed executed in another state, and certified so as to entitle it to record under the law then in force in this state, on the ground that the certificate does not show another fact made essential by a later statute, is untenable.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

§ 20. ——Impeachment and presumptions.

Under curative acts, see also post §§ 22, 23.
Acknowledgment by interested officer, see ante § 5.
Effect of person's ignorance of English language, see ante ¶ 12.
As to attestation by two witnesses, where some witnessed particular signature, see ante ¶ 4.

¶ 65. A genuine certificate of acknowledgment is presumptive evidence of the genuineness of the document to which it is attached.—Cameron v. Culkins, 44 Mich. 531.

¶ 66. A certificate of acknowledgment in proper form raises a presumption of the execution of the paper as stated therein that cannot be overcome except by clear and satisfactory evidence.—Shelden v. Freeman, 116 Mich. 646.

¶ 67. Instruments properly acknowledged carry with them a presumption of genuineness, which must be overcome by a preponderance of evidence.—Metropolitan Lumber Co. v. McColeman, 140 Mich. 333.

¶ 68. A certificate of acknowledgment carries with it the presumption that the officer making it has certified to the truth, and the party attacking it has the burden of proof. —Dikeman v. Arnold, 78 Mich. 455.

¶ 69. The regularity of acknowledgment taken before a reputable acknowledging officer is presumed, and the burden of proof is with the party contesting the instrument to show misconduct on the part of the officer, or forgery, or other irregularity in the instrument that he ought to have discovered.—Hourtienne v. Schnoor, 33 Mich. 274.

¶ 70. Certificates of acknowledgment may be impugned by proof of fraud or duress, but not by a mere denial of the facts certified, made on oath by the party purporting to make the acknowledgment, and opposed by equally strong evidence in support of such certificate. —Johnson v. Van Velsor, 43 Mich. 208.

¶ 71. A notarial certificate is prima facie but not conclusive evidence of the authority of the instrument to which it is attached, and its force may be rebutted by the testimony of the person who appears to have executed the instrument.—Camp v. Carpenter, 52 Mich. 375.

¶ 72. If officer taking acknowledgment is satisfied as to parties' identity, the court cannot inquire into evidence basing his conclusion and it seems that his certificate stating that he is "satisfied" that the parties appearing before him "are the grantors," etc., is sufficient. At any rate, where the conveyance certified is of Michigan land and is executed in another state, it is shown to be valid when there is attached thereto a certificate of the proper clerk certifying to such officer's official character and to the fact that the acknowledgment was made according to the laws of such other state.—Culbertson v. H. Witbeck Co., 127 U. S. 326, 32 L. ed. 134, 8 Sup. Ct. Rep. 1136.

§ 21. Effect of invalidity or lack of acknowledgment.

What amounts to invalidating defect, see ante §§ 9-15.
Effect on the certificate itself of informalities therein, see also ante § 10.
Effect of the acknowledgment, its purpose and conclusiveness, see ante §§ 18-20.

¶ 73. The validity of a deed, as between the parties, is not necessarily affected by defective acknowledgments or certificates of acknowledgment, though they may not entitle it to record, or make it admissible in evidence without proof of the signatures. But if the defects are remedied before trial the deed becomes effective and admissible in evidence.—Taylor v. Youngs, 48 Mich. 268.

¶ 74. A deed or a power of attorney may be valid as between the parties and completely bind the grantor without any acknowledgment.—People v. Marion, 29 Mich. 31.

¶ 75. A deed good at common law is effective to transfer the property regardless of its being entitled to recordation.—Taft v. Simpson, 125 Mich. 206.

¶ 76. A deed is valid between parties without witnesses or acknowledgment.—Jennings v. Reeson, 200 Mich. 559.

¶ 77. Where a husband conveys his own title the deed is good as against him, even though the certificate of acknowledgment does not conform to the law concerning married women.—Conrad v. Long, 33 Mich. 78.

¶ 78. An acknowledgment is not one of the constituent facts of a conveyance proper. Even if bad, the deed, if a good common-law conveyance, will prove a transfer of title as between the parties, and as against all others rightly chargeable with notice.—Brown v. McCormick, 28 Mich. 215; Price v. Haynes, 37 Mich. 487.

¶ 79. The acknowledgment of an assignment of a mortgage is no part of the instrument of assignment.—Livingston v. Jones, H. 165.

¶ 80. A mortgage on a homestead will not be set aside merely because the acknowledgment of the mortgagor's wife was taken in her husband's presence unless there is some showing that she acted under compulsion.— Norton v. Nichols, 35 Mich. 148.

¶ 81. The acknowledgment of a deed before a notary public, who is an interested party, does not impair the validity of the deed, since title would pass without any acknowledgment whatever, and hence such objection goes, at most, to the admissibility of the deed in evidence.—Schwartz v. Woodruff, 132 Mich. 513.

¶ 82. A deed acknowledged by a foreign notary without the certificate of authority required by the laws of Michigan at that time, is a valid conveyance between the parties.—Messenger v. Peter, 129 Mich. 93.

§ 22. ——Of acknowledgment cured by statute.

¶ 83. Under the Confirming Act of 1861, How. St., §§ 5724, 5727, the record of a deed defectively executed is not made evidence of a valid sale without the production of the deed itself. The law makes such a record "hereafter operate as legal notice of all the rights secured by such instrument;" but does not render it of any validity except for notice.—Brown v. Cady, 11 Mich. 535.

¶ 84. The record of a deed defectively acknowledged is not evidence of the original instrument; but where the instrument was made in good faith and for a valuable consideration, and was intended to operate as a conveyance, the record operates as a notice of the rights secured by the deed (Laws 1861, p. 16, How. St., §§ 5724, 5727).—Brown v. McCormick, 28 Mich. 215.

¶ 85. Laws 1875, p. 128 (How. St., § 4015), in making valid the conveyances of mining and manufacturing corporations made in good faith though not according to law, does not make them presumptive evidence of the rightful character of the sale. A deed in proper form and a sale in good faith for value must be clearly proved.—Marquette, H. & O. R. Co. v. Atkinson, 44 Mich. 166.

§ 23. Curative legislation.

See Comp. L. 1915, § 11694.

Effect of cured acknowledgment, see ante § 22.

Supplying acknowledgment or certificates after making, see ante §§ 11, 16, 17, 20, 21.

Married women's acknowledgments, see Comp. L. 1915, § 11699.

¶ 86. The curative act confirming deeds irregularly executed (Laws 1861, p. 16, How. St., §§ 5724, 5727) was not repealed by Laws 1867, p. 139, How. St., § 5707, forbidding the record of deeds without due acknowledgment. The latter is simply intended to diminish the frequency of occasions for applying the former law.—Brown v. McCormick, 28 Mich. 215.

¶ 87. In order to bring a deed, executed in another state not in compliance with our laws, within the saving of the Act of 1861, How. St., § 5724, it is necessary to show that, although not valid under the laws of Michigan as a conveyance for all purposes, it was executed according to the laws of the state where the execution took place, as well as regularly acknowledged. And these facts cannot be presumed without evidence.—Brown v. Cady, 11 Mich. 535.

¶ 88. The Confirming Act of 1861, How. St., § 5726, confirms only such deeds as are legally executed and acknowledged, having certificates of acknowledgment and clerk's certificates, when they are required, which, though informal, are yet substantially correct.—Brown v. Cady, 11 Mich. 535.

¶ 89. Laws 1861, p. 16, § 3, How. St., § 5726, does not cure the defect caused by the want of the commissioner's seal to the certificate of an acknowledgment taken by a Michigan commissioner of the execution of a deed made in another state; or caused by the failure of the certificate to show that the grantor acknowledged that he executed the deed.—Buell v. Irwin, 24 Mich. 145.

¶ 90. The saving provisions of the Act of 1861, How. St., § 5724, do not apply to a deed without witnesses made and acknowledged in another state in 1843, and authenticated by a clerk's certificate attached in 1855, which does not purport to be made by the clerk of a court of record.—Donahue v. Klassner, 22 Mich. 252.

¶ 91. Under Laws 1861, p. 16, a deed that was executed before a commissioner of deeds in New York in 1839, and has attached to it a clerk's certificate to the commissioner's authority and the genuineness of the signature and the regularity of execution according to New York law, is not open to the objection that it had but one witness or was not acknowledged before the proper officer as provided by the laws in force at the time of its execution.—Brooks v. Fairchild, 36 Mich. 231.

¶ 92. Under Comp. L. 1871, § 4253, How. St., § 5727, which gives validity to certain defective instruments of conveyance and makes the registry thereof constructive notice, the record of a deed executed in New York in 1839, and recorded in Michigan in 1846, became legal notice of all rights under it, though lacking any clerk's certificate of the authentication of due execution until one was attached in 1875.—Healey v. Worth, 35 Mich. 166.

¶ 93. An ante-nuptial contract whereby the prospective husband agrees that certain lands shall on his death be conveyed to the wife, in case she survives him, otherwise the contract to be void, is a "conveyance" within the meaning of How. St., §§ 5645, 5727, and its record, though it has only one witness, is notice to a subsequent purchaser or mortgagee.—Aultman v. Pettys, 59 Mich. 482.

¶ 94. How. St., § 5727, mabing the record of certain instruments, executed in good faith "and for a valuable consideration," but defective in certain formal statutory requisites, notice of all the rights secured thereby, applies to and makes good a recorded but unacknowledged instrument, conveying land to the grantor's grandchildren, subject to life estates in her husband and son, and reciting and being upon a valuable consideration.—Lariverre v. Rains, 112 Mich. 276.

¶ 95. The last branch of Laws 1861, p. 16, § 3, How. St., § 5726, does not relate to acknowledgments taken in other states by commissioners of deeds for Michigan.—Buell v. Irwin, 24 Mich. 145.

§ 24. Liability for error or fraud.

Duty in taking proofs and identifying persons, see ante § 6 et seq.

¶ 96. Recovery may be had on a notary's bond for his misfeasance in knowingly certifying the acknowledgment of a grantor who has not appeared before him, or in certifying an acknowledgment without reading it.—People ex rel. Curtiss v. Colby, 39 Mich. 456.

¶ 97. A notary's liability on his bond for falsely certifying to the acknowledgment of a mortgage cannot be made to depend upon whether the mortgagee has redeemed a prior mortgage and has so reduced the damages.—People ex rel. Curtiss v. Colby, 39 Mich. 456.

¶ 98. The condition of a notary's bond to faithfully discharge the duties of his office, is broken by his act in affixing a false certificate of acknowledgment to a mortgage to which he has forged the signatures, and the breach is actionable by one who is injured by the fraud.—Doran v. Butler, 74 Mich. 648.

Liability of public officer for negligence in taking of acknowledgment, see note, 11 N. C. C. A. 581-598.

ACQUIESCENCE to ACTION OVER.

Cross-References.

Acquiescence—
See generally Equity (laches); Estoppel; Agency (ratification); Election and Waiver.
As basis of implied admission, see Evidence, VII; Indictment, VIII.
As basis for implied contract, see Implied Contracts.
As basis of prescription or adverse possession, see Adverse Possession; Easements.
As waiver of judicial error, see Saving Questions.
And see specific topics involving waiver or nonclaim.
Acquiring Jurisdiction, see Courts, V; Appearance; Process; Indictment; Arrest
Acquiring Property—
Capacity to acquire, see specific topics like Corporations; Municipal Corporations; Railroads; Infants; Insane Persons; Aliens.
Mode of acquiring, see Deeds; Gifts; Sales; Descent; Wills; Eminent Domain; Executions (sale on); Adverse Possession; etc.
Acquittal, see generally Crimes; Indictment and see also Malicious Prosecution (termination in favor).
Acreage—
Reconcilement or repugnancy of acreage to calls and distances in fixing boundaries, see Boundaries.
Liability for deficiency under contract see Vendors and Purchasers; and see also Covenants for Title.
Action Over, see generally Indemnity and Contribution; and as to action over by public in highway cases, see Highways XII, G.

ACTIONS AND SUITS.

TREATS of those general principles relating to actions and suits, or other judicial proceedings, which are of common application, excluding matter involving the remedies or procedure peculiar to specific rights, contracts and torts (e. g., Contracts, X; Conversion; Fraud; Libel and Slander; etc.), also matter peculiar to specific remedies (e. g., Ejectment; Trespass; Specific Performance), and also the law of procedure in actions and suits (see Evidence; Judgment; Pleading; Trial; Verdict and Findings; etc.).

Analysis.

§ 1. In general; definitions and distinctions.
§ 2. Causes of action.
§ 3. ——Severableness and splitting.
§ 4. ——Accrual, maturity and extinction of cause.
§ 5. Defenses and disabilities.
§ 6. Commencement, pendency and termination of action.
§ 7. Antecedent and subsequent facts.
§ 8. Demand, notice and other prerequisites.
§ 9. Remedies and forms in general.
§ 10. Legal or equitable.
§ 11. Contractual or tortious.
§ 12. Statutory remedies and actions.

§ 13. Common-law forms under the Judicature Act.
§ 14. Covenant and debt.
§ 15. Detinue and replevin.
§ 16. Trover.
§ 17. Trespass and case.
§ 18. Choice of remedies, election and waiver.
§ 19. Cumulative and exclusive remedies.
§ 20. Practice and procedure.

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§ 1. In general; definitions and distinctions.

Various forms and distinctions, see post §§ 9-17 and cross-references thereunder.
Official party defendant as requisite to suit against state, see State of Michigan.
Application for writ of assistance as new proceeding or continuation of the old, see Assistance, Writ of.
What is penal action, see post ¶ 36; and see also Penalties.

¶ 1. A proceeding in court for the vacation of a street is not technically an action or a suit, but is a statutory proceeding, and its determination must ordinarily involve the discretionary consideration of public interests, and can seldom, if ever, rest on a claim of private right to the exclusion of other considerations.—Detroit Real Estate Inv. Co. v. Wayne Circuit Judge, 137 Mich. 108.

§ 2. Causes of action.

Elements of tort in general, see Torts.
Elements of negligence in general, see Negligence.
Doctrine of damnum absque injuria, see generally Torts.
Doctrine that actual damages must be proved to sustain award of substantial damages, see Damages, VIII, XI.
Doctrine that injury must be the proximate effect of negligence to be actionable, see Negligence.
Doctrine that recoverable damages extend only to proximate consequences, see Damages.
Damnum absque injuria from exercise of right of eminent domain, see Eminent Domain, III, IV.
Actionable change of grade on street, see Highways, V.
Use of waters amounting to damnum absque injuria, see Waters.
Survival of causes of action, see Abatement, §§ 16, 17.

¶ 2. The elements of a cause of action are a breach of duty to another and a damage to him resulting therefrom.—Post v. Campau, 42 Mich. 90.

¶ 3. One entitled to nominal damages only may yet have a right of action.—Chapel v. Smith, 80 Mich. 100.

¶ 4. A civil action is maintainable where the person complaining is of a class entitled to take advantage of the law, is a sufferer from the disobedience, is not himself a partaker in the wrong of which he complains, or is not otherwise precluded by the principles of the common law from his proper standing in court.—Syneszewski v. Schmidt, 153 Mich. 438; Lepard v. Michigan Cent. R. Co., 166 Mich. 373.

¶ 5. The violation of a statutory duty is the foundation of an action in favor of such persons only as belong to the class intended by the legislature to be protected.—Lepard v. Michigan Cent. R. Co., 166 Mich. 373.

¶ 6. One cannot be damnified by being deprived of the opportunity of doing what he has no right to do; e. g., of taking timber off lands when forbidden by contract of purchase.—Jennison v. Stone, 33 Mich. 99.

¶ 7. The owner of wild lands has an immediate right of action against one who floods them, though no present special damage can be shown.—Chapel v. Smith, 80 Mich. 100.

¶ 8. Damage alone does not give a right of action; wrong and damage must concur.—Macomber v. Nichols, 34 Mich. 212; Brown v. Marshall, 47 Mich. 576; National Copper Co. v. Minnesota Mining Co., 57 Mich. 83.

¶ 9. A wrong to one person, though it may incidentally injure another, gives the latter no right to redress unless it wrongs him also.—Hall Lumber Co. v. Gustin, 54 Mich. 624.

¶ 10. No private action lies for a crime as such.—Elliott v. Van Buren, 33 Mich. 49.

§ 3. ——Severableness and splitting.

Joinder and splitting causes in equity, since it involves the doctrine that equity will do complete relief and other doctrines peculiar to equity, is treated in Equity.
Elements and items recoverable in a given action, see Damages.
Consolidation and severance of actions (as distinguished from causes of action), see Consolidation and Severance.
Separation of counts, joinder and misjoinder in pleading, see Pleading, II.

The doctrine, that, when recovery has been had on one portion of a cause of action, which might have been sued in its entirety, the judgment is a bar to a further recovery, is a part of the law of Former Adjudication, which see.

Combining and splitting labor claims, see Assignments; Corporations, XXIV, E, 2; Liens.

Splitting cause of action on insurance policy, see Insurance, XX, A.

Effect of decree declaring ratable shares in decedent's chose in action on distribution of estate, as entitling heir to sue for his share, see Estates of Decedents, XIII, B.

¶ 11. The principle which prevents the splitting up of causes of action and forbids double vexation for the same thing is a rule of justice, and not to be classed among technicalities. It was intended to suppress serious grievances.—Dutton v. Shaw, 35 Mich. 431.

¶ 12. While the law does not favor the unnecessary splitting up of causes of action, it does not require that two or more distinct and different causes of action shall be brought into one litigation. The nearer the controversy is to being single and distinct the more likely the jury is to dispose of it with full intelligence and justice.—Morehouse v. Baker, 48 Mich. 335.

¶ 13. A single cause of action even for a tort cannot be split up so as to permit separate actions for different parts thereof.—Continental Ins. Co. v. H. M. Loud & Sons Lumber Co., 93 Mich. 139.

¶ 14. The rule that a single cause of action cannot be split and made the subject of several actions applies generally where the cause is in favor of several persons jointly or against several persons jointly.—Jensen v. Gamble, 191 Mich. 233.

¶ 15. A defendant having interposed a set-off for $150 for an unpaid balance due on an executed contract, cannot split his cause of action and withdraw that part over $100 so as to enable him to recover for it in a subsequent suit, where it embraces part of an indivisible balance.—Andreas v. Leavitt Twp. School Dist. No. 4, Fractional, 138 Mich. 54.

¶ 16. A party who proceeds in chancery to procure the annulment of a decree must set forth all the reasons he has against the validity of the deed and cannot allege one reason, have that determined against him and then bring suit for another reason.—Sayers v. Auditor General, 124 Mich. 259.

§ 4. ——Accrual, maturity and extinction of cause.

The time when right of action accrues generally arises in question on a plea of limitations or laches, which see in Limitations of Actions; Equity.

The doctrine of anticipatory breach of contract, so called, by which action for breach may be brought before the time for performance, is treated in Contracts, VII, X; Sales, VIII, E, IX, B.

Abatement of actions and of cause of action, see Abatement and Revival.

Survivable causes of action on death of party, see Abatement, §§ 16, 17.

Right to bring second suit while premature one is pending, see Abatement, ¶ 30.

Necessity that condition be made precedent to prevent accrual, see post ¶ 32.

Time of accrual on successive accounts stated, see Account Stated, § 7, ¶ 32.

¶ 17. One cannot bring suit before his right of action accrues; the state of facts authorizing a party to sue in his own name must, as a general rule, exist at the time suit is so instituted.—Hovey v. Sebring, 24 Mich. 232.

¶ 18. A cause of action accrues to a party at the earliest time when he may, of his own volition, institute proceedings.—In re King's Estate, 94 Mich. 411.

¶ 19. Parties may agree to submit the question of unliquidated damages to arbitration as a condition precedent to bringing suit.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

§ 5. Defenses and disabilities.

Defenses pertaining to the particular cause of action, see topics treating of that cause of action, e. g., Contracts; Sales; Negligence; Highways, XII, XIII; Railroads, VIII; and like topics.

Special defenses like payment, release, etc., see Payment, Tender and Deposit; Release; Limitation of Actions; Frauds, Statute of; Fraud; Duress; etc.

Disabilities, see Husband and Wife; Incompetency; Infants; Insane Persons.

Want of power to act or contract, see Corporations; Municipal Corporations; and the like.

Bar or estoppel by judgment, and merger in judgment, see Former Adjudication.

Pendency of another action as ground for abatement, see Abatement and Revival, §§ 10-13.

Contracts and stipulations affecting right to sue or make given defense, see Contracts, IV, VI; Stipulations; Insurance, XX, A.

Disability to sue state, see State of Michigan.

That it is no defense to a prosecution for violating an ordinance that it has not been enforced against others equally guilty, see Municipal Corporations, XVI, B.

¶ 20. A suit pending in another state is not a bar, even if it might be pleaded in

abatement.—Wilcox v. Kassick, 2 Mich. 165.

¶ 21. Pendency of another suit involving the same subject-matter is not a bar.—Near v. Mitchell, 23 Mich. 382; Sullings v. Goodyear Co., 36 Mich. 313.

¶ 22. Pendency of a prior suit in which there can be no recovery because it was prematurely brought, does not bar a new suit for the same cause of action.—Blackwood v. Brown, 34 Mich. 4.

¶ 23. Even though a decree in admiralty for a master's wages has been granted and affirmed on appeal, it not being satisfied, does not bar a common-law action for them.—People ex rel. Granger v. Wayne Circuit Judge, 27 Mich. 406; Murphy v. Granger, 32 Mich. 358.

¶ 24. The rule that title to land cannot be tried in a personal action, does not prevent the making of a defense in such an action (replevin) that the plaintiff had no title to the land from which the chattels (logs) were severed, since the judgment would not be a bar on the question of title.—Busch v. Nester, 70 Mich. 525, citing Keyser v. Sutherland, 59 Mich. 455.

§ 6. Commencement, pendency and termination of action.

The question when an action is commenced usually arises on an issue of limitations and will be treated usually in Limitations of Actions, V.

Commencement of action as foundation for attachment or garnishment, and attachment or garnishment as commencement of the action, see Attachment; Garnishment.

Process or service to commence action, see Process.

Mode of serving defendant when action is begun by declaration, see Process, II, A.

Continuance for trial at later time, see Continuances.

Suspension or stay of action or proceedings therein, see Appeal and Error, IX; Stay of Proceedings; Injunctions, II; Abatement and Revival.

Discontinuance or dismissal, see Discontinuance.

Writ or proceeding after judgment, or accessory to action, as new action or continuation of old, see specific topic treating of such writ or proceeding, e. g., Appeal and Error; and see Limitations of Actions, V.

Proceeding for writ of assistance as new action or continuation of old, see Assistance, Writ of.

¶ 25. It seems that a suit is commenced when summons is taken out with the bona fide intention of placing it in the hands of an officer and having it served during its life.—Harvey v. Detroit Fire & Marine Ins. Co., 120 Mich. 601.

¶ 26. Inasmuch as the commencement of a suit requires the delivery or transmittal of a summons to an officer with the bona fide intention of having it served, such delivery or transmittal must be made within the statutory period after the injury on which the suit is based has occurred, and it is not enough that the writ may have issued within the period.—Dedenbach v. City of Detroit, 146 Mich. 710.

¶ 27. Actions commenced by declaration are not begun until the declaration is filed.—Ellis v. Fletcher, 40 Mich. 321; Wetherbee v. Kusterer, 41 Mich. 359; South Bend Chilled Plow Co. v. Manahan, 62 Mich. 143.

¶ 28. The rule that a suit in chancery begins for most purposes with the filing of the bill, applies where a defendant who has not answered dies, and the suit is revived by petition against his administrator.—Gordon v. Tyler, 53 Mich. 629.

¶ 29. The simultaneous issue of two writs of summons in the same case, tested in the names of different judges, cannot be considered as effectuating the commencement of distinct suits where the record exhibits the two as allied proceedings in one case.—Bogue v. Prentis, 47 Mich. 124.

¶ 30. An action commenced is presumed to be still pending unless the contrary is shown.—State Savings Bank v. Wayne Circuit Judge, 95 Mich. 100.

§ 7. Antecedent and subsequent facts.

See also ante ¶ 17.

The allegation of a cause of action pleaded as of a time certain and proof of one at another time presents a question of variance, as to which, see Pleading, X, and those portions of specific topics treating of actions and procedure, e. g., Contracts, X.

General rule as to admissibility of matters after commencement of action and of time pleaded, see Evidence, III, and also specific topics.

§ 8. Demand, notice and other prerequisites.

A demand, tender or notice may be requisite to fix the rights of the party under contract or to establish a tort by fixing a wrong. In this sense it is not so much a prerequisite of the action as a part of the cause of action, and will be treated with topics treating of the various causes of action. See Assignments; Contracts; Conversion; Negotiable Instruments; Replevin; Sales; Vendor and Purchaser; and the like.

Notice of a danger may also be necessary to engender a duty in respect thereto, and thus to show negligence, see Negligence and related topics, e. g., Highways; Master and Servant; Railroads; etc.

Arbitration or umpirage as precedent to right to sue under contracts, see Building and Construction Contracts, VI, IX; Contracts, X; Insurance, XX, A.

Various statutes have enacted that a notice of claim or of intention to sue must be given to municipalities or public officers before suing, and these are treated in Highways; Municipal Corporations.

Commencement of action as prerequisite to attachment or garnishment, see Attachment, I; Garnishment, I.

Dismissal of premature action as carrying down all claims depending thereon, see Discontinuance, Dismissal and Nonsuit, III.

Accrual dependent on prerequisites, see ante § 4.

¶ 31. Where a demand is necessary to create a cause of action, such demand must be made within a reasonable time.—Freeman v. Ingerson, 143 Mich. 7.

¶ 32. In order to prevent one from suing where he has agreed to arbitrate, there must be another and further agreement that makes the award a condition precedent to the right of action.—Chadwick v. Phoenix Accident & Sick Benefit Ass'n, 143 Mich. 481.

§ 9. Remedies and forms in general.

Constitutional power of legislature to change forms, see Constitutional Law.

As to the form of action proper to be used in a given case, see topics treating of subject-matter of the cause of action, such as Contracts, VII, D, X; Carriers, II, J, IV, E; Covenants for Title, IV; Conversion; Trespass; Nuisance; Negligence; Sales, VIII, IX; etc.

Form or nature of action as determined by declaration, see Pleading, II.

Form as determining period of limitations, see Limitations of Actions, II.

Objections for form, see generally Pleading; and as to saving question for review by seasonable objection, see Saving Questions for Review.

Proceedings in rem and in personam, see Former Adjudication (estoppel and bar); Process (manner of service); and see Attachment; Quieting Title; Estates of Decedents; Admiralty; Shipping; Liens; and other topics dealing with ex parte proceedings.

Bastardy proceedings as civil or criminal in nature, see Bastards.

What law governs when foreign cause of action is sued on, see Conflict of Laws, VII.

Trial of title to land, see generally Ejectment; Quieting Title; but see also ante ¶ 24, as to defense of title.

¶ 33. Whenever the common law gives a right or prohibits an injury, it gives a remedy by action.—Stout v. Keyes, 2 D. 184.

¶ 34. Circuity of action should if possible be avoided, and is unnecessary when the rights of parties can be fully adjusted in one suit.—Rall v. Cook, 77 Mich. 681; Seligman v. Pinet, 78 Mich. 50.

¶ 35. The form of a remedy does not affect its substance.—First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 58 Mich. 315.

¶ 36. An action, based on the statute of Canada where the accident occurred, for death caused by negligence, is not a penal action.—Rick v. Saginaw Bay Towing Co., 132 Mich. 237.

¶ 36a. The proceedings of a board of registration in medicine under Pub. Acts 1899, No. 237, How. St., 2nd Ed., § 5108 et seq., to determine the qualifications of an applicant for a certificate of registration, are not criminal in their nature, although one assuming to practice medicine without a certificate is deemed guilty of a criminal offense.—Reetz v. People, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; affirming 127 Mich. 87.

§ 10. Legal or equitable.

Equitable causes of action and rights generally, see Equity; and see specific topics treating of such rights, e. g., Accounting Suits; Creditors' Suits; Fraudulent Conveyances; Foreclosure of Mortgages; Mortgages; Liens; Trusts; etc.

¶ 37. The constitutional provision directing the legislature to abolish distinctions between law and equity proceedings, as far as practicable, does not blend legal and equitable interests, although favoring the removal of such as are nominal rather than real.—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

¶ 38. In Michigan the distinction between law and equity as applied to remedies has been maintained. Courts of law have no jurisdiction to reform written instruments, such jurisdiction being vested exclusively in courts of chancery.—Bush v. Merriman, 8 Mich. 260.

§ 11. Contractual or tortious.

Nature as determining assignability of cause, see Assignments, I.

Nature of action, whether in contract or tort, for purpose of joinder or set-off, see Pleading, II; Set-off and Recoupment, III.

Whether action against carrier or telegraph company sounds in tort or on the contract, see Carriers, II, J, IV, E; Telegraphs and Telephones.
Waiver of tort to sue in assumpsit, see Assumpsit; Conversion; Fraud; Trespass.

¶ 39. A cause of action may be in tort though arising out of contract relations between the parties where a considerable part of the plaintiff's case rests upon matters outside of the contract, growing out of a duty which the defendant owes to the plaintiff.—Church v. Anti-Kalsomine Co., 118 Mich. 219.

§ 12. Statutory remedies and actions.

See also ante ¶ 5.
See generally the specific topics for statutory rights of action and statutory remedies, e. g., Death by Wrongful Act; Assumpsit (statutory right to waive tort); Intoxicating Liquors, VII (Civil Damage Act).
Pleading statutes, see Pleading, I, C; and see specific topics treating of statutory remedies.
Enactment, titles, and amendment and repeal of statutes, see Statutes; and see specific topics to which the remedy relates.

¶ 40. One who relies upon a statutory right of action must come within the terms by showing that the facts exist on which the liability arises.—Hall v. Palmer, 54 Mich. 270.

§ 13. Common-law forms under the Judicature Act.

As to the abolition by the Judicature Act of certain of the ordinary common-law actions and the retention of others enlarged to serve the offices of those abolished, see Comp. L. 1915, § 12350.
The forms of action appropriate to a given cause of action are treated in connection with the cause of action, inasmuch as the common-law forms are reduced and changed by the Judicature Act.

§ 14. Covenant and debt.

Actions on bonds or covenants for title, see generally Bonds; Covenants for Title, IV.
Actions before justices of the peace on bonds, see Justices of the Peace.

¶ 41. Debt still lies as at common law upon sealed agreements, and is not barred before ten years.—Goodrich v. Leland, 18 Mich. 110; Stewart v. Sprague, 71 Mich. 50.

§ 15. Detinue and replevin.

See generally Replevin.

§ 16. Trover.

See generally Conversion.

§ 17. Trespass and case.

Causes of action for trespass or trespass on the case, and also the common-law and statutory forms of trespass and case are treated in Trespass.

§ 18. Choice of remedies, election and waiver.

Which remedies are available, see generally topics treating of the cause of action, e. g., Contracts, VII, D; Sales, VIII, IX; and see also cross-references under sections 9 and 11 of this topic.
Waiver of tort to sue in assumpsit, see Assumpsit, I; and see also Implied Contracts, II; Conversion; Fraud and Deceit; Trespass.
General rules as to election and waiver, when election is required or proper, and what constitutes it, see Election and Waiver.

¶ 42. It is not unusual to give a choice of two or more remedies to obtain similar ends.—Case v. Frey, 24 Mich. 251.

¶ 43. While a double satisfaction is seldom allowed, concurrent and cumulative remedies are not universally forbidden.—People ex rel. Granger v. Wayne Circuit Judge, 27 Mich. 406.

§ 19. Cumulative and exclusive remedies.

Usually the question whether one remedy is cumulative to another for the same cause or is exclusive and displaces others will be so involved in the law of the specific cause of action and the remedies prescribed or recognized, that it will be found treated in the topics dealing with the specific cause of action. See generally Election and Waiver; and cross-references there found.
Statutory remedy for forfeiture of land contracts without suit, as cumulative to remedy by suit, see Vendors and Purchasers, XII.
Contempt proceedings against officer for not executing process as excluding action for neglect, see Sheriffs and Constables, VI.

¶ 44. Giving a statutory right of action different in form from that at the common law for the same grievance does not abrogate the right to proceed at common law unless the new remedy is declared to be exclusive.—Bellant v. Brown, 78 Mich. 294.

¶ 45. Comp. L. 1857, § 4550, How. St., § 7778, providing that assumpsit may be brought upon sealed instruments, does not compel a resort thereto; debt or covenant may still be brought.—Goodrich v. Leland, 18 Mich. 110.

§ 20. Practice and procedure.

The law of practice and procedure is treated in specific topics dealing with the several incidents of actions or suits and the trial thereof. The topic treating of the particular practice should be consulted, e. g.,

Pleading; Evidence; Examination of Witnesses; Trial; Verdict and Findings; Judgments and Decrees; Appeal and Error; Certiorari; Mandamus; Quo Warranto; Harmless Error; Saving Questions for Review; and many others whose names will suggest themselves.

Venue of the action and change of venue, and the question whether the action is local or transitory in nature, see Venue.

Jurisdiction of courts generally, see Courts, V; Equity.

Sufficiency of the procedure to acquire jurisdiction, see Appearance; Process.

Collateral attack on jurisdiction, see Judgments, VII.

Parties to actions, see Parties; and see specific topics as to parties to particular actions.

¶ 46. Decisions upon ex parte statements before judicial tribunals or arbitrators are condemned by the courts.—Hudlemyer v. Dickinson, 143 Mich. 250.

ACTING OFFICERS to ADJOINING.

Cross-References.

Acting Officers, see generally Officers; Municipal Corporations; Corporations, XV.

Actionable Words, see Libel and Slander.

Actionable Wrongs, see Torts and specific topics treating of torts; Contracts, VII.

Active Trusts, see Trusts; Wills.

Acts of Congress or of Legislature, see generally Statutes; Constitutional Law.
- Pleading and judicial notice, see Evidence, I; Pleading, I.
- Relating to specific matters, see specific topic involved.

Acts of God—
- As reason for nonliability, see Negligence; Carriers; Insurance; Contracts, VII, C (excuse for nonperformance).

Acts of Public Enemy, see generally War; Contracts, VII, C (excuse for nonperformance).

Acts of Servants and Agents, see Agency; Master and Servant; Independent Contractors.
(breach).

Actual—
- Authority, see Agency; Corporations, XVII.
- Contempts, see Contempt.
- Damages, see Damages; and see also Indemnity.
- Delivery and acceptance, see Sales; Frauds, Statute of; Chattel Mortgages; Fraudulent Conveyances; Execution of Instruments; Escrows.
- Fraud, see Fraud and Deceit.
- Loss, see Insurance.
- Notice, see Notices; Notice and Record of Title; Lis Pendens; Negotiable Instruments; Agency (revocation or limitations on authority); and see specific topics involving notice.
- Possession, see Adverse Possession; Chattel Mortgages; Fraudulent Conveyances; Notice and Record of Title (possession as notice); Forcible Entry; Ejectment.
- Taking for Public Use, see Eminent Domain; Highways.
- Value, see Taxes; Values; Damages.

Additional—
- See generally specific topic treating of the thing described as "additional," e. g., Costs and Allowances; Estates of Decedents; Instructions; Local Improvements and Assessments; Parties; Pleading; Equity (supplemental pleadings); Eminent Domain (additional taking or damaging); Highways (additional servitudes); Railroads; Street Railways (additional tracks); Contracts; Building Contracts (additional work).

Additions to Property, see Accession and Confusion; Fixtures.

Address on Notices or Papers, see Notices; Pleading; Negotiable Instruments.

Address to Jury, see Argument of Counsel; Indictment.

Adduction of Proof, see Evidence; Indictment; Trial (order of proof).

Ademption of Legacies, see Wills.

Adequate Other Remedy, see generally Equity (legal remedy); and see also specific equitable topics like Injunctions; Specific Performance; and as bar to extraordinary legal remedy, see Certiorari; Mandamus; Habeas Corpus.

Adjoining County or Township, see Counties; Townships; Bridges; Highways; Venue; Indictment; Justices of the Peace.

ADJOINING OWNERS.

TREATS of the relative rights of owners of adjoining lands due to the fact of their adjoining apart from any contract to which they are parties, excluding such contract rights as Boundaries; Fences; Party Walls; Easements; etc., all of which see, and also excluding rights of adjoinder on Highways; Railroads; both of which see, and the easements of surface water drainage, which is treated in Waters, II.

Analysis.

§ 1. In general; lateral support and excavations.
§ 2. ——Duty to underpin or shore buildings.
§ 3. ——Pressure by superstructure.
§ 4. ——Character of soil.
§ 5. ——Evidence.
§ 6. Water or other substances cast on adjoining premises.
§ 7. Rights as to trees, fences and party walls.

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§ 1. In general; lateral support and excavations.

Rights of adjoinder and support of land bordering park or parkway, see Parks and Commons.

¶ 1. The owner of land has the right to excavate close to his boundary, but must take reasonable precautions to prevent the soil of the adjoining owner from falling; and he is liable, notwithstanding such precautions, for injury to his neighbor's land, if the soil falls from its own pressure and not from that of a superstructure.—Gildersleeve v. Hammond, 109 Mich. 431.

¶ 2. If one who makes an excavation takes reasonable precautions to protect the adjoining soil, he is not liable for injury either to land or superstructure by a fall caused by the pressure of the superstructure; but his failure to take such precautions renders him liable for injury both to land and superstructure if the soil falls solely by reason of such failure.—Gildersleeve v. Hammond, 109 Mich. 431.

¶ 3. The mere fact that the excavation of a lot adjoining premises of another on which a building is located with one of its walls up to the land causes the wall of such building to fall, does not establish liability of a contractor for injury to goods of a tenant of such building.—Horowitz v. Blay, 193 Mich. 498.

¶ 4. A landowner has a right to excavate to a depth of 114 feet to secure foundations for a building and no recovery can be had by adjoining owners, if reasonable precautions are taken to prevent their soil from falling, though there is a lateral movement of the soil, where no claim is made for injury to the land.—Bissell v. Ford, 176 Mich. 64.

¶ 5. Defendant who is sinking foundations for a building is not required to take extraordinary precautions to have at hand equipment to free the pits from water.—Bissell v. Ford, 176 Mich. 64.

Liability to adjoining landowner for injury to property caused by excavation, see note, 6 N. C. C. A. 900-918.

§ 2. ——Duty to underpin or shore buildings.

Evidence, see post § 5.

¶ 6. Where the wall of a building is placed upon the line of a lot with a three-foot foundation under it, the adjacent owner or his employee is not required to support such wall by an underpinning before excavating such adjoining lot, especially where it appears that the soil is of a clay substance, and it does not appear that such wall would have given away except for the weight of the building resting upon it.—Horowitz v. Blay, 193 Mich. 498.

¶ 7. Although a contractor who is excavating a lot for the purpose of erecting a building adjoining a lot on which a building was constructed with a foundation built to the line is not required to furnish the labor and sustain the expense of constructing a support for the wall, he is bound to conduct the work of excavation with such ordinary care and skill as to avoid unnecessary injury to the building or its contents.—Horowitz v. Blay, 193 Mich. 498.

¶ 8. One who knowingly, intentionally, and wilfully removes the natural support to a building belonging to another, situated four and one-half feet from the boundary line, by

excavating upon his own land, and allowing the soil, from its own pressure, to cave in and undermine the foundation of the building, is not relieved from liability for the resulting damage by the fact that the owner of the building saw the danger, and failed to shore up the property, especially where such owner was informed by the party excavating that he would protect the building.—Gildersleeve v. Hammond, 109 Mich. 431.

§ 3. ——Pressure by superstructure.

See also ante ¶¶ 1, 2.

As dependent on looseness of soil, see also post § 4.

¶ 9. If one's land, which, but for a superstructure, would remain in its natural position with the lateral support removed, caves in because of the pressure of such superstructure, it is damnum absque injuria.—Gildersleeve v. Hammond, 109 Mich. 431.

¶ 10. The lateral support to which one's soil is entitled is such as is sufficient to support the soil in its natural condition; and if the pressure of a superstructure causes one's land to fall into an excavation made by the owner of the adjoining premises, the latter is not liable for injury to land or superstructure. —Hemsworth v. Cushing, 115 Mich. 92.

¶ 11. If a landowner in excavating to secure foundations for a building fails to take reasonable precautions to protect an adjoining owner's soil, he is liable for the injury to a building thereon if such building did not cause the movement of the soil.—Bissell v. Ford, 176 Mich. 64.

§ 4. ——Character of soil.

¶ 12. In an action for damages caused by the removal of the lateral support of plaintiff's land the kind of soil of which such support was comprised may be important in determining the amount of care required in removing it.—Bissell v. Ford, 176 Mich. 64.

¶ 13. If the lateral support of certain land is negligently removed and such land is injured in consequence, it is unimportant whether part of the injury was caused by "seepage" since a landowner is entitled to the lateral support of adjoining land regardless of its composition.—Bissell v. Ford, 176 Mich. 64.

¶ 14. In sinking foundations for modern sky-scrapers, which must be put down to great depths, due regard for the adjacent premises ought to make it incumbent upon the one sinking them to use reasonable diligence to ascertain in advance the character of the soil through which it is intended to go.—Bissell v. Ford, 176 Mich. 64.

§ 5. ——Evidence.

¶ 15. In an action for damages to plaintiff's building caused by the alleged negligent excavation of caisson pits on defendant's premises, where it is alleged that the lateral movement of plaintiff's building was caused by a movement of the soil towards such pits, testimony is admissible to the effect that witness saw a bulging in one of the pits on the side towards plaintiff's building.—Bissell v. Ford, 176 Mich. 64.

¶ 16. Whether the plan used by defendant in excavating for foundations for a building was negligent is for the jury where seven caisson pits were sunk parallel with and across an alley from plaintiff's building, at about the same time, varying from 65 to 114 feet in depth, thereby removing 45 per cent of the soil in the belt in which they were constructed and where engineers testified that the method used was improper and that the pits should have been filled with cement immediately.—Bissell v. Ford, 176 Mich. 64.

¶ 17. In an action for damages to plaintiff's building alleged to have been caused by the negligent removal of the lateral support of the premises where seven caisson pits were sunk by the defendant from 65 to 114 feet in depth, parallel with and across an alley from plaintiff's building. and were left open for several weeks, held, that under the testimony the question whether there was a lateral soil movement; whether it was caused by defendant's failure to use reasonable care in excavating the pits, and whether the building on plaintiff's land caused the movement were all questions for the jury. —Bissell v. Ford, 176 Mich. 64.

¶ 18. It is a question of fact whether a reasonable effort was made to free foundation pits from water after its presence became known where action is brought by an adjoining landowner for injury to lateral support, and the question depends on the exposure of lateral support and the ease with which the water could have been removed.— Bissell v. Ford, 176 Mich. 64.

¶ 19. In an action by the tenant of a building against a contractor for damages for injuries to goods of plaintiff stored in the building due to a fall of the wall of the building adjoining the lot which was being excavated, held that the burden of proof to show negligence on the part of the contractor in failing to notify the landlord of the excavation rested on the plaintiff.—Horowitz v. Blay, 193 Mich. 493.

§ 6. Water or other substances cast on adjoining premises.

Necessity of electing between counts for want of snow guards and for nonrepair of same, see Pleading, II.

¶ 20. In the absence of some fault or neglect of duty one is not liable for damage done by water dripping from his own house upon another's.—Underwood v. Waldron, 33 Mich. 232; Barry v. Peterson, 48 Mich. 263.

¶ 21. Damages may be recovered by the owner of premises upon which snow has been thrown from the defendant's premises, by the defendant's order, to the plaintiff's injury.—Barry v. Peterson, 48 Mich. 263.

¶ 22. The board of education of Detroit was liable for a personal injury sustained by plaintiff by falling on ice and snow which had been precipitated upon a stairway of his house from a sloping roof on a school building located next to the plaintiff's house, there having been no guards to interrupt the falling of the snow and ice, and the board having had notice of the situation; the erection of the building without guards having been the proximate cause of the injury.—Ferris v. Board of Education of Detroit, 122 Mich. 315.

¶ 23. Case lies for damages caused by eavesdrip and snow thrown from defendant's premises upon the space between buildings and on plaintiff's premises.—Barry v. Peterson, 48 Mich. 263.

Pollution of percolating or well waters by waste matter stored or cast on neighboring premises, see note, 2 N. C. C. A. 646-651.

Liability for driving insects upon land of adjoining owner, see note, 2 N. C. C. A. 659.

§ 7. Rights as to trees, fences and party walls.

As to fences and party walls, see Fences; Party Walls.

Injunction against interference with fences or other objects on the line, see Injunctions, II, F.

¶ 24. Where branches of a tree extend over onto the land of an adjoining owner, the latter has no right to cut them off beyond the division line in the absence of a license.—Newberry v. Bunda, 137 Mich. 69.

¶ 25. Defendant rebuilt a line fence under agreement with plaintiff and in so doing cut off, close to the trunk, branches of a tree standing three feet from the line and a short distance from the part of the fence which he was rebuilding. He claimed that this was necessary in order to establish the line. Held that the question whether it was necessary to so cut the branches was properly for the jury.—Newberry v. Bunda, 137 Mich. 69.

ADJOURNMENT to ADMINISTRATORS.

Cross-References.

Adjournment, see generally topics treating of the meeting, body or proceeding adjourned, e. g., Corporations, IX, XVII, A; Municipal Corporations, IV; Courts, II.
Of trials, see Continuances; Indictment; Trial, II (recess); Reference.
Of tax proceedings, see Taxes; Local Improvements and Assessments.
Of sales, see Executions; Foreclosure of Mortgages.
Adjudications, see Judgments and Decrees; Justices of the Peace; Indictment (sentence); Foreign Judgments; and for adjudication as res adjudicata, see Former Adjudication; Crimes, I (former jeopardy).
Adjustment of Loss, see Insurance.
Adjutant General, see Military and Naval Affairs.
Ad Litem, see Guardians ad Litem; Estates of Decedents (special administrators).
Admeasurement of Dower, see Dower.
Administration of Estates, see Estates of Decedents; Assignments for Creditors; Corporations, XXIII (insolvency); Bankruptcy; Guardianship; Receivers; Trusts.
Administration of Medicine or Poisons, see Medicine and Surgery; Crimes, II; Homicide; Indictment.
Administrative Functions, see Constitutional Law, II; Courts, V; Certiorari; Injunctions, II; Mandamus, III; and as to nonliability, see Highways, XII, A; Municipal Corporations, VIII, XII; Bridges; Officers.
Administrators, see Estates of Decedents.

ADMIRALTY.

TREATS of admiralty courts and practice.

Analysis.

§ 1. Jurisdiction in general.
§ 2. Maritime torts, contracts and liens.
§ 3. Procedure.

§ 1. Jurisdiction in general.

Jurisdiction of crimes under federal laws committed on the Great Lakes or in international waters, see Indictment, III.

Territorial limits within which process of arrest for crime may be executed, see Arrest, Commitment and Bail, V.

Abatement of state suit pending admiralty suit vice versa, see Abatement, § 13.

¶ 1. The Great Lakes are subject to the admiralty jurisdiction.—Backus v. Coyne, 35 Mich. 5; overruling Rossiter v. Chester, 1 D. 154; The Genesee Chief v. Fitzhugh, 12 How. (53 U. S.) 443, 13 L. ed. 1058; Jackson v. The Magnolia, 20 How. (61 U. S.) 296, 15 L. ed. 909; The Eagle, 8 Wall. (75 U. S.) 15, 19 L. ed. 365.

¶ 2. The admiralty jurisdiction upon the Great Lakes and their connecting waters has only been vested in the United States district courts in certain specified classes of cases connected with external commerce; and if salvage cases concerning derelict property are properly cognizable in those courts they must have some reference to external commerce.—Cummings v. Stone, 13 Mich, 70.

¶ 3. The maritime law subsists as an entirety as the subject of federal jurisprudence, and is to be administered by the federal courts without impairment by state legislation.—Mack S. S. Co. v. Thompson, 176 Fed. 499.

§ 2. Maritime torts, contracts and liens.

Contracts and liens cognizable under the Water Craft Act, see Shipping, IV.

¶ 4. The definition of the term "torts," when used in reference to admiralty jurisdiction, is not confined to wrongs or injuries committed by direct force, but includes, also, wrongs suffered in consequence of the negligence or malfeasance of others where the remedy at common law is by an action on the case.—John Spry Lumber Co. v. Steam Barge C. H. Green, 76 Mich. 320.

¶ 5. Locality of the accident is the test for the determination of the question of admiralty jurisdiction over cases of tort, and where the active cause of the injury originates on a ship upon navigable waters, but the tort is consummated upon a dock or wharf extending from land, admiralty has no jurisdiction.—Gordon v. Drake, 193 Mich. 64.

¶ 6. A boom that extends no further into the water than a landowner, with due regard for navigation, might extend it, is a structure pertaining to the adjacent land as much as any wharf or building erected thereon, and a wrongful injury to it would not be a marine injury, and the tort cannot, therefore, be redressed in admiralty.—The City of Erie v. Canfield, 27 Mich. 479.

¶ 7. Injury caused by a vessel's collison with a boom in which logs were stored and which was fastened to piles on a mill-dock is not a marine tort cognizable in admiralty, since the locality of the thing injured, and not of the offending instrument, determines the locality of the tort.—John Spry Lumber Co. v. Steam Barge C. H. Green, 76 Mich. 320.

Application of workmen's compensation acts to cases within admiralty jurisdiction, see note, 14 N. C. C. A. 597–601.

Conflict between admiralty law and workmen's compensation acts, see note, 10 N. C. C. A. 688-699, 13 N. C. C. A. 782-799.

§ 3. Procedure.

¶ 8. Admiralty, in a proceeding to enforce a lien against a vessel, can obtain jurisdiction in rem only by its actual seizure by the marshal, notice thereof, and notice by publication of the time when process shall be returned and the cause heard; and two weeks before such return such notice shall have been given at least twice. A recital of due publication in a return by a marshal does not cure the want of it where the facts are set forth in the return and show that the publication was insufficient.—Gould v. Jacobson, 58 Mich. 288.

ADMISSION to ADOPTED STATUTES.

Cross-References.

Admission; Admissions (in the sense of conceding a fact), see Evidence, VII, C; Indictment, VIII; Pleading; Equity, VII, C; Trial, V, A (admission in open court); Stipulations; and other procedural topics.

Basis for estoppel, waiver or ratification, see Estoppel; Election and Waiver; Agency, II, C (ratification); Corporations, V, XIV, XVII, XXIV.

Authority to bind by, see Agency, II; Attorneys, II; Corporations, XVII; Partnership; Evidence, VII, C (as factor in competency of); Indictment, VIII, B (accomplices).

To avoid continuance or the like, see Continuances; Indictment, VI; Venue.

As excluding evidence of admitted fact, see Evidence, III; Pleading, IX.

As curing error related to admitted fact, see Harmless Error.

Admission of Account, see Account Stated.

Admission of Service, see Process; Notices; Appearance.

Admissibility of Evidence, see Evidence; and also see specific topics as to relevancy on particulars in issue.

Admittance to Bail, see Arrest; Civil Arrest.

Admittance to Profession or Membership, see Attorneys; Medicine and Surgery; Associations; Corporations; Fraternal Beneficiary Associations; Partnership.

Admixture of Goods, see Accession and Confusion.

Adopted Statutes, see Statutes, V (construction); and see specific topic involved in subject-matter to which the statute relates.

ADOPTION.

TREATS of the taking of another's child into the relation of one's own, and the consequential rights of such an adoption.

Analysis.

§ 1. In general; statutory procedure.
§ 2. Informal or unconsummated adoption contracts.
§ 3. Consequences of adoption; mutual rights.
§ 4. ——Inheritance and kinship.

The word "adoption" is used frequently to signify the act of ratifying or accepting after the fact something done by another without authorty. In this sense, see Agency, II, C; Corporations, XVII, D. As used in the sense of affirmance of a voidable contract, see Contracts; Fraud; Rescission. As used in the sense of appropriating name, see Names; Trade Marks.

Agreements to make will or to leave property, see Wills; Specific Performance; Estates of Decedents.

General rights and duties towards children, see Parent and Child; Infants.

§ 1. In general; statutory procedure.

Adoption lacking complete legal form, see post § 2.

Name of adopted child, see Names.

¶ 1. A child, not his own, was placed by petitioner with a Catholic institution. Later, the custody of the child was given back to petitioner with the understanding that the institution did not permanently surrender its rights to the child until it should become satisfied that the child's parents would not wish to resume their parental rights. About two years later petitioner adopted the child with the consent of the institution. Held, the institution had retained sufficient custody of the child up to the time of the adoption to be legally qualified under 3 Comp. L. 1897, § 8777, subd. d to give consent to said adoption.—In re Courtright, 167 Mich. 689.

¶ 2. The matron of the Mercy Hospital of Detroit, may, under section 8777, Comp. Laws 1897, How. St., 2nd Ed., § 11637, consent to the adoption of an abandoned child which is an inmate of such hospital.—Fisher v. Gardnier, 183 Mich. 660. (Stone, Ostrander, Steere, and Bird, JJ., dissenting.)

¶ 3. It seems that the probate judge has no authority, even on the joint application of the natural and the adoptive parents, to revoke his order of adoption made under How. St., § 6379.—Morrison v. Sessions' Estates, 70 Mich. 297.

§ 2. Informal or unconsummated adoption contracts.

¶ 4. Where one has lived in another's household from early youth to the age of thirty-six years, the two treating each other as daughter and father, she may be regarded as a member of his family though not related to him by blood or marriage.—Carmichael v. Northwestern Mut. Ben. Ass'n, 51 Mich. 494.

¶ 5. Where, on his father's death, a child was adopted by his uncle, who stood in loco parentis to him, and to whom he sustained the relation of an adopted child till he came of age, it is presumed twenty years from his majority, if nothing appears to the contrary, that his mother assented to his arrangement with his uncle, whatever it was, and to his emancipation from any parental control or rights that she could have asserted at the time.—Sword v. Keith, 31 Mich. 247.

¶ 6. An executory agreement to adopt and take the necessary legal steps to secure such adoption cannot be made the basis for legal inheritance of real estate or operate as an agreement to convey land.—Bowins v. English, 138 Mich. 178.

¶ 7. In an action against an estate to enforce specific performance of a contract by the deceased to adopt the complainant and to establish the claim of the complainant to heirship, statements by the deceased as to friendly relations, etc., are inadmissible to modify or amplify the written promise to adopt.—Bowins v. English, 138 Mich. 178.

¶ 8. Where the law under which adoption proceedings were had, was subsequently held unconstitutional, and there was no other evidence of a contract to make the adopted child an heir, such adopted child would not be entitled to share in the estate of the adopting parent.—Albring v. Ward, 137 Mich. 352.

¶ 9. A., who had been bound out when two years old to B., was, when nine years old, adopted by B. and B.'s wife, under the

invalid adoption law of 1861, and continued to live with them upon their farm until B.'s death, which happened when A. was more than twenty-two years old, faithfully performing during all the time his duty towards his foster parents, and giving them his entire time without compensation, in the belief, which they encouraged, that he was in fact their son, and as such would ultimately own their property. Upon a bill filed by persons who had been adjudicated to be B.'s heirs at law to restrain A. from committing waste upon said farm, A. set up title to the premises, which was sustained, two justices holding that specific performance should be granted of the partly performed implied contract, and a third justice holding that equity could give validity to the obvious intention of the parties that A. should have the property.—Wright v. Wright, 99 Mich. 170.

¶ 10. Plaintiffs, the children of one Rose May Smithlin, alleged in their bill for specific performance of a contract of adoption, that one Lull and his wife had adopted Rose when a little girl, and agreed to make her their heir if she would live with them and render to them her personal services. Plaintiffs alleged there was a written contract to this effect, which Lull and his wife had kept in their possession but which plaintiffs could not produce. Rose was the child of foreigners just recently arrived in this country. Held, the evidence set forth was not sufficient to support the claim asserted in view of the social prominence of the Lulls, and their ignorance of the antecedents of the child.—Smith v. Lull, 152 Mich. 126.

Right of adopting parent to recover for death of adopted child, see note, 10 N. C. C. A. 743-748; 13 N. C. C. A. 447.

§ 3. Consequences of adoption; mutual rights.

Adoption sufficient to make insurable interest, see Insurance, IV.

¶ 11. The duties of one adopting a child are fixed by Comp. L. 1897, § 8780, How. St., 2nd Ed., § 11640, providing that the person or persons adopting shall stand in the place of a parent or parents and be liable to all the duties and entitled to all the rights of parents, the same as if in fact the child was the child of such person or persons.—Greenman v. Gillerman's Estate, 188 Mich. 74.

¶ 12. A minor who has been adopted into a family, and performed labor for his adopted father as a child would for a parent, cannot recover for his services without an understanding or agreement that he shall.—Sword v. Keith, 31 Mich. 247.

¶ 13. A girl who had been practically though not formally adopted into a family in pursuance of an understanding that she shall be in all things as a daughter may use the family name as her own in bringing suit.—Watson v. Watson, 49 Mich. 540.

¶ 14. Where an infant is taken into a family the presumption is that neither its support nor its service is to be recompensed except as the one compensates the other.—Thorp v. Bateman, 37 Mich. 68.

¶ 15. The liability of the estate of an adopting parent for the support of a child left by such parent with its natural parent must be decided upon the status of the arrangement between such adopting parent and its natural parent.—Greenman v. Gillerman's Estate, 188 Mich. 74.

¶ 16. In an action by a natural parent against the estate of an adopting parent for compensation for support of a child left by such adopting parent with its natural parent, evidence held insufficient to authorize the trial court in directing the jury that the adopting parent was relieved of liability for the support of the child.—Greenman v. Gillerman's Estate, 188 Mich. 74.

§ 4. ——Inheritance and kinship.

See also ante ¶ 8.

Effect of contract to adopt, see also ante ¶ 6.

¶ 17. Heirship by adoption is unknown at common law.—Albring v. Ward, 137 Mich. 352.

¶ 18. Under Comp. L. 1897, § 8780, governing the adoption of children and providing that "such child shall thereupon become and be an heir at law" of the persons adopting it, an adopted child does not become an heir of the kindred of the persons adopting it, nor does it inherit from them by right of representation of the adopting parents.—Van Derlyn v. Mack, 137 Mich. 146.

¶ 19. Statements of adopting parents calling an adopted child their daughter, and similar statements by the child calling them father and mother, are not evidence of any contract to make the child an heir or to convey to her any property.—Albring v. Ward, 137 Mich. 352.

ADULTERATION.

TREATS of the debasement of commodities by addition of foreign or deleterious matter or by abstraction of some essential quality. See generally Comp. L. 1915, chaps. 121, 124, 254, as to statutes bearing on this subject, and see topic Food for matters relating to sale of food substances improperly labeled or below standard or intrinsically unwholesome.

As to crimes and prosecutions for adulterating goods, see Crimes, II; Indictment.

Failure to add to a food commodity a customary but useless and nonessential ingredient does not amount to adulteration in the sense of abstracting a necessary constituent or ingredient as defined in Pub. Acts 1895, No. 193.—People v. Jennings, 132 Mich. 662.

ADULTERY to ADVERSE.

Cross-References.

Adultery—
- As crime, see Crimes, II; Indictment.
- As ground for divorce, see Divorce.
- As actionable wrong to other spouse, see Husband and Wife, V.
- Defamation by charging, see Libel and Slander.
- Custody of child as affected by, see Divorce, IX; Parent and Child; Infants.

Advancements, in the sense of portions given to children in anticipation of inheritance, see Estates of Decedents; Wills; Gifts (distinction from).

Advances, in the sense of moneys loaned or paid over in expectation of reimbursement, see Contracts; Mortgages; Implied Contracts; Indemnity and Contribution; and especially the specific topics treating of relationships in which the advances were made, e. g., Agency; Brokers; Corporations; Estates of Decedents; Partnership; Joint Adventures; Joint Stock Companies; Tenants in Common.

Advancing Prices, as illegal object of contract or combination, see Contracts, IV; Combinations.

Advantage or Detriment, as element of consideration, see Contracts, V.
- As element in estoppel, see Estoppel.
- Taking advantage as fraud or undue influence, see Fraud; Wills; Gifts.

Adverse Claims, see Attachments; Garnishment; Interpleader; Ejectment; Replevin; Quieting Title; Foreclosure of Mortgages; and see references under "Adverse Interest."
- Necessity or propriety of joining claimants as parties, see Parties; and preceding references.
- Setting off one against another, see Set-off; Judgments, XI.

Adverse Decisions or Rulings, right to appeal from or have review, or to attack, see Appeal and Error; Certiorari; Harmless Error; Saving Questions for Review; Judgments, VII (collateral attack); Equity, XI; New Trial.

Adverse Interest—See generally topics treating of relations involving fidelity and good faith, e. g., Agency; Attorneys; Corporations; Partnership; Trusts; Estates of Decedents; Husband and Wife; Parent and Child; Guardianship; Tenants in Common.
- Affecting witnesses or evidence, see Evidence; Examination of Witnesses; Witnesses; Indictment, VIII.
- As disqualifying fact in official capacity, see Acknowledgments; Affidavits; Oaths; Judges; Jury; Officers; Process; Sheriffs; etc.

Adverse Liens and Priorities, see generally Liens; and see specific topics treating of liens and conflict of creditors, e. g., Attachment; Chattel Mortgages; Foreclosure of Mortgages; Mortgages; Assignments for Creditors; Bankruptcy; Estates of Decedents; Corporations, XXIII; Partnership; Marshalling Assets; Subrogation.

Adverse Possession, see Adverse Possession.

ADVERSE POSSESSION.

TREATS of the doctrine of title to land by disseisin and adverse possession for the period within which an action would lie for recovery of possession, and of the nature, requisites and proof of such possession, excluding to Easements and Highways, II, A, the doctrine of prescriptive right to incorporeal hereditaments by user thereof for the prescriptive period.

Analysis.

I. Property subject to it.

§ 1. Nature of property or estate in general.
§ 2. Property affected with public use; highways.
§ 3. Publicly owned property not in public use.
§ 4. Diversion to other public use.

II. Parties capable of or subject to disseisin.

§ 5. The public and persons non sui juris.
§ 6. Parties having common or dependent interests.

III. Elements and incidents of disseisin and possession.

A In General; Openness and Hostility.

§ 7. Nature and elements generally.
§ 8. Necessity of present adverse right or possession.
§ 9. Openness and visibility; character of occupancy.
§ 10. ——Vacant or unimproved open lands.
§ 11. Hostility.
§ 12. Notice or knowledge.
§ 13. Nature of original entry; permissive entry.
§ 14. ——Wrongful, stealthy or collusive entry.
§ 15. Joint or divided possession.
§ 16. Ouster of co-tenant or paramount owner.
§ 17. ——Of vendor by purchaser.
§ 18. Acknowledgment or recognition of better title.
§ 19. ——Buying in claims or liens.
§ 20. Disputed strips and uncertain boundaries.
§ 21. Inclosing or fencing.
§ 22. Using, cultivating or taking products.
§ 23. Payment of taxes and expenditures.
§ 24. Holding against grantor, dedicator or lessor.
§ 25. Holding under parol or otherwise invalid grant.
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§ 43. Pleading.
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§ 56. ——As to inclosure, fencing and boundaries.
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I. PROPERTY SUBJECT TO IT.

§ 1. Nature of property or estate in general.

The estate claimed must be a corporeal hereditament, capable of exclusive, hostile possession in order to be within the doctrines of seisin and disseisin. See generally post this topic.

The doctrine of prescription which applies to easements and other incorporeal hereditaments of similar nature is treated in Easements; Highways, II, A; Nuisance; Waters.

Elements which must concur, see post § 7.

§ 2. Property affected with public use; highways.

Sufficiency of possession, see post § 28.
Sufficiency of proof, see post § 51.
Adverse possession against dedicator, see also post § 24.
Effect of taking deed according to plat, estoppel to claim, see post § 167.
Prescription as to easements and other incorporeal hereditaments, see Easements; Highways, II, A; Nuisance; Waters.
Extinguishing of railroad right of way by adverse possession, see Railroads, III.

See generally Jud. Act, Chap. IX, § 1, ¶ 8, Comp. L. 1915, § 12311, ¶ 8.

¶ 1. Title may be acquired by adverse possession of property within the limits of streets.—Flynn v. City of Detroit, 93 Mich. 590; Village of Essexville v. Emery, 90 Mich. 183; City of Big Rapids v. Comstock, 65 Mich. 78.

¶ 2. In the absence of a statute expressly authorizing it, title to a highway by adverse possession may be obtained by an abutting owner, but the propriety of permitting title to be obtained in this way is of doubtful expediency.—Mendel v. Poland, 200 Mich. 571.

¶ 3. Title by adverse possession may be acquired to land laid out for a public alley.—Vier v. City of Detroit, 111 Mich. 646.

¶ 4. Under some circumstances a private person may acquire title to a highway by adverse possession.—La Barre v. Bent, 154 Mich. 520.

¶ 5. The provision in the charter of the City of Ann Arbor, Local Acts 1889, No. 331, § 129, that the title of the city in its public streets should not be divested by encroachments, is valid; and an instruction in an action of quare clausum fregit against a street commissioner to the effect that the plaintiff can establish title by adverse possession, is erroneous.—Crawford v. Ross, 126 Mich. 634.

¶ 6. Prior to the passage of Act No. 46, Pub. Acts 1907, How. Ann. St., 2nd Ed., § 14133, title to property within the limits of a public street or highway might be acquired as against a municipality by adverse possession.—Pastorino v. City of Detroit, 182 Mich. 5.

¶ 7. Act No. 46, Public Acts 1907, How. St., 2nd Ed., § 14133, prohibits the acquisition of title by adverse possession of land within the limits of a street or highway.—Crosby v. City of Greenville, 183 Mich. 452.

¶ 8. Since the passage of Pub. Acts 1907, No. 46, How. 2nd Ed., §§ 14133, 14134, adverse possession of a highway as against the public is no longer obtainable.—Mendel v. Poland, 200 Mich. 571.

§ 3. Publicly owned property not in public use.

Sufficiency of possession, see post § 28.
Property bought in by city but burdened with private easements, see post ¶ 127.

¶ 9. The statutory right to title by adverse possession against the state is derogatory of the common law and construed strictly does not apply to lands submerged at all times except in extremely low water.—State v. Lake St. Clair Fishing & Shooting Club, 127 Mich. 580, per Hooker, J.

¶ 10. Where, upon the purchase by the city of Detroit of land sold for special assessments, no deed is issued, the city has at least an equitable title, and such title may be destroyed by adverse possession.—Klatt v. City of Detroit, 162 Mich. 186.

§ 4. Diversion to other public use.

Land dedicated to religious uses, see also post ¶ 104.
Use of municipal land for church purposes, see also post ¶ 115.

¶ 11. Upon land dedicated as a court house square the county erected a court house in 1838, which was removed in 1850 or 1851, when the city took possession, continuing from that time to use and improve the land for a public park or square. Held, that the city's adverse possession for more than thirty years barred action by the heirs of the dedicator.—Sheldon v. City of Grand Rapids, 71 Mich. 508; Pantlind v. City of Grand Rapids, 71 Mich. 514.

II. PARTIES CAPABLE OF OR SUBJECT TO DISSEISIN.

§ 5. The public and persons non sui juris.

See also ante §§ 2, 3.
Necessity of person to assert title, see post § 8.
Public as disseisor, see post § 29.
The right to sue, being the correlative of adverse possession, and the disabilities to sue operating as a suspension of limitations are fully treated in Limitations of Actions, III, which see.
Immunities of the state, see generally State of Michigan.
Presumption of grant of public lands after lapse of time, see Public Lands, II.

¶ 12. Adverse possession may give good title as against a city.—Schneider v. City of Detroit, 135 Mich. 570.

§ 6. Parties having common or dependent interests.

See also, post § 8.
General doctrine that husband and wife or tenants in common have a common possession in each for all, see Husband and wife; Tenants in Common.
General doctrine that life tenant has possession for remainderman or reversioner, see Life Estates.

¶ 13. A husband cannot hold adversely to his wife premises of which they are in joint occupancy as a family.—Hendricks v. Rasson, 53 Mich. 575.

¶ 14. Under How. St., § 5744, providing that a widow entitled to dower in the lands

of which her husband died seised may continue to occupy the same with the children or other heirs, so long as the heirs or others interested do not object, without having the dower assigned, the peaceable occupancy of the homestead by the widow and minor children, after the renunciation of a life estate granted to her under the will, not followed by an assignment of her dower, is not adverse to the remainderman.—Lumley v. Haggerty, 110 Mich. 552.

¶ 15. The possession of a life tenant cannot be adverse to the remainderman.—Lumley v. Haggerty, 110 Mich. 552.

¶ 16. There can be no adverse possession by a life tenant against his grantor or remaindermen.—Hamilton v. Wickson, 131 Mich. 71.

¶ 17. The possession of land by one of the heirs of an intestate is not adverse to the rights of another heir during the lifetime of the intestate's widow, where the former was living on the premises at the death of the intestate, and it was agreed by all the heirs that the place should be left just as it was until the death of the widow, who was also residing thereon.—Beck v. Schick, 110 Mich. 665.

¶ 18. One who goes into possession of land under a lease from the owner, and continues to occupy the position of a lessee, cannot set up an adverse holding against a purchaser from the owner.—Smalley v. Mitchell, 110 Mich. 650.

III. ELEMENTS AND INCIDENTS OF DISSEISIN AND POSSESSION.

A IN GENERAL; OPENNESS AND HOSTILITY.

§ 7. Nature and elements generally.

Essentials of the several elements, see post § 9 et seq.
Claim or color of title, see post III, B.
Duration and continuity of possession and interruptions, see post III, C.
Land included within possession, see post III, D.
Possession acquired from predecessor, see post III, E.
Who may be subject to adverse possession and disabilities preventing it, see ante II, post III, F.
Sufficiency of constructive notice, see post § 12.
Necessity of entry under tax sale, see also post ¶ 111.
Instructions defining elements, see post § 55.

¶ 19. Adverse possession defining to give title, must be an actual, continued, visible, notorious, distinct and hostile possession.—Paldi v. Paldi, 95 Mich. 410.

¶ 20. Adverse possession requires exclusive occupancy known to and against the will and consent of those who are interested and have a right to contest the possession.—Whitford v. Crooks, 54 Mich. 261.

¶ 21. Possession of land in order to ripen into title must be actual, continuous, visible, notorious, distinct and hostile to that of the real owner.—Crosby v. City of Greenville, 183 Mich. 452.

¶ 22. A claim of adverse possession cannot rest upon the acts of the defendant when the disseisor asserts it as a source of title in ejectment, but the acts relied upon must be those of the person, or of the representatives of the person, claiming title by virtue thereof; and such possession must have been actual, continued, visible, notorious, distinct and hostile.—Beecher v. Ferris, 110 Mich. 537.

¶ 23. Lapse of time does not necessarily operate as a disseisin in law or equity.—Compo v. Jackson Iron Co., 49 Mich. 39.

§ 8. Necessity of present adverse right or possession.

Permissive holding, see post § 13.
Swamp lands not yet perfected in the state, see post § 113.

¶ 24. Adverse possession cannot arise until there is some one to dispute the right claimed.—Marble v. Price, 54 Mich. 466.

¶ 25. There can be no adverse possession against one whose legal title or right of entry is incomplete.—Cook v. Knowles, 38 Mich. 316.

¶ 26. There can be no adverse possession against remaindermen whose right of entry is not complete.—Watkins v. Green, 101 Mich. 493.

¶ 27. Under Pub. Acts 1885, No. 153, §§ 115, 116, providing for the acquisition of title by adverse possession, the time does not begin to run as between cotenants until the termination of a precedent life estate gives the right of entry.—Sleight v. Roe, 125 Mich. 588.

¶ 28. The statute of limitations does not begin to run against a remainderman until after the death of the life tenant.—Porter v. Osmun, 135 Mich. 361.

¶ 29. Where the owner of a life estate and of an undivided interest in the fee of land permits an adverse claimant to remain in undisturbed possession until such possession ripens into a valid title, neither he nor his grantees can separate his interests in the land, under the plea that, as to some of

them, he had not the right of entry.—Watkins v. Green, 101 Mich. 493.

¶ 30. A sale of land by an executrix who has purchased the property from a person acting for her in purchasing a homestead, and who sells to a third person cannot be said to be made good by the statute of limitations, as such executrix was given a life estate in the property, and an action of ejectment could not be brought by the heirs in her life time.—Litchfield v. Tunnicliff, 118 Mich. 383.

¶ 31. The owner of land having sold an undivided one-half interest, taken a mortgage in payment, and subsequently assigned the mortgage, cannot assert title by adverse possession against the interest sold until a right of entry has been acquired by foreclosure.—Nowlen v. Hall, 128 Mich. 274.

¶ 32. Under Comp. L. 1897, § 9716, How. St., 2nd Ed., § 14121, relating to the accrual of causes of action for the recovery of land, where one dies intestate leaving a wife and father, the former of whom becomes entitled to a life estate and the latter the remainder after the death of the widow, no right of action for ejectment against one occupying the premises adversely accrues in favor of the father until the death of the widow, where he survives the widow.—Rich v. Victoria Copper Mining Co., 147 F. 380.

§ 9. Openness and visibility; character of occupancy.

See also ante § 7.

In respect of public ways or places, see post § 28.

Necessity and sufficiency of hostility, see post § 11.

Particular acts of possession, such as inclosing, using and improving, see post §§ 21-23.

Stealthy or collusive entry, see post § 14.

Intermittent and discontinuous possession, see post § 35.

As to actual residence on premises, see also post § 157.

Sufficiency of constructive notice, see post § 12.

Effect of actual notice when possession is not notorious, see post § 49.

Apparent location of line fence as notice, see also post § 93.

Pleading, evidence and practice, see post V.

Law and fact questions, see post §§ 52-54.

¶ 33. Acts of possession, in order to constitute adverse possession, must be such as, if seen by the party whose claim is sought to be divested, would clearly apprise him that the party doing the acts claimed the ownership of the property.—Chabert v. Russell, 109 Mich. 571; Crosby v. City of Greenville, 183 Mich, 452; Village of Manchester v. Clarkson, 195 Mich. 854.

¶ 34. To constitute adverse possession it is necessary to show that the ownership is of such a character as to openly and publicly indicate an assumed control or use consistent with the character of the property.—Crosby v. City of Greenville, 183 Mich. 452.

¶ 35. Adverse possession must be based on exclusive occupancy, known to and against the will and consent of those interested, and whose right it is to contest.—Marble v. Price, 54 Mich. 466.

¶ 36. Possession is adverse if under color of title and a claim of right, and exclusive, held so openly and notoriously that the community understand and recognize the claim of ownership.—Murray v. Hudson, 65 Mich. 670.

¶ 37. To constitute adverse possession it is sufficient if the acts of ownership are of such a character as openly and publicly to indicate and assume control or use such as is consistent with the character of the premises in question; the occupation need not be such as to inform a passing stranger that some one is asserting title, but it is enough if it be such as to notify and warn the owner should he visit the premises, that a person is in possession under hostile claim.—Whitaker v. Erie Shooting Club, 102 Mich. 454.

¶ 38. To constitute adverse possession it is not necessary that the occupation should be such that a mere stranger passing by the land would know that some one was asserting title to and dominion over it, nor is it necessary that the land be cleared or fenced or any building be placed upon it.—Murray v. Hudson, 65 Mich. 670.

¶ 39. The continued occupation of land as a home, coupled with the payment of taxes for forty years, is notice to the owner of adverse claim.—Lake Shore & M. S. Ry. Co. v. Johnson, 157 Mich. 115.

§ 10. ——Vacant or unimproved open lands.

Sufficiency of evidence, see post § 49.

Under tax sales, see also post § 27.

Particular acts of possession, see also post §§ 21-23.

¶ 40. Use of land as a wood lot apurtenant to one's farm, and the exercise of such acts of ownership as are necessary to such use, amount, if continuous and uninterrupted, to actual possession.—Murray v. Hudson, 65 Mich. 670.

¶ 41. Notices posted around a piece of marsh land from early in the spring until late in the autumn every year for twelve successive years that the land belongs to the club posting the notices, and that all tres-

passers will be prosecuted, are notices of an adverse title and possession, the meaning of which could not be misunderstood by the owner if he visited the land, they being inconsistent with his rights as the original owner of the fee.—Whitaker v. Erie Shooting Club, 102 Mich. 454.

¶ 42. Plaintiff claimed ownership of certain land by adverse possession under a void tax title deed. In 1885 he arranged with one Calhoun to take possession of the land for him, and Calhoun went upon the land and cleaned off the timber until 1889, when he moved away. Thereafter plaintiff did nothing to the land, which was wild. Held, that there was no adverse possession after 1889, since there was no indication of possession.—Lasley v. Kniskern, 152 Mich. 244.

§ 11. Hostility.

See also ante § 7, post ¶ 143.

Necessity that entry be hostile and not permissive, see post § 13.

Effect of acknowledging better title, see post § 18.

Possession of grantee against grantor or of lessee against lessor, etc., see post §§ 24-26.

Holdings against grantor or under involuntary sale, see also post §§ 25-27.

Joint occupation, see post § 15.

Disputed strips, see also post § 20.

How pleaded, or proved, and instructions, see post V.

Law and fact questions, see post §§ 52-54.

¶ 43. An adverse holding may exist though the holder does not believe in his title.—Campau v. Lafferty, 43 Mich. 429.

¶ 44. There must be an adverse possession before the statute of limitations can commence to run.—May v. Rumney, 1 Mich. 1.

¶ 45. An action of ejectment is not barred after ten years' occupancy by defendant if it does not appear that his possession was adverse to the plaintiff.—Perkins v. Nugent, 45 Mich. 156.

§ 12. Notice or knowledge.

See also ante § 7.

Necessity of openness and visibility, see ante §§ 9, 10.

Posting notices on land, see also ante ¶ 41.

Ouster of cotenant, see post § 16.

Pleading, evidence and practice as to notice, see post V.

¶ 46. Adverse possession up to a boundary for fifteen years being sufficient to bar a recovery by the contiguous owner, actual knowledge of the adverse holding is not required where the circumstances are such that the contiguous owner should have known it.—Bird v. Stark, 66 Mich. 654.

¶ 47. Actual notice is not required where one enters under a conveyance of an entire interest by a tenant in common, though it may be questioned whether a mere entry suffices without some knowledge or notice brought home to the co-tenants.—Fuller v. Swensberg, 106 Mich. 305.

¶ 48. To transform a permissive use into an adverse one there must be a distinct and positive assertion of a right hostile to the rights of the owner, and such assertion must be brought to his attention.—Weber v. City of Detroit, 159 Mich. 14.

¶ 49. Where the owner of land has actual notice of adverse possession, it is unnecessary that the possession be notorious to be adverse.—Lasley v. Kniskern, 152 Mich. 244.

§ 13. Nature of original entry; permissive entry.

See also post ¶ 132.

See also ante § 7.

Necessity of openness, visibility and exclusiveness, see ante §§ 9, 10.

Notice to change permissive to adverse holding, see also ante § 12.

By purchaser as against vendor, see also post § 17.

Use of land dedicated to possessor's use, see also post § 24.

Use of portion of street under license for grass-plat, porches and the like, see also post ¶ 122.

Presumptions and evidence, see post §§ 44-51.

¶ 50. A permissive use cannot initiate an adverse possession.—People v. Ferguson, 119 Mich. 373.

¶ 51. Possession may ripen into an adverse holding, although the act of taking possession was not hostile in the first instance.—Michigan Land & Iron Co. v. Thoney, 89 Mich. 226.

¶ 52. To constitute adverse possession the possession need not have been hostile in the first instance, but it is sufficient if it becomes so and continues for the requisite time, although the original entry was by consent of the owner and without shadow of title.—Ward v. Nestell, 113 Mich. 185.

¶ 53. Title by adverse possession cannot be claimed by one who has obtained and who holds possession of land under an agreement with another person in possession by the true owner's assent.—Butler v. Bertrand, 97 Mich. 59.

¶ 54. A mere permissive possession or one consistent with the title of another, however long continued, can never ripen into a title by adverse possession.—Township of Jasper v. Martin, 161 Mich. 336.

§ 14. ——Wrongful, stealthy or collusive entry.

Entry on wild land by permission of one tenant in common, see post ¶ 79.

¶ 55. Possession, when taken wrongfully, should put the real owner on his guard; but when held in apparent subordination to the owner's rights, and without his knowledge that it is in opposition to them, it cannot be considered adverse.—Campau v. Lafferty, 50 Mich. 114.

¶ 56. A possession gained by force and held but a short time cannot be made the ground of an action.—Harrington v. Scott, 1 Mich. 17.

¶ 57. A nocturnal entry by stealth and without right upon lands in the peaceable possession of another cannot amount to a possession that enables a party entering to question the sufficiency of the true possessor's title or to set up an outstanding title in a third person.—Van Auken v. Monroe, 38 Mich. 725.

¶ 58. Where the purchaser of a tax deed colluded with the tenants of the owner of the land, asked them to leave, and then return and take possession for him under the tax deed, he cannot be considered as holding adversely under the tax deed, and the statute of limitations does not run in his favor.—Williams v. Fox, 152 Mich. 215.

§ 15. Joint or divided possession.

See also post § 16.

Necessity of right of entry in opposing party, see ante § 8.

Disputed strips and uncertain boundaries, see post § 20.

Adverse possession against one where others have no mature right of entry, see ante ¶ 29.

¶ 59. Where land is owned by tenants in common, and one tenant in common claims title to all the property as the result of adverse possession, the nature of such adverse possession is not the same as where such relation does not exist.—Rich v. Victoria Copper Mining Co., 147 F. 380.

¶ 60. Neither occupation in common with the public, nor possession concurrent with that of the true owner of land, is such an exclusive possession as will support title by adverse possession.—LeRoy v. Collins, 176 Mich. 465.

¶ 61. The possession by an aged mother, after the death of her daughter, of real property owned by the latter, under an arrangement that the former might continue to make the place her home, cannot become adverse as against the daughter's heirs, until after some notorious, open, and hostile act, inconsistent with possession under such arrangement.—Beaufait v. Dolson, 110 Mich. 146.

¶ 62. A father deeded land to his daughter as a gift but remained in possession, paying the taxes out of moneys owed to the daughter. After the latter died, the father bought the land at a tax sale, but this title was invalid. He remained in possession and subsequently deeded the land to plaintiff. The daughter left minor children and defendant acquired their title. Held that the father's possession began in subordination to the daughter's title and remained so until her death, and the title then vested in her minor heirs, and there having been no ouster of them by any actual notice either during minority or after, limitation did not run against their title and hence defendant's title was good.—Nugent v. Peterman, 137 Mich. 646.

¶ 63. One Fitzgerald loaned money to one Quinlan and had the mortgage made out to his sister, one Schell. Later the mortgagor at Fitzgerald's request deeded the premises to the said Schell. Fitzgerald reserved a couple of rooms in the house on the premises, and for many years spent much of his time there. He at one time leased the premises and caused his sister to join in the lease. The heirs of Fitzgerald brought a bill to have the deed from Quinlan to Schell set aside. Held, the bill should be denied, as Fitzgerald's possession was not adverse to the ownership of his sister.—Atkinson v. Schell, 161 Mich. 380.

§ 16. Ouster of co-tenant or paramount owner.

Capacity to possess adversely, see ante § 6.

Necessity and sufficiency of notice, see ante § 12.

Holding over, see also post §§ 24, 25.

By entry under tax sale of entire premises, see also post ¶ 112.

Entry by collusion with owner's tenant, see ante ¶ 58.

Subsequent recognition of title breaking possession, see post ¶ 161.

Deed from one tenant as color of title, see post § 32.

Extent of possession where entry is on part only, see post ¶ 165.

Presumptions, see post § 45.

Character and sufficiency of proofs, see post § 50.

¶ 64. As between tenants in common there can be no ouster and no adverse possession until one of them does or says something that

is unequivocal notice to his co-tenants that he claims the entire property as against them.—Fenton v. Miller, 94 Mich. 204.

¶ 65. To make possession adverse as against a co-tenant, notice of the hostile claim must be clearly brought home to him and mere occupancy for the statutory period by one of them is not enough.—Weshgyl v. Schick, 113 Mich. 22.

¶ 66. Mere possession by one co-tenant is not sufficient to establish ouster and adverse possession, especially where the co-tenants are brothers and sisters; some clear, positive and unequivocal act amounting to an open denial of the co-tenant's rights must be shown.—Fenton v. Miller, 94 Mich. 204.

¶ 67. Where co-tenants are brothers and sisters claiming as heirs of a common ancestor, mere possession by one co-tenant is not sufficient to establish ouster and adverse possession.—Dahlem v. Abbott, 146 Mich. 605.

¶ 68. To constitute adverse possession of land by one tenant in common mere actual possession and doing things which might seem to others proper by one owning the entire interest is insufficient, and it is necessary that the other tenant in common shall have notice that his co-tenant is asserting title to the whole estate.—Rich v. Victoria Copper Mining Co., 147 F. 380.

¶ 69. Where a mining company tenant in common of certain property, obtains a deed from one holding a life estate in the remainder of the property, and continues in lawful possession of all the property until the death of the life tenant, the continuance of that possession is not adverse to the remainderman, its then co-tenant, unless accompanied by tortious and disloyal acts, which must be open, continued and notorious so as to preclude all doubt as to the character of the holding or the want of knowledge on the part of the co-tenant.—Rich v. Victoria Copper Mining Co., 147 F. 380.

¶ 70. Occupation by one tenant in common, giving leases and receiving rents for more than twenty years, with the knowledge of the co-tenant, but without actual knowledge of the latter's rights, and without any claim by the co-tenant for a share of the rents and profits, constitutes adverse possession in the absence of anything to show that it is other than adverse.—Dubois v. Campau, 28 Mich. 304.

¶ 71. There is no statute disposing of the controversies which may arise from the exclusive possession of one tenant in common during a longer period than will otherwise bar the recovery of real property.—Campau v. Dubois, 39 Mich. 274.

¶ 72. Any acts by a tenant-in-common in possession, equivalent to a denial of the rights of his co-tenant, are sufficient to set the statute of limitations in motion as against the latter. The ouster need not necessarily be founded upon a deed assuming to convey an entirety.—Fuller v. Swensberg, 106 Mich. 305.

¶ 73. An ouster of a tenant in common may be predicated upon a quitclaim deed from a co-tenant purporting to convey the entire interest, as well as upon a deed with covenants of warranty.—Fuller v. Swensberg, 106 Mich. 305.

¶ 74. A tenant in common in possession cannot use tax titles so as to predicate bar of statute of limitations by adverse possession against co-tenant; nor can his grantee. —Richards v. Richards, 75 Mich. 408.

¶ 75. The commencement of an ejectment suit by heirs against a co-heir in the possession of the joint premises is an admission of such possession and of the ouster of the plaintiffs.—Fenton v. Mackinac Circuit Judge, 76 Mich. 405.

¶ 76. Where certain of a number of tenants in common of lands, conveyed the property by warranty deed to bona fide purchasers for value, and the latter after examining the title go into possession and improve the property and later convey by similar deed to other bona fide purchasers, it operates as an ouster of the other tenants in common, since the second purchasers went into possession as strangers to the interests of such other tenants, and under claims which denied any rights of such other tenants.—Brigham v. Reau, 139 Mich. 256.

¶ 77. Entry on premises under a contract with one of several tenants in common is not hostile whether the agreement was or was not binding upon the owners in fee.—Lee v. Livingston, 143 Mich. 203.

¶ 78. In an action of ejectment where the owner of a dower interest which had not been assigned, had leased the premises to the defendant, who had entered into possession of the premises, his possession could not become hostile as to the other owners of the title in fee, by any agreement made with or acquiescence of the owner of the dower interest.—Lee v. Livingston, 143 Mich. 203.

¶ 79. The fact that a tenant in common of wild, unfenced land permitted one, without the knowledge of the other life tenant, to allow his cattle to graze on the land, is not evidence of adverse possession as against the co-tenant.—Rich v. Victoria Copper Mining Co., 147 F. 380.

¶ 80. That a tenant in common of property allows the taxes to go unpaid and then bids them in are not acts of absolute ownership, evidencing title to the entire property by adverse possession as against the co-tenant.—Rich v. Victoria Copper Mining Co., 147 F. 880.

§ 17. ——Of vendor by purchaser.

Holding against grantor, see post § 24.

¶ 81. Possession by a vendee under a land contract is not adverse until he has either complied with its terms, or has in some way given notice to his vendor or the latter's assignees that he claims to hold in hostility thereto.—Burke v. Douglass, 115 Mich. 197.

¶ 82. The holder of a legal title is not ousted by the act of a contract purchaser in going on the land with a team and ploughing for a few hours.—Goetchius v. Sanborn, 46 Mich. 330.

¶ 83. Acquiescence by a vendor for the statutory period in the possession of land by a vendee in a land contract, under a claim that the contract had been surrendered and that the land belonged to the vendee, will bar a recovery by the vendor in ejectment.—Michigan Land & Iron Co. v. Thoney, 89 Mich. 226.

§ 18. Acknowledgment or recognition of better title.

Interruption after beginning to run, see post § 35.

Recognition as breaking continuity of possession, see post § 36.

Effect of disbelief in title or right, see post § 31.

¶ 84. Where A. entered under a deed from the owner of land conveying an entire tract "except the parcel of land deeded by quitclaim deed to G. and C., if included in the foregoing description," and where, except for such quitclaim deed, there was no evidence that G. or C. ever had any title to any part of such tract, A.'s constructive possession as against persons claiming under G. and C. was not limited by the fact of his entering under the deed to himself.—Clark v. Campau, 92 Mich. 573.

¶ 85. In an action involving title to real property, where defendant, who was formerly plaintiff's wife, claimed title by adverse possession, the fact that defendant had within the fifteen years, filed a petition for alimony in which she stated that plaintiff owned the property, does not estop her from asserting title where no alimony was granted on the petition.—Place v. Place, 139 Mich. 509.

¶ 86. Where a person in possession of premises allows them to be assessed in the name of another and bids them off year after year, such conduct is not necessarily inconsistent with his claim of adverse possession.—Merritt v. Westerman, 165 Mich. 585.

¶ 87. The acquiescence which will prevent the running of the statute must be that of the possessor in the owner's claim, and not that of the owner in possession not acknowledged to be held under him.—Bower v. Earl, 18 Mich. 367.

§ 19. ——Buying in claims or liens.

Presumptions and evidence, see post §§ 44-51.

¶ 88. One in possession of land, claiming to own it, may buy an outstanding claim of title without abandoning or impairing his own or acknowledging the validity of the title bought.—Ripley v. Miller, 165 Mich. 47.

¶ 89. Where one in the possession of land holds the same under a tax deed, he may contract to purchase the claims of title put forward by another person and in so doing he does not acknowledge the validity of said person's claim or relinquish his own adverse possession.—Ripley v. Miller, 165 Mich. 47.

§ 20. Disputed strips and uncertain boundaries.

See also ante ¶ 46.

As between lessor and lessee, see also post ¶ 103.

Law and fact questions, see post § 53.

Instructions as to, see post § 56.

¶ 90. "A mere permissive possession" of land adjoining a line fence, which is understood and agreed between the adjoining owners to be subject to change on accurate survey, cannot ripen into title by adverse possession.—Pugh v. Schindler, 127 Mich. 191.

¶ 91. Adverse possession may grow out of permissive possession of a strip of land along a disputed line fence where a subsequent purchaser takes without notice of any agreement for correction of line upon accurate survey, and no notice of intention of holding adversely need be given.—Pugh v. Schindler, 127 Mich. 191.

¶ 92. An error was made in running a division line between two farms. The parties respectively occupied up to the erroneous line for more than twenty years. Afterwards the correct line was run. Held, that if the parties occupied up to the erroneous line supposing it to be the true boundary, and relying upon it, such line could not be disturbed afterwards, and a mere oral agreement to run a new line could not disturb the title

thus fixed; but if the parties did not rely upon the first survey, but expected to settle the line by another when convenient to make it, the mere possession for twenty years, according to the erroneous line, would not give title.—Bunce v. Bidwell, 43 Mich. 542.

¶ 93. An owner of land seeing a fence at about the line where it commenced near a road on which he passed is not charged with knowledge thereby that it deviates and incloses his land as it draws away from that point.—Hockmoth v. Des Grand Champs, 71 Mich. 520.

§ 21. Inclosing or fencing.
Instructions as to, see post § 56.

¶ 94. It is not necessary, in order to entitle one to claim title by adverse possession, that the premises should be inclosed by a fence, or that when a fence is used it should be of any particular kind.—Greene v. Anglemire, 77 Mich. 168; Sauers v. Giddings, 90 Mich. 50.

¶ 95. The mere fact that one builds fences and afterwards claims ownership is not enough to constitute adverse possession, which involves uninterrupted occupancy as well as claim of title.—Beecher v. Ferris, 117 Mich. 108.

§ 22. Using, cultivating or taking products.
See also ante § 10.
Use for home, see also ante ¶ 39.
Taking timber, see also ante ¶ 42.
Admissibility of evidence as to, see post § 47.

¶ 96. An owner of outlots which he does not fence or cultivate may establish an adverse possession by cutting grass and timber, ditching, paying general and special taxes, and openly and notoriously claiming and using the land.—Curtis v. Campbell, 54 Mich. 340.

¶ 97. Where for eighteen years the grantees in a warranty deed duly recorded, and those claiming under them, pay the taxes from year to year, and publicly, and without their rights being questioned, cut valuable timber at different times as they see fit, and erect shanties for the use of their workmen, cut hard wood and burn charcoal on the land for several years, clear and cultivate a portion of it, and at one time raise crops thereon, pasture it, run lines around and make roads over the land, and look it over from year to year to prevent trespasses, such acts of ownership are sufficient to establish a title by limitation.—Deer Lake Co. v. Michigan Land & Iron Co., 89 Mich. 180.

¶ 98. Entry upon land openly and notoriously under color of right and assertion of ownership, the cutting of large quantities of wood and timber therefrom, the clearing and seeding of several acres and the annual removal of the crops for the statutory period establish adverse possession, and are not mere acts of trespass.—Kingston v. Guck, 155 Mich. 264.

¶ 99. The occasional cutting of timber on wild, rough mining and mineral land by a tenant in common, a mining company, does not constitute adverse possession as against a tenant in common, there being no continuity in such cutting.—Rich v. Victoria Copper Mining Co., 147 F. 380.

§ 23. Payment of taxes and expenditures.
See also ante ¶¶ 39, 96, 97.
Permitting assessment to another and bidding in for tax, see also ante ¶ 86.
Assessment to new claimant as tacking to that of former occupant, see post ¶ 186.

¶ 100. The mere payment of taxes on land is not such an assertion of ownership as to affect the adverse possession of another party, or to weaken the force of the payer's other acts and conduct looking to an abandonment of his claim of title.—Cook v. Rounds, 60 Mich. 310.

¶ 101. A father bought a farm for his son upon which the latter afterwards resided, making some repairs and paying taxes and part of the interest of a $3,000 purchase-money mortgage given by his father, who paid the rest of the interest and the principal, but retained the title to the farm, never conveying, or being asked to convey to the son; and before his death, twenty-two years after the purchase, he devised the premises to the son, subject to a charge of $3,000 to be used in paying legacies. Held, upon an executor's bill to foreclose the lien created by the will, that the son's possession could not be regarded as hostile to his father's title.—Gifford v. Gifford, 100 Mich. 258.

§ 24. Holding against grantor, dedicator or lessor.
Hostility generally, see ante § 11.
Ouster of vendor, see also ante § 17.
Sufficiency of acts of possession, see also ante §§ 22, 23.
Under invalid grant or lease, see post § 25.
Nature of lessee's tenure under lessor, see Landlord and Tenant.

¶ 102. Adverse possession is held as against one's grantor by one who has taken a warranty deed of the premises in reliance on the record title and in ignorance of any life-lease outstanding in the grantor.—Case v. Green, 53 Mich. 615.

¶ 103. In an action of ejectment where the defendant set up title by adverse posses-

sion, and the evidence showed that the defendant, then a tenant, had built a house on leased land which extended a foot or less upon other land of the lessor, the adverse possession claimed cannot begin to run against the lessor until the date of a deed made by the lessor to the lessee of that portion of the premises leased.—Ross v. Guentherodt, 142 Mich. 634.

¶ 104. Premises which are occupied by a religious society, by virtue of a common-law dedication to that use, are not held adversely so that title to the fee may be gained by adverse possession.—Patrick v. Young Men's Christian Ass'n of Kalamazoo, 120 Mich. 185.

§ 25. Holding under parol or otherwise invalid grant.

Effect of deed or mortgage by owner to break possession, see post ¶ 152.

¶ 105. The possession of land by a donee under a parol gift, accompanied by a claim of ownership, is adverse to the donor.—Schafer v. Hauser, 111 Mich. 622.

¶ 106. Twenty years' adverse possession by one heir to an estate, following a parol sale to him of the interest of another heir, gives the former a sufficient title.—Hyne v. Osborn, 62 Mich. 235.

¶ 107. A husband gave a lease of a part of a homestead to a township to be used for township purposes. The lease was void for lack of his wife's signature. Held, the township could not by occupancy under such lease gain title by adverse possession.—Township of Jasper v. Martin, 161 Mich. 336.

§ 26. Holding over one's estate, lease or grant.

See also ante § 15, ¶¶ 62, 63.
Presumptions as to, see post § 45.

¶ 108. A tenant who, after the expiration of his lease, holds for more than fifteen years under claim of title the open, notorious and hostile possession of a portion of the leased premises, which he had inclosed with his own adjoining lands during tenancy, acquires title.—Sanscrainte v. Torongo, 87 Mich. 60.

¶ 109. Where, prior to the married woman's act, a husband was vested with an estate in the marital right, which terminated at his wife's death, if he held over he became, not a tenant at sufferance, but a trespasser; the right of action of the wife's heirs accrued at her death; and from that time the statute of limitations began to run in his favor.—Pattison v. Dryer, 98 Mich. 564.

§ 27. Holding under involuntary sale; tax sale.

See also ante ¶ 62.
Effect of buying in outstanding titles, see ante § 19.
By cotenant, see also ante ¶ 80.
What included in possession, see post § 38.
Deed as color of title, see post §§ 32, 33.
Period under tax deed, see post § 34.
Right of possession under involuntary sale or deed, and time of accrual of such right, see Executions, VII, D; Foreclosure of Mortgages; Taxes, XII; and like titles.
Special periods of limitations on actions to attack or vacate tax sales and proceedings, see Taxes, XII, C.

¶ 110. A claim under a tax title is necessarily hostile to the owner of the original title.—Sparrow v. Hovey, 44 Mich. 63.

¶ 111. In an action of ejectment where the defendant claims title under a tax deed, and sets up the statute of limitations against the plaintiff, an entry under the tax title, or something equivalent to an entry, is necessary to set in motion the statute of limitations under sec. 73 of the general tax law, as amended by Pub. Acts 1899, No. 262.—Lee v. Livingston, 143 Mich. 203.

¶ 112. Possession is adverse where it appears that the entry was made by claimant under a deed of warranty to the entire estate from one who had bought it for taxes and before he had received his tax deed had bought in an undivided interest from one of the owners, and where the land was wild and unoccupied at that time and no actual entry was made by the tax purchaser. The entry in such case cannot be said to have been under any duty or recognition of the rights of the other undivided interests.—Watkins v. Green, 101 Mich. 493.

§ 28. Public lands and public ways.

Extent to which possession covers street, see post § 37.
Joint occupation with public, see ante ¶ 60.
Recognition of public right, see post ¶ 159.
Tacking successive possessions, see post § 39, ¶ 189.
Sufficiency of evidence, see post § 51.

¶ 113. Possession under claim of title of land embraced in the swamp-land grant to the state would not be adverse to the state until the state's right of entry became complete under the terms of the grant.—People v. Warner, 116 Mich. 228.

¶ 114. Where the title to land has been for many years in a city as the result of successive tax sales to it, the holder of the record title cannot, merely by virtue of the theoretical possession incident to such title and without actual occupancy, acquire a title by adverse possession as against the city.—Galinski v. City of Detroit, 193 Mich. 184.

¶ 115. The possession of a church society which entered into such possession with the consent of a village which was the owner, and did nothing inconsistent with what might be expected from a mere licensee, was not adverse, and could not without notice of adverse holding, ripen into a title which would defeat the right of the owner.—City of St. Joseph v. Seel, 122 Mich. 70.

¶ 116. There is a broad distinction between obtaining title to land by adverse possession as against an indivdual, and gaining title to a portion of a pubic street as against a municipality.—Crosby v. City of Greenville, 183 Mich. 452.

¶ 117. In order to acquire title by adverse possession to a public street or way, the occupancy must be such as to warn the public that the occupant is going beyond his right as an abutting owner and is actually claiming the property as his own.—Crosby v. City of Greenville, 183 Mich. 452.

¶ 118. Since an abutting owner may use a street in any manner which does not interfere with public travel, uses which might be evidence of a claim of title if individual property was concerned, may not be notice to the public that title is claimed in the street.—Crosby v. City of Greenville, 183 Mich. 452.

¶ 119. In order that occupancy of part of a highway by an abutting owner may ripen into title by adverse possession it is necessary that it be clearly established that the possession was actual, continuous, visible, notorious, distinct and hostile to that of the public.—Mendel v. Poland, 200 Mich. 571.

¶ 120. Where a private way is improved by the owner and left open convenient for others, their use of it in common with the owner and those for whose special benefit it was opened is, as a rule, to be regarded as permissive only, and under an implied license.—LeRoy v. Collins, 176 Mich. 465.

¶ 121. One who buys lots which his deed describes according to a recorded plat is estopped from disputing the dedication and acceptance of an alley which appears thereon as bounding his lots and passing between them; and a mere occupancy by him of the space designed for the alley, without claim or color of title, does not establish an adverse possession until the interests of some one else are affected by it.—Marble v. Price, 54 Mich. 466.

¶ 122. A lot owner who building a fence so as to inclose, together with his lot, a strip of land claimed to be within the limits of an adjoining street, and who builds a house so that it stands partly upon said strip, the remainder of which is fenced in a manner not permitted, is not acting within the license of statutes (acts of May 18, 1807, and Nov. 7, 1815), reserving certain space of street for porches, grass-plats, etc., prohibiting erections on such space that exceed fifty inches in height, and forbidding severance of space from street; and his possession of the strip is adverse.—Flynn v. City of Detroit, 93 Mich. 590.

¶ 123. No evidence of adverse possession can be found in the piling of lumber on the eastern side of a street contiguous to a "reserved strip" and a canal, where a passageway was always left on the west portion of the street, the claimant's lands being west of the street and that which it claimed being on the eastern side and adjoining the street.—Nichols v. New England Furniture Co., 100 Mich. 280.

¶ 124. Complainant owned some lots bordering on a public alley. The whole land was a common, with nothing to distinguish boundary lines, and complainant for many years piled lumber on the alley, lumber which he changed and replaced by other lumber several times a year. Held, the possession by complainant was not notorious and hostile so as to give him title by adverse possession.—Weber v. City of Detroit, 159 Mich. 14.

¶ 125. The occupation and use of a private alley by a lot owner in connection with other adjoining lot owners for purposes of general convenience in the use of their property, and especially of a strip thereof, the record title to which is in another, cannot be such exclusive possession as to give title thereto by adverse possession.—LeRoy v. Collins, 176 Mich. 465.

¶ 126. The continuous maintenance of a fruit stand on the sidewalk of a public street for the statutory period under a lease from an adjoining landowner, does not confer a title by adverse possession on the owner of the stand as against the municipality.—Pastorino v. City of Detroit, 182 Mich. 5.

¶ 127. Where land has been used for some time as a private way by abutters with the apparent acquiescence of the owners, and where a city acquires a title by virtue of a tax sale, and recognizes to some extent its use as a way, the city will not, in the absence of actual occupancy by some one claiming a right to occupy, have any occasion to eject or oust any one in order to prevent such person from obtaining title as against it by adverse possession, it being assumed that when some one occupies the premises under a claim of right to do so, the city will begin proper proceedings to try title, and the abutters will begin proceedings to

assert their rights.—Galinski v. City of Detroit, 193 Mich. 184.

§ 29. Disseisin by the public of private owner.

¶ 128. Whether the act of a city in constructing a sewer across land is a disseisin depends upon the facts and circumstances under which the city entered upon the land and constructed the sewer.—Harrington v. City of Port Huron, 86 Mich. 46.

B. CLAIM OR COLOR OF TITLE.

§ 30. Necessity of claim or color of title.

Constructive possession of whole tract covered by color of title, see post § 38.
Necessity that deed transferring right of possession cover land in question see post § 39.
Evidence as to color of title, see post §§ 46, 48.
Color of title as basis for claim for compensation for improvements in ejectment, see Ejectment, VI.

¶ 129. Adverse possession for more than fifteen years need not be based upon claim of title and claim of right; either is sufficient.—Sanscrainte v. Torongo, 87 Mich. 69.

¶ 130. Adverse possession need not be based upon color of title.—Vier v. City of Detroit, 111 Mich. 646; Ward v. Nestell, 113 Mich. 185.

¶ 131. An adverse holding must formerly have been under claim of title to make void a deed given by one out of possession; but no claim of title has been necessary to perfect an adverse title under the statute of limitations.—Campau v. Dubois, 39 Mich. 274.

¶ 132. Adverse possession, under Comp. L. 1871, § 7137, need not be based on color of title, and it may become perfect even though the possessor originally had no shadow of title. But it must plainly appear, in such a case, that the real owner has been given a cause of action; and if the possession began in subordination to his right he is entitled to assume that his right is continuously admitted until he finds that it is disputed, or that the possessor has renounced the title under which he entered; and until then the owner cannot be prejudiced by not bringing suit.—Campau v. Lafferty, 50 Mich. 114.

§ 31. Intent, good faith or belief in title.

See also ante ¶ 43.
Recognition or acknowledgment of better title, see ante §§ 18, 19.
Pleading, evidence and practice as to, see post V.
Instructions as to, see post § 55.

¶ 133. One who does not believe in his title cannot have his possession regarded as adverse, where he is not a defiant trespasser.—Smeberg v. Cunningham, 96 Mich. 378; Campau v. Lafferty, 43 Mich. 429.

¶ 134. A poor person who takes possession of a house on relinquishment by another living therein, neither paying rent nor intending to do so but both taking possession because they supposed that they would never be asked to pay rent and having had information that another owned it, and not intending to hold it against a demand for rent, does not thereby institute adverse possession.—Smeberg v. Cunningham, 96 Mich. 378.

¶ 135. Good faith is not an element of adverse possession.—Dawson v. Falls City Boat Club, 136 Mich. 259.

§ 32. What constitutes color of title.

Intention to settle boundary as element in adverse possession of disputed strip, see also ante § 20.
Lease lacking signature of wife, see also ante ¶ 107.
As law question, see post § 52.

¶ 136. Color of title is that which in appearance is title, but which in reality is no title.—Miller v. Clark, 56 Mich. 337.

¶ 137. An entry upon land by an heir of the patentee thereof, from whom no conveyance is shown, is not without color of title, although the patent is not in his possession, and others have in fact acquired title to the land by adverse possession.—Miller v. Davis, 106 Mich. 300.

¶ 138. The commissioner's deed executed in pursuance of the order of the court in a partition suit gives color of title to the land included in such deed.—Lang v. Osceola Consolidated Min. Co., 145 Mich. 370.

¶ 139. There is no adverse possession of realty by the grantee of a life tenant as against the remainderman where the life tenant simply conveys all her "right, title and interest" in the property, which was a life estate without a covenant of warranty.—Rich v. Victoria Copper Mining Co., 147 F. 380.

¶ 140. Color of title is not given by a deed from a life tenant of an undivided interest in land to the other tenant in common of all the grantor's "right title and interest," although the grantee claims title by adverse possession against one deriving title through the remainderman, since by its terms the deed would have been satisfied by a life estate as well as by an estate in fee.—Rich v. Victoria Copper Mining Co., 147 F. 380.

¶ 141. The occupation by a mining company of two quarter sections of land in a section, on one of which it has a mine, and a claim of the whole section, does not charge a tenant in common in the remaining two quarter sections with notice that the mining company, the other tenant in common, makes any hostile claim or put him upon inquiry in respect to the nature of the mining company's claim, the interest of the mining company in the respective parcels being acquired under independent grants.—Rich v. Victoria Copper Mining Co., 147 F. 380.

§ 33. Tax titles and tax deeds.

Admissibility of invalid deeds, see post § 47.

¶ 142. A tax deed which discloses on its face that it was issued in violation of law is not color of title sufficient to set the statute of limitations in operation, for it is not of itself prima facie evidence of title.—Fitschen v. Olson, 155 Mich. 320.

¶ 143. The claim of a tax title is necessarily hostile to that of the original owner. —Lasley v. Kniskern, 152 Mich. 244.

¶ 144. Tax deeds and leases, though shown by evidence to be void, afford color of title to one who has gone into possession thereunder.—Hoffman v. Harrington, 28 Mich. 90.

C. DURATION AND CONTINUITY; STATUTORY PERIOD.

§ 34. Period and duration under the statutes.

The period of limitations and the construction and application of the statutes pertains rather to Limitations of Actions, which see; and for special periods within which to sue for annulment of proceedings affecting titles, see topic treating of the specific proceeding, e. g., Taxes, XII, C (proceedings to annul tax sales).

Accrual of right to sue as beginning of period, see ante § 8.

For recovery of lands generally, see Jud. Act, Chap. IX, Comp. L. 1915, §§ 12311-12322.

¶ 145. The period in which title to land will become absolute by limitation depends upon the statute in force at the time the right of action accrues to the owner.—McKenzie v. Cook Co., 113 Mich. 452.

¶ 146. Actual and undisputed possession of land purchased under a void tax deed for a period of five years from the date of such purchase gives the purchaser title by adverse possession under Pub. Acts 1893, No. 206, § 73, as amended by Pub. Acts 1895, No. 154, and by Pub. Acts 1899, No. 262, since the general statute of limitations (Comp. L. 1897, § 9714) does not apply to such cases, as shown by the general policy of the state. —Pence v. Miller, 140 Mich. 205.

¶ 147. Under How. St., § 8698, subd. 1, barring a right of entry after the lapse of five years, against one occupying under a deed of a ministerial officer of a court of competent jurisdiction within this state; a deed by an assignee in bankruptcy appointed by a U. S. District Court in this state, is within the act.—Potter v. Martin, 122 Mich. 542.

§ 35. Continuity and interruption.

See also ante ¶ 42.

Temporary entry under vendor, see ante ¶ 82.

Presumption as to occasional interruptions, see post ¶ 210.

Persons against whom limitations will run, see generally Limitations of Actions, III.

¶ 148. Title by adverse possession cannot be acquired by the erection along a portion of a disputed line, of a fence which was not continuously maintained but was permitted to fall into decay.—Conner v. Detroit Terminal R. Co., 183 Mich. 241.

¶ 149. The continuity of adverse possession is broken by a decree requiring the occupant to convey the land, even if the actual possession is not disturbed. The decree has the effect of a voluntary conveyance.—Gower v. Quinlan, 40 Mich. 572.

¶ 150. Where the ownership of the record title to unoccupied, uninclosed wild land is cut off by a sale of the land to the state for taxes and failure to redeem any claim of title by adverse possession by a stranger is likewise cut off.—Closser v. Remley, 195 Mich. 313. (Stone and Ostrander, JJ., dissenting.)

¶ 151. Adverse possession is not broken by deeding the land away if the grantor continues in possession and takes back a mortgage for purchase money which he afterwards forecloses, and under which he himself becomes foreclosure purchaser. And it is immaterial that the foreclosure proceedings are defective if the possession is retained.—Whitford v. Crooks, 54 Mich. 261.

¶ 152. The execution of a mortgage by the oral donor of land subsequent to the entry of the donee does not change the character of the latter's possession, as adverse to the donor nor operate to suspend the running of the statute in his favor.—Schafer v. Hauser, 111 Mich. 622.

¶ 153. An entry upon land by a plaintiff in ejectment, followed by a continuous occupancy for several years, is such an inter-

ruption of an adverse possession as to suspend the operation of the statute of limitations as against him, although, having misconceived his remedy, he subsequently discontinues his suit, and the defendant thereupon enters upon a writ of restitution.—Millard v. Hayward, 107 Mich. 219.

¶ 154. Under Comp. L. 1897, § 9721, mere disturbance of possession of lands not acquiesced in, does not interrupt the running of the statute of limitations.—Place v. Place, 139 Mich. 509.

¶ 155. Possession for the requisite period, of a vacant lot under a deed from an assignee in bankruptcy, by fencing the lot and using it for such purposes as vacant lots are used, could not be interrupted by acts amounting merely to trespass.—Potter v. Martin, 122 Mich. 542.

¶ 156. Tearing down the fence between one's self and one's next neighbor after asserting a right to premises inclosed by it is a mere trespass; and though perhaps a common-law entry, it does not break his adverse possession of the premises inclosed, nor of itself disseise him.—Donovan v. Bissell, 53 Mich. 462.

¶ 157. The mere failure to reside continuously on premises does not necessarily constitute a failure to keep continuous adverse possession, where such permanent and visible improvements were made and existed in such a way as to indicate to the owner, had he seen the premises, that some one was in possession under a hostile claim.—Merritt v. Westerman, 165 Mich. 535.

§ 36. Recognition of adverse title; taking lease.

Recognition of title as preventing inception of adverse holding, see ante §§ 18, 19.

Making new lease after title is complete, see post ¶ 200.

As to proof of taking lease, see post § 48.

¶ 158. Adverse possession is not broken by negotiating with other claimants if there is no waiver or nonclaim on the occupant's part.—Chapin v. Hunt, 40 Mich. 595; Ripley v. Miller, 165 Mich. 47.

¶ 159. The removal by a lot owner, pursuant to notice from the board of public works, of a fence which, for a period sufficient to give title by adverse possession, had inclosed with the lot a strip of land situated within the sidewalk line, will not be construed, after the lapse of twelve years, during which time the city has made no attempt to use any part of the strip of land for public purposes, and during which, also, the porch and steps of the lot owner's house have projected several feet over and upon said strip, as an acknowledgment by the lot owner of the claim of the city that the line of the street included said strip of land.—Leonard v. City of Detroit, 108 Mich. 599.

¶ 160. A parol lease for a single year, if accepted, is enough to break a period of adverse possession and bar the statute of limitations against actions for real estate.—Campau v. Lafferty, 43 Mich. 429.

¶ 161. The running of the statute of limitations in favor of a tenant in common in possession of the entire estate is suspended by the recognition of the title of the cotenants by executing an option for a mining lease, and by the execution of such lease.—Donahue v. Vosper, 189 Mich. 78. Affirmed in 243 U. S. 59, 61 L. Ed. 592, 37 Sup. Ct. Rep. 350.

D. AREA AND EXTENT.

§ 37. Extent of claim or title in general.

Evidence as to, see post §§ 46-48.

¶ 162. Constructive possession is coextensive with the title which creates it, and actual possession is limited by the occupant's title.—Campau v. Campau, 44 Mich. 31.

¶ 163. An occupant's possession of land is coextensive with his claim and color of title. If in possession of a part under color of title to the whole tract, his constructive possession extends to the whole.—Fuller v. Swensberg, 106 Mich. 305.

¶ 164. Where the line of a building on a street has been occupied and used by the public as the line of the street for twenty-five years, title is gained as against the public to all the ground occupied by the building.—City of Big Rapids v. Comstock, 65 Mich. 78.

¶ 165. A tenant in common who has entered upon a portion of the premises is not thereby precluded from claiming the whole, since he is not barred from buying the remainder of the title.—Chamberlain v. Ahrens, 55 Mich. 111.

¶ 166. Title by adverse possession of an entire tract of land is acquired by defendant in ejectment, where such defendant or its grantor has been in actual occupancy of a part of such land, and no one has been in adverse occupancy of any part of it.—Lang v. Osceola Consolidated Min. Co., 145 Mich. 370.

¶ 167. The fact that a lot owner took title to his lot according to a recorded plat, does not prevent him from extending the line of

his lot into the street, so as to gain title by adverse possession.—Triece v. City of South Haven, 154 Mich. 129.

¶ 168. Title by adverse possession was obtained to the center of a village alley, as against the village, where certain lots were purchased which abutted on land platted as an alley but which was never used as such by the public or the village authorities, and where although the alley was not included in the literal reading of the deed in question, the purchaser and his grantor had been in possession for a much longer period than that required by the statute to obtain title by adverse possession.—Darrow v. Village of Homer, 122 Mich. 229.

¶ 169. Occupation of the house and garden on a designated tract of land, under an agreement to keep off trespassers and to prevent the cutting of valuable timber, extends to the whole tract, and is sufficient to apprise the original owner that adverse claims are being asserted thereto.—Merritt v. Westerman, 180 Mich. 449.

§ 38. Constructive possession under color of title.

¶ 170. As a general rule, when a grantee takes actual possession of a part of a tract of land which the grant purports to convey to him under a claim of title to the whole derived from the grant, such partial possession will by construction extend to the limits of the grant.—Rich v. Victoria Copper Mining Co., 147 F. 380.

¶ 171. Color of title under a deed and occupancy of a part will constitute an adverse possession to a single lot except where there is an actual occupancy under a different claim.—Millerd v. Reeves, 1 Mich. 107.

¶ 172. Possession of part of a tract which has always been occupied and taxed as one parcel and which has never been subdivided is constructive possession of the whole.—Clark v. Campau, 92 Mich. 573.

¶ 173. Where a grantee builds a boundary fence according to a recent survey and occupies for more than fifteen years, his possession must be regarded as having been under color of title to the whole tract, including a strip which by a later survey was found to be outside the boundary.—Carpenter v. Monks, 81 Mich. 103.

¶ 174. Where one sells part of a parcel of land and delivers possession up to a certain line, and continues the occupancy of the remainder to that line, he is to be considered, as against his grantee, in adverse possession to that line, and if such possession is continuous for twenty years the grantee cannot insist that such line was not the true boundary.—Bower v. Earl, 18 Mich. 367.

¶ 175. Adverse possession of forty acres of land under a recorded patent covering an entire quarter section will not of itself give the occupant title to the land not actually occupied, as against a prior patentee of another part of the quarter section.—Turner v. Stephenson, 72 Mich. 409.

¶ 176. A defendant in trespass who entered into possession under a tax deed, and cleared up and fenced a small portion of the land and planted a crop, and was in actual possession coextensive with the deed.—Brigis in a position to contest plaintiff's title, the deed, though conceded to be void, giving him color of title to the whole tract.—Hecock v. Van Dusen, 80 Mich. 359.

¶ 177. Entry under a deed describing the premises as a single tract gives the grantee possession coextensive with the deed.—Brigham v. Reau, 139 Mich. 256.

¶ 178. If one has a deed or color of title to one entire tract of land, as to one whole lot or farm, which is uninclosed, and he is in actual possession of a part, the remainder not being actually occupied by any one, his deed or color of title will ordinarily extend his possession to the entire tract, for the purpose of showing adverse possession.—Kingston v. Guck, 155 Mich. 264.

¶ 179. Where the same grantor conveys to the same grantee two separate descriptions of land, contiguous to each other, by separate instruments, which are thereafter used, dealt with, and deeded by the grantee and his successors in title as one description, acts of dominion over any portion of the land covered by the entire description are referable to the whole, in any event after the two descriptions are merged in one.—Kingston v. Guck, 155 Mich. 264.

E. TACKING AND TRANSFERS.

§ 39. Successive possessors; tacking.

Effect of buying in outstanding titles and claims, see ante §§ 18, 19, 36.

Transfer of completed title, see post § 42; and see Deeds; Descent; Wills.

¶ 180. Separate successive disseisins cannot be tacked so as to constitute one and a single continuous possession unless there is privity of estate between the successive parties in possession, each coming in as the transferee of the possessory rights of his predecessor.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503.

¶ 181. Where a grantee relies upon the deed of his grantor to show privity of estate between himself and the latter, he cannot have the benefit of the grantor's possession of lands which are not mentioned in the deed. —Sheldon v. Michigan Cent. R. Co., 161 Mich. 503.

¶ 182. Where the deeds to land excluded land which is claimed by adverse possession the last occupant cannot tack the successive possessions of his predecessors in title.—Lake Shore & M. S. Ry. Co. v. Sterling, 189 Mich. 366.

¶ 183. One who acquires the title of an alleged tenant and also the title of the alleged landlord can tack his possession to that of the landlord, and a stranger cannot assert estoppel of the tenant to question the title. —Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 184. Where one in possession of premises has contracted to sell them and has recovered possession from the vendees through forfeiture of the contracts or otherwise, the possession of the vendees may inure to his benefit in establishing continuous adverse possession if there has been no interval between the vacation by the vendees and the occupancy by the claimant.—Merritt v. Westerman, 165 Mich. 535.

¶ 185. One cannot have the benefit of the adverse possession of land by his predecessors in title where the conveyances under which he claims do not purport to convey the premises so occupied, and where the same are not within the inclosure of those actually conveyed.—Nichols v. New England Furniture Co., 100 Mich. 230.

¶ 186. The mere assessment of land to a claimant thereof, and the payment of the taxes by him, is insufficient to continue an adverse possession previously held by his grantor, especially where the latter had abandoned the premises prior to conveying them. —Miller v. Davis, 106 Mich. 300.

¶ 187. A mortgagee of land who takes possession thereof under oral authority from the mortgagor is entitled, as against a stranger, to set up adverse possession under a tax title under which the mortgagor claimed.— Harrison v. Spencer, 110 Mich. 215.

¶ 188. One Legault, complainant's predecessor in title to certain land, conveyed a 100-foot strip from the west side of said land to the defendant railroad. Defendant, instead of fencing the whole strip built a fence some thirty feet from the center of the strip on the east side thereof. Several of complainant's predecessors holding under Legault occupied with buildings and dwellings the portion of the 100-foot strip lying east of the said fence. No one of them did so for the statutory period, but by tacking their occupations the statutory limit necessary to obtain title by adverse possession was exceeded. All the deeds between these predecessors and th one to the complainant expressly excepted the 100-foot strip from the grant. No oral agreements were made between these grantees surrendering possession to one another of the portion of the 100-foot strip occupied by them. Held, the complainant did not gain title by adverse possession to the strip so occupied.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503.

¶ 189. Actual possession and occupancy for the statutory period, by successive owners of a city lot, of a strip of land included within the platted lines of a public street, is sufficient to establish title as against the city, although none of the owners occupies the premises for the full period, and although each conveyance excepts that part set aside for sidewalk purposes, where the part actually used for a sidewalk has never included the strip claimed, and the recorded plat sets aside no specific land for such purpose.—Vincent v. City of Kalamazoo, 111 Mich. 230.

F. DISABILITIES AND SUSPENSIONS.

§ 40. Capacity to enter or sue for possession.

Capacity of the public to be disseised, see ante § 5.

Necessity that right of entry exist, see ante § 8.

The disability to sue pertaining to infancy, coverture, etc., is fully treated in Infants; Husband and Wife; Insane Persons; Limitations of Actions, which see.

The maturity of the right to enter depends on the nature of the estate under which entry is to be made, and hence is properly treated in topics Life Estates, Reversions and Reminders; Dower; Wills; and the like.

Time when right deemed to have accrued, see Jud. Act, chap. IX. §§ 2, 3, Comp. L. 1915, §§ 12312, 12313.

Extended time for persons under disability, see Jud. Act, Chap. IX, §§ 5, 7, Comp. L. 1915, §§ 12315, 12317.

Extension on account of death, see Jud. Act, Chap. IX, § 6, Comp. L. 1915, § 12316.

IV. EFFECT AND TITLE ACQUIRED.

§ 41. Title acquired by disseisor.

Constructive possession of whole tract under color of title, see ante § 38.

The area to which title passes depends on the extent of possession under color or claim of title, as to which see ante III, D.

Sufficiency of title to control giving of notice to occupant or owner in highway opening proceedings, see Highways, II, B.

Disseisin as preventing consummation of dower in premises on death of husband, see Dower, II.

The general doctrine that possession is notice of the possessor's claim or right to one taking a conveyance from another is treated in Notice and Record of Title.

¶ 190. Actual possession with a claim of ownership in fee establishes a presumptive title as against every one but those whose title is better.—Loomis v. Roberts, 57 Mich. 284.

¶ 191. A deed from one who has held lands adversely long enough to acquire title conveys a good title to the grantee.—McKay v. Gardner, 120 Mich. 267.

¶ 192. Fifteen years' adverse possession is sufficient to entitle the plaintiff to maintain ejectment without paper title.—Nowlen v. Hall, 128 Mich. 274.

¶ 193. A title obtained by more than 15 years' adverse possession is sufficient to entitle the plaintiff to maintain trespass.—Hart v. Doyle, 128 Mich. 257.

¶ 194. A purchaser at guardian's sale duly confirmed by the probate court and conveyed subsequent to the ward's attainment of majority, purporting to convey the ward's interest and held as such for 42 years with no recognition of any tenancy in common with him, has the title good as against one claiming through such ward.—Payment v. Murphy, 141 Mich. 626.

¶ 195. The adverse possession of land by a patentee and those claiming under him for fifty years renders evidence of the nonrecord of the patent irrelevant in a suit involving the title to the land.—Dikeman v. Arnold, 78 Mich. 455.

¶ 196. Defendant and his predecessors had been in possession of premises under tax titles since 1854, and their occupation had been adverse, open, notorious, and under claim of right. They at no time stood in any fiduciary relation to plaintiff or his predecessors. Held, plaintiff's action in ejectment would not lie.—Carmell v. Parr, 161 Mich. 429.

§ 42. How transferable or lost.

See also post ¶ 227.

Transfer of possession before title complete, see ante III, E.

The general doctrine that a title or interest in land must be conveyed by a writing is treated in Frauds, Statute of.

¶ 197. In an action of trespass involving the true location of a boundary line, it appeared that, upon defendant's removing a fence from the line as claimed by plaintiff, where it had existed for many years, and building it upon the line as claimed by himself, plaintiff stated that he would have a resurvey to determine where the true line was, and would not abide by the survey which defendant had caused to be made, and in accordance with which he had erected his fence. Held, that plaintiff was not thereby estopped from setting up title to the land in dispute by adverse possession.—Van Der Groef v. Jones, 108 Mich. 65.

¶ 198. A parol agreement made by a person after he has acquired title to a disputed strip by adverse possession, that he will unite with the adjoining landowner who claims to own such strip, in having a survey made to determine the true line, will not, at least until it is acted upon, and the line actually established, divest such person of his title.—Lamoreaux v. Creveling, 103 Mich. 501, on authority of Burns v. Martin, 45 Mich. 22.

¶ 199. If a boundary line has been established by adverse possession for more than 15 years, an oral agreement to have a survey made to establish the line is not sufficient to defeat the title obtained by the adverse possession.—Lamb v. Lamb, 139 Mich. 166.

¶ 200. A husband leased a part of a homestead to a township, but the lease was void for lack of the wife's signature. The township occupied the premises for thirty-six years. The township board learned of the lease, and found it among the township papers. It made a new agreement to pay rent for the premises. Held, it was estopped to set up that it had held the premises by adverse possession.—Township of Jasper v. Martin, 161 Mich. 336.

V. PLEADING, EVIDENCE AND PRACTICE.

§ 43. Pleading.

Admissibility in proof under general issue in ejectment, see Ejectment, III.

¶ 201. A purchaser of real property may set up adverse possession as against a tax lien in favor of the city existing at the time of the purchase, without alleging want of knowledge of the outstanding tax lien at the time of purchase.—Cass Farm Co. v. City of Detroit, 139 Mich. 318.

¶ 202. A bill to quiet title to certain lands, based upon adverse possession, held sufficient in alleging adverse possession without also alleging same was exclusive.—Corby v. Thompson, 196 Mich. 706.

¶ 203. An allegation of a bill of complaint that trustees have always refused and still refuse to account to the complainants for the corpus of the trust estate, negatives any claim that the trustees hold adversely to the complainants.—Sprague v. Trustees of Protestant Episcopal Church, 186 Mich. 554.

¶ 204. Where a bill by a vendee for specific performance alleges that the vendee purchased, took and continuously maintained possession under the contract and paid the full purchase price an allegation of adverse possession therein is wholly untenable.—Rodgers v. Beckel, 172 Mich. 544.

§ 44. Burden of proof and presumptions.

Statute regulating presumption, see Jud. Act, chap. IX, § 4; Comp. L. 1915, § 12314.

¶ 205. The burden of proving adverse possession rests on the person asserting it.—Conner v. Detroit Terminal R. Co., 183 Mich. 241.

¶ 206. Where the possession of land is separate from the title the law will not presume that the possession is adverse, since every presumption is in favor of possession in subordination to the title of the true owner.—Conner v. Detroit Terminal R. Co., 183 Mich. 241.

¶ 207. Evidence of adverse possession must be strictly construed, and every presumption is in favor of the true owner.—Sheldon v. Michigan Cent. R. Co., 161 Mich. 503.

¶ 208. When the possession is by actual occupation of the possessor, or by his tenants, under claim of title, his possession is visible, open, notorious and distinct, and will be presumed to be hostile.—Greene v. Anglemire, 77 Mich. 168.

¶ 209. Any presumption that the adverse character of a possession of land ceases when the holder buys the original title to a part of the premises may be overcome by evidence that the possession held continued under the claim of an exclusive right, and with the intention to exclude co-owners of the original title from any right or interest.—Cook v. Clinton, 64 Mich. 309.

¶ 210. The effect of evidence of continuous possession as the basis of a claim of title is not destroyed by proof of occasional interruptions in the actual occupancy of the premises, nor by the fact that at times they were actually occupied by persons not distinctly shown to be in under any of the parties in the claimant's chain of title; there being no proof of any adverse occupancy, or of any intention of the claimant or his grantors to abandon the possession. It is a just presumption that such persons were in, as tenants merely, under the parties claiming title.—Rayner v. Lee, 20 Mich. 384.

¶ 211. One who goes into possession of land with the owner's permission, and under the belief that the land has been granted by a wrong description, may acquire rights therein that ought not to be disturbed by an action of ejectment; but unless such facts are shown mere continued possession will not raise such presumptions in defendant's favor as will defeat a legal action.—Christopher v. Detroit & N. R. Co., 56 Mich. 175.

§ 45. ——As between common tenants and dependent estates.

Degree and sufficiency of proofs, see post § 50.

¶ 212. Tenancy in common extends to the entire premises, but sole possession by any one tenant is not presumed adverse as against the rest and does not affect their rights, unless held under a claim of exclusive right whereof they have express or implied notice.—Campau v. Campau, 44 Mich. 31; Gower v. Quinlan, 40 Mich. 572.

¶ 213. A claim of adverse possession by one tenant in common, as against another, must be clear and unambiguous because the mere possession in a tenant in common would be rightful and would not imply an adverse holding, and the tenant is presumed to hold in recognition of the rights of his co-tenant unless his acts and declarations are clearly inconsistent with such presumption.—Campau v. Campau, 45 Mich. 367.

¶ 214. Where one of several heirs had taken exclusive possession of land to which all were entitled as tenants in common, and had improved it without interference from the others, though they lived in the immediate neighborhood, and no possessory action was brought by them, or by their heirs or representatives for more than twenty-five years after their death, it was held that no possession could properly be found that was not adverse and exclusive within the statutory period of limitation, and that there could be no recovery in the right of the excluded parties.—Campau v. Dubois, 39 Mich. 274.

¶ 215. Whether it is error to rule that occupation by one tenant in common, giving leases and receiving rents for more than twenty years with the knowledge of his co-tenant, without actual acknowledgment of the latter's rights, and without any claim by such co-tenant for a share of the rents and profits, will bar a recovery in ejectment by the latter, quere, two justices holding that upon such facts the inference or presump-

tion of title is one of law, and the other two holding it to be one of fact for the jury.—Dubois v. Campau, 28 Mich. 304.

¶ 216. The presumption that the continued occupancy of land by a grantor after its conveyance and the recording of the deed is for a temporary purpose, without claim of right, and merely as a tenant at sufferance of the grantee, can only be overthrown by circumstances tending to show a clear renunciation of such tenancy, brought home to the grantee, and of a subsequent exclusive, adverse possession by the grantor under a claim of superior right.—Paldi v. Paldi, 84 Mich. 346.

¶ 217. Where children are of full age, married, and with homes of their own, there is no conclusive presumption that a father who occupies realty owned by the deceased mother does so in subordination to the title of the children.—Tyler v. Wright, 164 Mich. 606.

¶ 218. In an action of ejectment by one tenant in common against another, where defendant claims title to all the property as the result of adverse possession of the part claimed by plaintiff, where defendant obtained possession lawfully under a deed from the life tenant and its possession did not become unlawful until the death of the life tenant, the burden to show that the continued possession was adverse was upon the defendant.—Rich v. Victoria Copper Mining Co., 147 F. 380.

§ 46. Admissibility of evidence.

Necessary kind or quality of possession, see ante III, A.

Weight and sufficiency of evidence, see post §§ 48-51.

General law of evidence, see Evidence.

The cases on the rule that one's acts and declarations out of court may be received against him as admissions against interest, and on the rule that one's similar acts and declarations are not receivable against the other party unless brought home to his knowledge or notice under a duty to make reply, are treated in Evidence, VII.

¶ 219. Adverse possession and its character may be shown by the claims and assertions of occupants, and if these are made in the ordinary course of possession and not during litigation, they are admissible as explanatory and for what they are worth.—Jacobs v. Callaghan, 57 Mich. 11.

¶ 220. A defendant in ejectment interposed the defense of adverse possession. In order to meet this, plaintiff was allowed to prove by the grandfather of certain minor heirs who inherited the land, and through whom plaintiff claimed title, that defendant's possession of the land was under an agreement made by him with the witness, who assumed to act for the minors, that defendant might occupy said land in consideration of his paying the taxes thereon. The testimony was objected to for want of proof of the authority of the grandfather to act for the minors. Held, that, if defendant in fact entered into the possession of the land under the agreement testified to, he did not enter in hostility to the minor heirs, and that for the purpose of establishing such fact the testimony was admissible.—Hoban v. Cable, 102 Mich. 206.

¶ 221. Where plaintiff claims by adverse occupancy up to a division fence which defendant claims was not built by plaintiff with the expectation of holding all of the land inclosed within it, defendant may show that after a survey which disclosed that part of the fence encroached on defendant's land, plaintiff removed it so as to conform to the division line as located by said survey.—Hockmoth v. Des Grand Champs, 71 Mich. 520.

¶ 222. Where, in an action of ejectment for a strip of land which plaintiff claimed by adverse possession, a surveyor testified that he was employed by plaintiff's grantor, seventeen years before, to make a survey of the ground, and that the latter then claimed title up to the fence on the west side of his premises, it was proper to show, by way of characterizing his claim, that the original boundary, as located by the surveyor at the time, was east of the strip in controversy, and that he so indicated the line by a surveyor's mark, which was yet visible.—Beecher v. Ferris, 110 Mich. 537.

¶ 223. Where it is shown that plaintiff's ancestor owned deeds introduced in evidence, took possession of land some forty years previous to a suit, and that her heirs had remained continuously in possession ever since, such facts constitute evidence of title by prescription.—Dahlem v. Abbott, 153 Mich. 465.

¶ 224. The intention with which possession is held constitutes the very essence of adverse possession, and the assertion of the occupant with reference to the nature of his possession is competent evidence to prove intention.—Youngs v. Cunningham, 57 Mich. 153.

¶ 225. In an action involving title to certain land, it being claimed that the common grantor had conveyed to his daughters who had again conveyed to plaintiff, claiming adversely, evidence showing how the land was treated by the members of the family, and their understanding as to whom it be-

longed to, is admissible as bearing upon their subsequent conduct.—Brigham v. Reau, 139 Mich. 256.

¶ 226. In ejectment, it was not error to refuse to permit defendant to testify on the issue of adverse possession of a disputed strip, as to whether at the time he built the fence in question, he ever intended to change it; where such fence was built under some arrangement between defendant and plaintiff's remote ancestor, since deceased.—Miller v. Shumway, 135 Mich. 654.

¶ 227. On an issue of adverse possession in ejectment by one against another common owner testimony by defendant that many years ago his father, the ancestor of both, made defendant a parol gift of the land was incompetent.—Weshgyl v. Schick, 113 Mich. 22.

¶ 228. In ejectment, it was not error to refuse to permit defendant to prove on the issue of adverse possession, that it was generally understood in the neighborhood that he owned the land in controversy; where defendant's possession was conceded to be distinct and notorious, but its hostility was denied.—Miller v. Shumway, 135 Mich. 654.

¶ 229. The extent of the possession is a fact to be established upon the trial, and it is always competent to establish it by any testimony relevant for that purpose, where title is claimed by adverse possession.—Greene v. Anglemire, 77 Mich. 168.

¶ 230. Deeds, whether valid or not, under which a party in possession claims, are admissible for the purpose of showing possession under claim and color of title, and the extent thereof.—King v. Merritt, 67 Mich. 194.

¶ 231. On issue of adverse possession whether a former suit in ejectment has or has not been abandoned is not material when it is admitted only for the purpose of proving that the plaintiffs therein by bringing it, committed an ouster of their co-tenants.—Fenton v. Miller, 94 Mich. 204.

¶ 232. Where the grantee in a deed from a tenant-in-common purporting to convey the entire estate enters into possession of the land, such deed is evidence of the extent of his claim and of the character of his entry and possession.—Fuller v. Swensberg, 106 Mich. 305.

¶ 233. In an action of ejectment by a wife's administrator against the heirs of her deceased husband, defendants' attorney offered in evidence a tax deed acquired by the husband in the wife's lifetime, stating that he proposed to follow it up by proof of adverse possession. She had been dead more than 15 years when action was begun. The admissibility of the deed was questioned, and the court inquired if defendants proposed to build up title under the deed, and also asked if there was any claim that the statutory period began to run from the wife's death. Defendants' counsel refused to concede that they relied wholly upon the deed, or to base their claim solely on adverse possession subsequent to the wife's death, but stated that they would "build title of possession up under the deed from the time it was given." The court thereupon rejected the evidence and directed a verdict for plaintiff. Held, that defendants should have been allowed to introduce their proofs relating to adverse possession in view of the rule that color of title is no longer requisite.—Ward v. Nestell, 113 Mich. 185.

§ 47. ——Using land, paying taxes, and taking tax titles.

See also post ¶ 281.

¶ 234. Inclosure of land by a fence for twenty-eight years, cutting wood on said land during that time, and performance of other acts indicating ownership and tending to show occupancy up to the line of the fence, must be regarded as tending to establish adverse possession.—Lamoreaux v. Creveling, 103 Mich. 501.

¶ 235. Evidence that defendant had used the strip of land in question, lying east of his fence, for a pathway during part of the time for which plaintiff claimed to have been in adverse possession, was admissible in the former's favor.—Beecher v. Ferris, 110 Mich. 537.

¶ 236. Although paying taxes, or asserting title, or the common understanding in the neighborhood, or making surveys, or an occasional renting for trapping and shooting, are not sufficient to establish title by adverse possession, yet such acts are competent evidence to be considered in determining the question.—Whitaker v. Erie Shooting Club, 102 Mich. 454.

¶ 237. Payment of taxes on land by a person claiming ownership is admissible in an action of ejectment against him, as tending not only to establish his claim of ownership, but to show adverse possession, the taxes being assessed to him.—Murray v. Hudson, 65 Mich. 670.

¶ 238. Where possession is shown to have been once acquired by those under whom a party claims, evidence that the land has since been assessed as resident land, and that the taxes have been paid by some one in such party's chain of title, is admissible as tending to show that the possession was continued.—Rayner v. Lee, 20 Mich. 384.

¶ 239. A tax deed which is insufficient in itself to pass title, and assessment rolls showing the assessment of the property in the name of the grantee, and proceedings of the probate court showing that the land was treated as a part of the estate of such grantee upon his decease, are admissible, upon an issue of adverse possession, to characterize the acts of possession, on the part of such grantee and his successors, shown by the evidence.—Chabert v. Russell, 109 Mich 571.

¶ 240. Payment of taxes and making of improvements by a tenant in common while in the joint possession of land with a cotenant who holds the record title are not evidence of adverse possession, or of an adverse claim, or of the actual ouster required by How. St., § 7812, to set in operation the statute of limitations.—Pierson v. Conley, 95 Mich. 619.

¶ 241. The fact of purchase of the tax title by an occupant of premises is admissible in evidence to show whether his possession was adverse.—Merritt v. Westerman, 165 Mich. 535.

§ 48. Sufficiency of evidence.

Necessary factors of openness, hostility, etc., see ante § 9 et seq.
Necessity of stronger case where there is no color of title, see ante ¶ 132.
When urged as title in ejectment, see also ante ¶ 22.
As question for jury, see also post §§ 52-54.
Propriety of directing verdict, see post § 54.

¶ 242. The doctrine of title by adverse possession must be strictly applied.—Yelverton v. Steele, 40 Mich. 538; Conner v. Detroit Terminal R. Co., 183 Mich. 241.

¶ 243. Adverse possession must be clearly shown and not left to inference.—Yelverton v. Steele, 40 Mich. 538; Conner v. Detroit Terminal R. Co., 183 Mich. 241.

¶ 244. Adverse possession must be clear and distinct, and plainly proved, to establish title.—Campau v. Campau, 45 Mich. 367.

¶ 245. Where title to land is sought to be divested by mere occupancy, clear and cogent proof upon each of the essential elements of adverse possession is required.—Judson v. Duffy, 96 Mich. 255.

¶ 246. No more than a preponderance of evidence is required to establish adverse possession.—Greene v. Anglemire, 77 Mich. 168.

¶ 247. When title is claimed under a deed, the deed is the best evidence of the extent of the possession, and when applied for that purpose the same rules of evidence apply in a case of adverse possession as in any other case, and no more than a preponderance of evidence is ever required to establish such a possession.—Greene v. Anglemire, 77 Mich. 168.

¶ 248. Upon the question whether a testator has title by adverse possession to realty which he attempts to dispose of by will, statements in the will tending to disparage his title must be interpreted in connection with the whole will, due weight being given to the fact that by making the will he assumed the right to dispose of said realty.—Tyler v. Wright, 164 Mich. 606.

¶ 249. Color of title, under a deed, and occupancy of a part, will be sufficient proof to constitute an adverse possession to a single lot.—Millerd v. Reeves, 1 Mich. 107.

¶ 250. Proof that a person entered into possession under a contract with a party under whom the claimant holds—it appearing that he never received a deed and that he has ceased to occupy the premises—is not evidence of possession adverse to claimant.—Rayner v. Lee, 20 Mich. 384.

¶ 251. Adverse possession is made out by showing that the plaintiff had entered into possession twenty-five years ago, built a house on adjacent property and used the tract in question since that time.—Hart v. Doyle, 128 Mich. 257.

¶ 252. Title cannot be gained by adverse possession where there is an absence of proof that the occupation was hostile and in denial of the owner's rights, and where the alleged adverse possessor conveyed his adjacent land without including the small parcel in question.—Dillie v. Longwell, 163 Mich. 439.

¶ 253. Evidence of a former ejectment suit brought by the now defendants against the husband of the now plaintiff in which the wife was a witness and interested in the suit, in which title by adverse possession was asserted and found for the then plaintiff, if not sufficient to show res adjudicata, is at least enough to warrant an issue for the jury in the present case involving lands with the same chain of title.—Carpenter v. Carpenter, 126 Mich. 217.

¶ 254. Title by adverse possession is shown, where, in a suit to quiet title, it appears that claimant under such title purchased the land in controversy thirty years prior upon foreclosure of a mortgage, that he lived in a village near by, that the land was generally known by his name, and was assessed to him, that he inclosed it with a fence, took wood and hay from it, raised some crops upon it and kept hay in a build-

ing upon it; even though such foreclosure proceedings were admittedly void.—Miskwabik Development Ass'n v. Croze, 140 Mich. 194.

¶ 255. Uncontradicted testimony of defendant's grantor that he took title subject to a life lease in duplicate to plaintiff's grantor, as lessee, who was previously in possession, relied on to prevent such possession being adverse, and that it was entered into in settlement of an effort to remove such possessor, who was to pay the taxes during his life, is discredited by failure to show that any one ever heard of any steps by him to oust such possessor, or of the lease, though each of the parties made transfers of the land, that the witness conveyed it by warranty deed and on the same day it was reconveyed to his wife, that his mediate and immediate grantees did not take the lease with their title papers, that the supposed lessee died before witness conveyed the land and before the lease was destroyed, as he claimed, nine years later, and that during such interval he was agent of his wife, in respect to the property and as such went to see the land, near which the supposed lessee had lived, but without learning of his death for twelve years.—Howatt v. Green, 139 Mich. 289.

¶ 256. Title by adverse possession is shown to have been acquired by the owner of a city lot of a strip of land between such lot and the one adjoining, even though the boundary line, according to the original plat, is that claimed by the defendant, in a suit to restrain trespass upon such land; where the evidence shows that one of the grantors of complainant built a fence along the line now claimed by complainant more than twenty years previously, and planted trees, shrubs, and bushes up to the fence line; that the fence remained until it decayed, leaving stubs of the posts in the ground; that the trees, shrubs, and bushes are still there; and that this exclusive and hostile occupation continued for such period of more than twenty years.—McGaw v. Manning, 145 Mich. 378.

¶ 257. In an action of ejectment a charge that the defendant had not established title by adverse possession held justified where the evidence tended merely to show that a crooked fence had stood along the boundary line for a period of much less than fifteen years, that a tenant of the defendant for a time maintained a garden on the strip and that another tenant had during one season made a lawn on a part thereof.—Austin v. Crowell, 193 Mich. 296.

¶ 258. In summary proceedings for the possession of real estate, where the sole question involved was whether defendant's adverse possession of the premises had been sufficiently hostile, the evidence showed that defendant had, a number of years before, disputed the title of plaintiff's decedent; that at the same time he disputed the right of plaintiff's decedent to put him off the land; that plaintiff's decedent lived eight years thereafter, and took no steps to disturb defendant; that after the death of plaintiff's decedent, defendant told the son who acted as agent for the estate that he (defendant) was the owner of the farm, and could not be put off, also telling him his grounds for claiming title; that defendant paid the taxes which were assessed to him; that after asserting title he built a substantial house on the land, and that he granted a right for a highway and drain through the land, and sold gravel from it. Held, that this evidence is sufficiently clear and cogent on the question of the hostility of defendant's possession.—Parker v. Case, 155 Mich. 497.

¶ 259. Evidence held to show adverse possession by plaintiffs of land in question in a suit to quiet title to such land.—Corby v. Thompson, 196 Mich. 706.

§ 49. ——As to vacant, wild or open lands.

Character of possession required, see ante § 10.

¶ 260. Evidence that in 1861 the grantor of defendant relying upon adverse possession employed to look after the land a farmer who at times drove his cattle there to pasture, and authorized men to cut the grass, that the land was used by the cattle of the neighborhood as a common, that grass was cut by any one who chose, that the farmer's supervision ended in 1876 or 1878, and that the land remained unoccupied until 1882, when defendant entered under a deed, is not sufficient to make a prima facie case for submission to the jury.—Judson v. Duffy, 96 Mich. 255.

¶ 261. Title was claimed by adverse occupancy up to a fence which, when built, commenced on the true line and by a deviation inclosed the land in dispute. It was composed in part of logs and brush. The adjoining land was wild and its owner did not live in the neighborhood, though he occasionally passed that way. Held, that the evidence of adverse holding should be such as to convince the jury that the fence was built as a permanent assertion of title to all of the land inside of it, which was thereafter held for the statutory period under such circumstances and in such a way as plainly to give notice that the occupant claimed title thereto as against all persons, and this so notoriously that the original owner, if he did not know of such hostile occupation, ought to have known it; and that the jury might take into consideration how and when the fence was built, and of what materials.—Hockmoth v. Des Grand Champs, 71 Mich. 520.

¶ 262. A bona fide and actual possession of wild lands is not clearly established by testimony tending to show that the party making such claim occupied a shanty on the land while removing timber therefrom, it not appearing who built the shanty, nor what the purpose was for which it was built, and there being a doubt as to the shanty's being upon the land from which the timber was removed.—McKinnon v. Meston, 104 Mich. 642.

§ 50. ——As against co-tenants and remaindermen, or other dependent estates.

See also ante ¶ 213.
What constitutes ouster, see ante § 16.
Ejectment suit as admission of ouster, see ante ¶¶ 75, 76.

¶ 263. Title by adverse possession, whatever the extent of the claim, must be clear and distinct, as against co-tenants.—Campau v. Campau, 44 Mich. 31.

¶ 264. Before a tenant in common will be held to have acquired title against his cotenant by adverse possession the proofs must be clear and cogent, and the case cannot be made out by inference.—Donahue v. Vosper, 189 Mich. 78, affirmed in 243 U. S. 59, 61 L. ed. 592, 37 Sup. Ct. Rep. 350.

¶ 265. A tenant in common executed a quitclaim deed purporting to convey the entire estate. The grantee entered into possession, claiming to own the whole property, and he and his grantees maintained an actual, continuous, and exclusive possession thereof for twenty-eight years, improving the premises, paying the taxes assessed thereon, and successively conveying the entire interest by warranty deed. The owners of the remaining interest resided in the immediate neighborhood during the greater part of such period of occupancy. Held, upon a bill for partition filed by the latter, that an absolute title by adverse possession had been established in the defendants.—Fuller v. Swensberg, 106 Mich. 305.

¶ 266. Testimony by the wife of a tenant in common of land, to the effect that her claim of adverse possession is based upon her continuous possession from the time of her marriage, is insufficient to establish title by adverse possession as against her husband's co-tenants, there being nothing to indicate that such possession was hostile to their rights.—Fenton v. Miller, 108 Mich. 246.

¶ 267. A finding of an ouster of a tenant in common by his co-tenant, essential to make the sole possession of the latter adverse, may rest upon evidence tending to show that for thirty years or more the land has been known by his name, that such acts of ownership as the character of the land was susceptible of were exercised by him, that he procured a tax deed, which he caused to be placed of record, and that upon his death the property was divided and the lots distributed among his heirs, and that neither the former tenant nor any of his successors made any claim to the premises during such time.—La Fountain v. Dee, 110 Mich. 347.

¶ 268. Evidence that a widow had a dower right to land occupied, under an agreement with the heirs, and subsequently built a house upon the premises upon condition of life tenure, although contradicted by other testimony of her claim of a fee, is held sufficient to defeat a title by adverse possession.—Carpenter v. Carpenter, 126 Mich. 217.

¶ 269. Title by adverse possession held sustained by the evidence in an action to quiet title, the question being between rights under an original tenancy in common, the defendants having resided in the vicinity at all times and been familiar with the lands in question.—Brigham v. Reau, 139 Mich. 256.

¶ 270. Evidence held to show plaintiff's possession of a certain portion of lands into possession of which plaintiffs' and defendants' ancestors had entered in common was of such character as to impart information and give notice to plaintiffs' co-tenants in common that adverse possession and actual disseisin were intended to be asserted against defendants, where plaintiffs had occupied such portion for seventy years, paid taxes, transferred same by warranty deeds, and had leased, inventoried and listed same as their own, in a suit to quiet title to such portion.—Corby v. Thompson, 196 Mich. 706.

§ 51. ——As to public lands or ways.

Sufficiency of possession, see ante § 28.

¶ 271. A lot owner does not obtain title to a portion of the street by adverse possession where the evidence shows that for many years the fences were not considered "line fences," that his building was recognized by him as encroaching, that there was a general understanding that he would remove the building when others did, and that the city had no notice of an open adverse possession.—Village of Red Jacket v. Pinton, 126 Mich. 194.

¶ 272. Title to a public street by adverse possession is not shown by fencing off and using for agricultural purposes where it is not clear that this is more than for temporary use of the land; the acquisition of title to a public street in this manner is not favored by the court.—City of Mt. Clemens v. Mt. Clemens Sanitarium Co., 127 Mich. 115.

¶ 273. Where a lot owner has adopted a certain line beyond the platted line as the boundary between his lot and the street, has built a fence thereon, and a barn, up to the line, and where sidewalks have been laid down and shade trees planted with reference to this claimed boundary, there is sufficient evidence of adverse possession to give complainant title.—Triece v. City of South Haven, 154 Mich. 129.

¶ 274. On a bill by a city against the owner of a building to restrain the construction of a stairway within the street line running from the street to the basement, evidence held insufficient to establish such continuous, uninterrupted, hostile, open and notorious possession by the defendant and his predecessors in title as would constitute adverse possession.—City of Ann Arbor v. Goodspeed Real Estate Co., 189 Mich. 165.

¶ 275. Evidence held insufficient to establish title in an abutting owner to parts of a highway by adverse possession.—Mendel v. Poland, 200 Mich. 571.

¶ 276. A possession of a part of a railroad right of way adverse and hostile to a railroad company is not made out by evidence that the complainant's predecessor in title built a railroad scale adjacent to its mill over which the railroad company constructed a siding which was used by the complainant and defendant railroad company jointly for storing cars and conveying them for transportation over the defendant's lines.—Michigan Milling Co. v. Ann Arbor R. Co., 138 Mich. 216.

§ 52. Questions of law and fact.

See also post ¶ 314.

¶ 277. Adverse possession is a defense resting wholly upon facts.—De Mill v. Moffat, 45 Mich. 410.

¶ 278. What constitutes color of title in a particular case is a question of law for the court.—Miller v. Clark, 56 Mich. 337.

¶ 279. Where the defense of adverse possession in an action of ejectment is not conclusively established by the evidence, the question is properly left to the jury to determine.—Harrison v. Spencer, 90 Mich. 586.

¶ 280. It is for the jury to say whether plaintiff in ejectment has shown adverse possession where there is evidence on both sides of that issue.—Beecher v. Ferris, 117 Mich. 108.

¶ 281. Evidence of the assessment of land to a claimant by adverse possession is admissible as tending to show such possession, and, while not of any great value, its weight is for the jury.—Sauers v. Giddings, 90 Mich. 50.

¶ 282. Where notwithstanding a deed to one person another went into exclusive possession and exercised acts of ownership, and such possession was recognized by all mesne grantees of the first, the occupant's adverse title is a question for the jury in an action of ejectment against him by one claiming under the deed.—McCall v. Wells, 55 Mich. 171.

¶ 283. Where the testimony in support of a claim of adverse possession tends to show a continuous use of the land, by cutting the grass and pasturing cattle thereon each year during the period of occupancy, in addition to planting trees upon the premises, it is a question for the jury whether such occupancy was practically continuous, exclusive and hostile, and intended to be such by the claimant.—Sauers v. Giddings, 90 Mich. 50.

¶ 284. After the death of his wife, who owned a piece of realty, one Thomas erected thereon a building and continued to occupy the premises for more than fifteen years. Shortly before his death he executed a life lease to defendant. Thomas was not on good terms with his children during this time, who at the time of their mother's death were of age and married. He made repairs, paid taxes and controlled the premises without paying rent therefor. At his death he made a will of the premises. Held, in an action of ejectment it was a question for the jury whether Thomas had acquired title by adverse possession.—Tyler v. Wright, 164 Mich. 606.

¶ 285. In ejectment, the issue of adverse possession was properly submitted to the jury, where although there was testimony that plaintiff's grantor knew that defendant had held the land for longer than the statutory period in hostility to his claim, there was also testimony of admissions by the defendant that when the suit was commenced he had not held the land long enough to make it his.—Miller v. Shumway, 135 Mich. 654.

¶ 286. In ejectment between grantees of tenants in common defendant claimed title by adverse possession, and asserted that his entry under a warranty deed was an ouster of the co-tenants. There was evidence to show, however, that he only bargained for an undivided interest, and there was nothing to show that the co-tenants knew of his possession or claim of title. Held, for the jury to determine whether he entered claiming title to the whole, and intending to oust his co-tenants.—Highstone v. Burdette, 54 Mich. 329.

¶ 287. It is a question for the jury, whether the continued possession of his deceased wife's property by her husband until his death, the payment of taxes, improvement of the premises, the assertions of title, the making of a lease, the disposition of the property by will and his alleged unfriendliness towards his children, show possession in recognition of or hostile to the title of his children.—Tyler v. Wright, 171 Mich. 579.

¶ 288. In ejectment against one who holds a life lease from the husband of the deceased owner of the land, who claims title by adverse possession for more than fifteen years against his children, who claim by descent from the wife, where there is a dispute concerning the circumstances surrounding the husband's possession of an invalid deed which the wife left in his hands to be delivered to one of the children under certain conditions, after a conference with the grantee of the deed and an attorney, it is for the jury to find the facts and to say whether they indicate a possession adverse or subordinate to the title of his children.—Tyler v. Wright, 171 Mich. 579.

§ 53. ——Disputed strips and boundaries.

¶ 289. It is for the jury to say on the evidence of the occupancy of a line for more than twenty years whether it was supposedly the true boundary and intended to settle it there, or whether it was in expectation of adjusting the occupancy to the boundary as soon as ascertained.—Bunce v. Bidwell, 43 Mich. 542.

¶ 290. In an action of ejectment, the issue being one of adverse possession up to a certain fence, where defendant testified that an agreement had been made with plaintiff's predecessor that the line should be established by a survey, and the time when such alleged agreement was made was not fixed by the evidence, it raises a question for the jury whether such agreement, if made, was made at a date before the statute of limitations had run.—Lamb v. Lamb, 139 Mich. 166.

¶ 291. The question as to whether use of the space between two buildings was adverse, so as to vest title to such space in the user, irrespective of the lot line, or was merely permissive, was for the jury; where, in an action for breach of the covenant of warranty in a deed, it appears that such space had been in use by the various occupants of one building solely for more than fifteen years as a passageway, but that the eaves of the other building extended over this space eighteen inches, and other buildings on the rear of the same lot extended over such space.—Seitz v. People's Sav. Bank, 140 Mich. 106.

¶ 292. In ejectment the plaintiff may have the jury pass on his title by adverse possession, notwithstanding his ownership for less than fifteen years, if the location of the fence, undisputedly marking the boundary of the land for over thirty years, during his possession and that of his predecessors in title, has not been changed.—Gildea v. Warren, 173 Mich. 28.

¶ 293. Where a plaintiff in ejectment shows that her house was built where it stands more than fifty years ago and that a strip of land lying between the residences of the parties has been occupied as a part of the yard surrounding her residence for more than thirty years by herself and by the grantors of her residence property and the preceding ones in title, the question whether the property has been held adversely should be submitted to the jury.—Abel v. Roosenraad, 173 Mich. 98.

§ 54. ——Propriety of directed verdicts.

See also ante ¶ 233.

¶ 294. Unless the evidence as to adverse possession reaches the required degree of clearness and cogency—which is a question for the court—the case should not be submitted to the jury.—Judson v. Duffy, 96 Mich. 255.

¶ 295. Where, in an action to recover marsh land to which defendants claimed title by adverse possession, it appeared that their predecessors claimed to be the owners, and exercised acts of ownership by driving stakes to mark boundaries, by fishing, hunting, and trapping, by leasing to others, by erecting signs to warn off trespassers, and defendants by building a dike around the land, a request to direct a verdict for plaintiff was properly refused.—Chabert v. Russell, 109 Mich. 571.

¶ 296. It is error to direct a verdict upon evidence sufficient to show thirty years' ouster of a co-tenant, in the face of the testimony of a witness who had several times been upon the premises adjoining those in dispute, and who was in position to know if there had been any acts of adverse possession, that he had not seen any sign of occupancy up to three years before the trial, nor any attempt to exercise ownership of the land at all.—La Fountain v. Dee, 110 Mich. 347.

¶ 297. Where there is any evidence tending to show that the premises were unoccupied during part of the period of adverse possession relied on by defendants in ejectment, it is error to direct a verdict in their favor, it being for the jury to determine, on conflicting evidence, whether there has been an actual, or visible, or notorious, or continued possession.—Pendill v. Marquette County Agric. Soc., 95 Mich. 491.

¶ 298. Where in ejectment against a city for portions of an island in a river, it appeared that for more than forty years before suit, the city's grantors had been in possession of the upper part of the island, and for twenty years were in actual occupancy of that portion represented by a so-called interlocker while claiming to own the entire island, the city's title was so clearly established by adverse possession that the court would have been justified in directing a verdict in its favor.—McKee v. City of Grand Rapids, 133 Mich. 272.

¶ 299. In an action of ejectment by the owner of the record title to land, located on the shore of Pere Marquette Lake and occupied by the fishing shanty of defendant, defendant testified that he built the shanty upon the land, supposed that some one owned it, but, not knowing who, he claimed to own it from the outset, and so told almost everyone he knew; that he never had permission from any one to occupy it; that he used and occupied it for thirty-five years during the fishing season as any one would use his own property. The evidence was not clear that defendant supposed the land to be owned by the federal government. The plaintiff testified that the shanty rested part on land and part on water, and that he never paid any taxes on the property. Held, the court erred in directing a verdict for the plaintiff, since under defendant's testimony he was a trespasser and it was for the jury to say whether his occupancy was hostile so as to give him title by adverse possession.—Stearns Salt & Lumber Co. v. Newberg, 170 Mich. 324.

§ 55. Instructions.

See also ante ¶ 5.

¶ 300. The use, in an instruction defining adverse possession, of the words "claiming it as his own" is not error; the actual, continued, visible, notorious and hostile possession being tantamount to a claim of ownership.—Shearer v. Middleton, 88 Mich. 621.

¶ 301. When the title is claimed by an adverse possession for the statutory period, it should appear that the possession had been actual, continued, visible, notorious, distinct and hostile. And where the circuit judge was requested so to instruct the jury, and refused, but instructed them only that the possession must be actual, continued and visible, held to be error.—Sparrow v. Hovey, 44 Mich. 63.

¶ 302. In an ejectment case the court instructed the jury, upon the question of adverse possession, that to bar a recovery the premises must have been occupied by defendant for fifteen years by an open and notorious possession, adverse to plaintiff, but did not tell them that this possession, in order to be adverse, must be distinct and hostile to plaintiff's rights. Held, in the absence of any request for a definition, that there was no error.—Miller v. Beck, 68 Mich. 76.

¶ 303. In ejectment where the defense was adverse possession, it was error to charge that such possession was required to be in good faith for the statutory period; good faith not being an element of adverse possession.—Dawson v. Falls City Boat Club, 136 Mich. 259.

¶ 304. An instruction in ejectment that plaintiff's adverse possession would become perfect with the lapse of fifteen years, even if he originally had no shadow of title, if such possession was so open that any other person could bring suit to eject him, sufficiently presents the point that plaintiff need not show any deed, survey, or plat as evidence of ownership to entitle him to recover.—Beecher v. Ferris, 112 Mich. 584.

¶ 305. In an action of ejectment by one tenant in common against another, in which defendant claimed title to the entire property by adverse possession, an instruction upon the requisites of adverse possession that it was not necessary that the occupation should be such that a mere stranger passing by would see the possession and would appreciate that somebody was in possession there claiming title, and that it was only necessary that the possession was such that those in the neighborhood, and who were in a position to know what was going on, appreciated that the defendants had possession and claimed the exclusive right to the whole of the property, was erroneous in view of the relationship of the parties.—Rich v. Victoria Copper Mining Co., 147 F. 380.

¶ 306. In ejectment where the defendant claimed that when he took possession of the land it came within the description of his deed, that he occupied all of it as one farm, and that the timber land was occupied as any farmer would occupy his timber land; it is not error to refuse to charge "that adverse possession, as far as the boundary is concerned, does not extend beyond the ground actually occupied."—Henry v. Henry, 122 Mich. 6.

¶ 307. Instruction in an action of trespass as to the elements of adverse possession pleaded defensively, held erroneous as requiring more direct and certain and explicit acts of the defendant than the law provides.—Sherrard v. Cudney, 134 Mich. 200.

¶ 308. A request for an instruction that confines the interruption of an adverse holding to the bringing of an action is properly refused.—Shearer v. Middleton, 88 Mich. 621.

¶ 309. An instruction, that executing a lease which recognized title in another would be very strong evidence that the lessee understood that he had no title to the property, is not objectionable as telling the jury that one must believe in his title in order to have an adverse possession.—Campau v. Lafferty, 43 Mich. 429.

¶ 310. Where the possession had continued so long that title was complete unless a certain lease to the claimant, ten years before suit, broke the continuity by recognizing title under which plaintiff claims, it was error to refuse to charge that the "lease shows full recognition of the title * * *, and if the jury find it was signed by defendant with full knowledge of its contents, the plaintiff is entitled to recover," and to charge instead that such recognition would be very strong evidence that he understood that he had no title and that twenty years' adverse possession would give him a perfect title without charging further what was meant by adverse possession.—Campau v. Lafferty, 43 Mich. 429.

¶ 311. In ejectment on a claim by plaintiff of adverse possession it is error to charge that, if one of plaintiff's grantors (Holland) held under S. as tenant, no independent title could be founded thereon; where S. also conveyed to plaintiff, who thereby became entitled to take possession, and the defendant did not claim under S.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 312. Where plaintiff in error claimed title by adverse possession to a strip of land which defendant had used for a footpath, it was error requiring reversal to give an instruction not supported by the evidence, to the effect that defendant had paid the taxes on the land for a specified year, since such fact, if true, would tend to show that the user of the strip by defendant was accompanied by a claim of title, and was therefore not in subordination to, or acquiescence in, plaintiff's claim.—Beecher v. Ferris, 117 Mich. 108.

¶ 313. In ejectment by the owner of lot 5 against the owner of the adjoining lot 6, to recover a strip of land declared for as part of lot 5, plaintiff, where the only issue was whether he had acquired title to the strip by adverse possession, and where the locus in quo was made clear to the jury, could not have been injured by a statement in the court's charge—the truth of which statement was not determinable from the proofs—that the action was brought to recover part of lot 6.—Beecher v. Ferris, 117 Mich. 108.

¶ 314. In ejectment involving the title to portions of an island in a river, where there was dispute as to whether the narrowing of the channel was due to natural accretions or to dredging, the jury were properly instructed that unless they believed that the narrowing was not made by natural accretions and that the defendant had not been in adverse possession of the strip of land between what was then the west bank and the bank at the present time for a period of 15 years; it was a question for the jury to say how far from the east bank of the channel plaintiffs were entitled to recover.—McKee v. City of Grand Rapids, 133 Mich. 272.

§ 56. ——As to inclosure, fencing and boundaries.

¶ 315. As a fence is not necessary to the adverse occupancy of land it is error to charge that the removal of a fence precludes claiming adverse possession.—Beecher v. Galvin, 71 Mich. 391.

¶ 316. On the question of adverse possession by fencing and occupancy, it is too broad to charge that the fence must be permanent and that a pole or brush fence does not amount to exclusive possession, where the land at the time was all wild; since the time and character of the place and of the fence should be considered.—Hockmoth v. Des Grand Champs, 71 Mich. 520.

¶ 317. Where title is claimed by adverse possession of land bounded by a fence it is proper to charge that if adverse possession for the requisite period is found, "it is wholly immaterial how or by what right or authority the fence came to be constructed and maintained at the place or along the line where it stood (when the suit was brought), if it was by and through an error or mistake."—Greene v. Anglemire, 77 Mich. 168.

¶ 318. Where title is claimed by adverse possession of land bounded by a fence, an instruction that it is immaterial where the actual line of the original survey was if the parties have for fifteen years acquiesced in the fence as the true boundary line is proper.—Greene v. Anglemire, 77 Mich. 168.

¶ 319. It was error to refuse to charge that the owner need not move to retake possession till he learns that the land is in possession, where there is evidence that the possession was by inclosing with a rude fence, and that it was not all built at one time, and that the owner had at times passed by the place.—Hockmoth v. Des Grand Champs, 71 Mich. 520.

¶ 320. In an action of ejectment, the issue being one of adverse possession up to a certain fence, instructions that unless the jury find that the land was occupied up to the fence under a claim that it was the line for fifteen years, and also that there was no agreement that the true line was to be ascertained by a survey, the line would not be fixed by adverse possession, is proper.—Lamb v. Lamb, 139 Mich. 166.

¶ 321. An instruction in ejectment that if the jury find that the land was occupied for fifteen years by the defendant, an oral agreement after that time by which the boundary

was changed would come within the statute of frauds and not be binding, is sufficient on the question of adverse possession.—Dawson v. Falls City Boat Club, 125 Mich. 433.

§ 57. Findings and verdict.

¶ 322. Adverse possession, to give title, must be an actual, continued, visible, notorious, distinct and hostile possession, and a finding of adverse possession must set forth in explicit terms a state of facts that will satisfy the legal definition.—Yelverton v. Steele, 40 Mich. 538.

¶ 323. A finding of adverse possession must set forth in explicit terms a state of facts that will satisfy the legal definition.—Paldi v. Paldi, 95 Mich. 410.

ADVERTISEMENTS to AFFIANCED.

Cross-References.

Advertisements—
- Service by publication, see Process; Notices.
- Publication of notices by, see Notices; Foreclosure; Local Improvements; Taxes; and other topics treating of notices of sale, hearing, etc.
- Notices for presentment of claims, see Estates of Decedents.
- Of call for bids on public contracts, see Public Contracts.
- Legal newspapers, see Newspapers.

Advertising—
- Contracts for, see Contracts.
- As element in crimes, see Crimes, II; Indictment.
- As means of fraud by misrepresentation, see Fraud.
- As method of unfair competition, see Fraud; Injunctions; Trade Marks and Trade Names.

Advice, as act of participation in crime or tort, see Crimes; Indictment; and see specific topics treating of the various torts.

Advice of counsel, as justification or excuse, see Malicious Prosecution; Contempt; False Imprisonment; Crimes.
- Duties, liabilities and privilege of attorneys, see Attorneys; Witnesses, V. A.
- Right to counsel when accused of crime, see Constitutional Law, IX; Indictment, IV; Attorneys, III.

Affection—
- Love and affection as consideration, see Contracts; Gifts.
- Personal affection as subject for opinion evidence, see Evidence, VI; Indictment, VIII.
- As bias disqualifying judge or juror, see Judges; Jury.

Affianced—
- Agreements in contemplation of marriage, see Husband and Wife; Frauds, Statute of.
- Breach of promise to marry, see Breach of Promise.
- Insurable interest and right to be beneficiary, see Insurance; Fraternal Beneficiary Associations.
- Undue influence by or upon, see Fraud; Wills; Gifts.

AFFIDAVITS.

TREATS of statements of fact made formally in writing and under oath and ex parte, excluding sworn pleadings in equity (see Equity, VII) and affidavits incident to pleadings at law (see Pleading, IX, A) or to other proceedings or instruments or writs, e. g., Attachment, IV, A; Injunctions, IV, A; Motions and Orders.

Analysis.

§ 1. In general; when and by whom to be made.
§ 2. Before whom made.
§ 3. Form and requisites; jurat, caption, venue and signature.
§ 4. Entitling in name of suit or proceeding.
§ 5. Force and effect; use as evidence.

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§1. In general; when and by whom to be made.

The necessity, propriety and sufficiency of affidavits as incidents to a particular proceeding or instrument will be considered in connection with the topics to which it relates, and only matters general to any and all affidavits are retained in this topic.

Oath to depositions, see Depositions, IV.

¶1. An affidavit is a sworn statement reduced to writing, and evidenced by the fact that it has been subscribed and sworn to before some officer having authority to administer oaths.—People ex rel. Esper v. Burns, 161 Mich. 169.

§2. Before whom made.

Officers empowered to administer oaths, see Oaths; and see also topics treating of the various offices, e. g., Notaries Public; Courts, I (clerks); Justices of the Peace.

¶2. An affidavit is a nullity if sworn to before a person not authorized to administer oaths.—Greenvault v. Farmers' & Mechanics' Bank of Michigan, 2 D. 498.

¶3. The deputy city clerk of Ionia may administer oaths and take affidavits in the absence of the clerk.—Tower v. Welker, 93 Mich. 332.

¶4. Under Comp. L. 1857, § 404, How. St., § 573, a deputy county clerk has general authority to perform the duties of his principal; therefore an affidavit for attachment sworn to before him is good, though it does not appear that the clerk was absent at the time.—Dorr v. Clark, 7 Mich. 310.

¶5. An affidavit sworn to before a notary is not avoided by his subsequent appearance as attorney in the cause wherein it is used.—Sullivan v. Hall, 86 Mich. 7.

¶6. An affidavit in a chancery cause is not void because the jurat is signed by the "deputy register" as the officer who administered the oath.—Torrans v. Hicks, 32 Mich. 307.

¶7. An affidavit taken by a de facto officer can not be avoided by collaterally questioning the validity of his appointment.—Tower v. Welker, 93 Mich. 332.

¶8. Attorneys should not administer oaths in their own causes; whether affidavits so taken are merely irregular, quere.—McCaslin v. Camp, 26 Mich. 390.

§3. Form and requisites; jurat, caption, venue and signature.

Competent officer, see ante § 2.
Mode of entitling, see post § 4.
Reduction to writing, see ante ¶ 1.
Caption and venue to certificate of acknowledgment, see Acknowledgments, § 11.
Caption and venue of pleadings, see Pleading, I, E.

¶9. Formal requisites of an affidavit are the title, the venue, the signature, the jurat and the authentication.—Beebe v. Morrell, 76 Mich. 114.

¶10. The jurat must show that the affidavit was sworn to before the officer signing it. Where it was stated that it was "sworn and subscribed," without adding "before me," it was held to be a nullity.—Smart v. Howe, 3 Mich. 590.

¶11. Where an affidavit appears in the body thereof to have been taken before the proper officer, the omission of the words "before me" in the jurat does not vitiate it.—Cross v. People, 10 Mich. 24.

¶12. When an affidavit is made for the purpose of being used before the officer who

administers the oath to it, the omission in the jurat of the words "before me" will not vitiate it.—In re Teachout, 15 Mich. 346.

¶ 13. Where the affidavit was sworn to before a notary public, omission of the venue from the jurat, even though the notary did not state the county for which he was appointed, was held not fatal.—Sullivan v. Hall, 86 Mich. 7.

¶ 14. Where the caption names the county, the affidavit is not bad because the name of the county for which the notary was appointed does not appear after his signature to jurat or in the body of the affidavit.—Smith v. Runnells, 94 Mich. 617.

¶ 15. The omission of the justice's signature to the jurat upon an affidavit in replevin in justice's court may be supplied when objection is raised.—Peterson v. Fowler, 76 Mich. 258.

¶ 16. The affiant's omission to sign an affidavit the jurat of which was officially signed by a justice of the peace before whom the affidavit is used is not fatal; the justice having therein expressly certified that it was subscribed and sworn to by the person concerned.—Bloomingdale v. Chittenden, 75 Mich. 305.

¶ 17. While it is better practice to have the affiant sign an affidavit, it is not essential where his name is stated and it appears from the jurat of the notary that he was properly sworn.—Wynkoop v. Grand Traverse Circuit Judge, 113 Mich. 381.

¶ 18. It is not necessary that the officer in signing the jurat should give more than the initials of his Christian name.—Rice v. People, 15 Mich. 9.

¶ 19. An affidavit for use here, sworn to in another state before a notary public, must be accompanied by a certificate of the notary's official character (How. St., § 7448, subd. 3).—Berkery v. Wayne Circuit Judge, 82 Mich. 160.

§ 4. Entitling in name of suit or proceeding.

¶ 20. An affidavit in order to be used in a cause must be entitled in like manner as the cause.—Graham v. Elmore, H. 265; Whipple v. Williams, 1 Mich. 115.

¶ 21. Affidavits must be entitled with the names of all the parties to the suit.—Arnold v. Nye, 11 Mich. 456.

¶ 22. The general rule is that an affidavit must be entitled in the cause in which it is to be used, and if it is entitled in a suit that is not pending it is null.—Beebe v. Morrell, 76 Mich. 114.

¶ 23. If an unentitled affidavit filed in a pending suit is fully identified as filed in that cause, the want of a title is immaterial.—Beebe v. Morrell, 76 Mich. 114.

¶ 24. The object of entitling affidavits being to connect them with a suit, so that perjury may be assigned upon them, an affidavit referring to a paper properly entitled and to which it is applicable must be assumed to have adopted the title by reference.—King v. Harrington, 14 Mich. 532.

¶ 25. An affidavit referring to a paper properly entitled, to which it is appended, must be assumed to have adopted the title by the reference.—King v. Harrington, 14 Mich. 532.

¶ 26. A writ of error was sued out in the names of A. and B. On motion, A. was allowed to sever. Affidavits subsequently drawn up and entitled in the names of A. and B. were held bad.—Whipple v. Williams, 1 Mich. 115.

¶ 27. On an application to dissolve a temporary injunction, an affidavit filed by the complainant which on its face is not entitled in the cause, but which is attached to a cover properly entitled in the cause, substantially complies with circuit court rule 37 (b) requiring papers to be entitled in the court and cause, which by chancery rule 15 is applicable to chancery cases, and it may be considered on the hearing.—Doane v. Allen, 172 Mich. 686.

§ 5. Force and effect; use as evidence.

Necessity of certificate to office of the notary taking affidavit in another state, see ante ¶ 19.

The sufficiency of affidavits for various purposes of making a showing is treated in connection with topics treating of the thing or proceeding or writ to which the affidavit is incident. See such topics as Attachment; Pleading, IX, A (formation of issues non est factum and the like): Taxes (authentication of assessment lists and the like); Process, II, D (proof of publication).

Affidavits as evidence in Equity, VIII, A; or on Motions and Orders; or for Injunctions, IV; will be treated such topics.

¶ 28. As a general rule, no matter can be tried upon mere affidavit, except such as to depend upon the discretion of the court.—Haskins v. Moore, How. N. P. 17.

AFFILIATION to AGE OF CONSENT.

Cross-References.

Affiliation, see Bastards.

Affinity—
- As disqualification of judge or juror, see Judges; Jury; Justices of the Peace.
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AGENCY.

TREATS of the general law of principal and agent between themselves and as respects third persons, excluding to other more specific topics agencies in so far as they exhibit features peculiar to such topics, e. g., Brokers; Insurance; Corporations; etc.

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Nature of trustee's relation to persons interested in the trust, see Trusts, I.

¶ 1. In legal conception an agency is a contract which to be binding must possess all the essentials of such an agreement.—Cunningham v. Irwin, 182 Mich. 629.

¶ 2. The two positions of principal and agent are inconsistent with each other, and the law will not permit a man to act in such dual capacity.—Hogle v. Meyering, 161 Mich. 472.

¶ 3. One who examines risks for insurance, suggests improvements, fills out and submits applications, and recommends them, if favorable, for an insurance company to write, is an "agent" of such company although he is called an "inspector."—Seamens v. Temple Co., 105 Mich. 400.

¶ 4. A corporation that expressly authorizes a named person "to make sale of same (referring to certain mining leases) on such terms as he shall see fit," and is silent about dividing the proceeds among the shareholders, establishes an agency rather than a trust.—Titus v. Minnesota Min. Co., 8 Mich. 183.

¶ 5. An agreement between a retail grocer and a commercial broker that the former shall include for the latter in his annual order for canned goods a certain amount for the broker is a contract of agency and not a case of bargain and sale required by the statute of frauds to be in writing where the value of the goods exceeds $50.—Hatch v. McBrien, 83 Mich. 159.

¶ 6. A contract whereby a party agrees to sell drills for a company to be settled for during the season at agreed prices, any not sold to be settled for by note or at the option of the company remain its property, and the proceeds of all sales to be turned in to the company with final settlements twice a year, is a contract of purchase and not one of agency merely.—DeKruif v. Flieman, 130 Mich. 12.

¶ 7. A contract by which brewers agree to ship to a certain firm all beer ordered by it at a specified price per barrel, title to remain in vendors until the beer is sold, and by which the firm agrees to take and pay for the beer on such conditions, creates a mere agency.—Dewes Brewery Co. v. Merritt, 82 Mich. 198.

¶ 8. A contract between a resident of the state and a nonresident corporation which has not fulfilled the statutory requirements by filing its articles of incorporation within the state, held to provide for an absolute sale, and not for the establishment of an agency.—Standard Fashion Co. v. Cummings, 187 Mich. 196.

§ 2. Agency involved in contract.

See also post ¶ 35.

Involved in assignment, see also post ¶ 26.

Agency involved in joint adventure or partnership, see Joint Adventures; Partnership.

Partial assignee as agent for assignor to collect balance, see Assignments, III.

¶ 9. Although in ordinary transactions the relation of contractor excludes that of principal and agent or of master and servant, yet there is not necessarily such a repugnance that they cannot exist together.—City of Detroit v. Corey, 9 Mich. 165; Gardner v. Smith, 7 Mich. 410.

¶ 10. In an action to recover the balance due on a contract under which plaintiff agreed to place defendant's advertising, it was held that the court properly charged that the contract created an agency and should govern so far as it expressed the agreement of the parties.—Ayer v. Devlin, 179 Mich. 81.

§ 3. Capacity to be agent or principal.

The capacity of infants or insane persons or married women to enter into contract relations involving agency is treated in Infants, IV; Insane Persons, IV; Husband and Wife, IV, A.

Corporation as agent, see Corporations, XII, B.

§ 4. Object and purposes of agency; regulations and legality.

The general doctrine that a contract for an illegal object is void, is treated in Contracts, IV.

Registration and regulation of agents dealing in securities under the Blue Sky Law, see Pub. Acts 1915, No. 46, § 11; Comp. L. 1915, § 11955.

Regulation and licensing of agents soliciting for charities, see Pub. Acts 1915, No. 68; Comp. L. 1915, §§ 15344-15346.

Registration of name of agent for owner of dwelling under act regulating buildings used for habitation, see Pub. Acts 1917, No. 167, § 107.

¶ 11. There can be no agency to do an illegal act, which will absolve the agent when he has performed it and relegate the third person to an action against the principal alone; so held where a sheriff executed a void tax warrant and had paid over the money realized thereby and was afterwards sued for the amount.—First Nat. Bank of Sturgis v. Watkins, 21 Mich. 483.

§ 5. Oral or written appointment.

See also ante ¶ 5.

Oral ratification, see post § 57.

Mutual rights under the contract of appointment or employment, see post § 93 et seq.

Validity of power of attorney between parties without acknowledgment, see Acknowledgments, ¶ 74.

Necessity and sufficiency of writing to comply with Statute of Frauds, see Frauds, Statute of.

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Requisites of power of attorney "over or concerning lands or in any manner relating thereto," see Comp. L. 1915, § 11975.

Provisions of the Staute of Frauds as to necessity of written authority, see Comp. L. 1915, chaps. 231, 232. Requirement of writing of agreement to pay commissions on sale of real estate, see Comp. L. 1915, § 11981, ¶ 5.

¶ 12. The general rule is that an agent may be appointed by parol.—Mayor, etc., of City of Detroit v. Jackson, 1 D. 106; Johns v. People, 25 Mich. 499; Taymouth v. Koehler, 35 Mich. 22.

¶ 13. To authorize an agent to execute an instrument under seal, the instrument upon which his power is founded need not be so executed.—McIntosh v. Hodges, 110 Mich. 319.

¶ 14. Complainant sold the timber on certain land to defendant company. The latter at her direction paid back taxes standing against the land, such payment to apply on the timber account. Held, defendant was complainant's agent in paying the taxes.—Backus v. Cowley, 162 Mich. 585.

§ 6. Agency as between two principals.

Evidence as to who was principal, see post §§ 9, 10.
Estoppel to question principalship, see also post ¶ 102.
As question for jury, see post § 11.
Duty of agent, fidelity and good faith, see post §§ 90, 91.
Effect of notice, which person bound and as to what, see post § 74.
Scope of collecting agency, agency in acts beyond scope, see post § 36.
Double agency of broker, see Brokers.
Liability of corporation for acts of agent done while agent of predecessor, see Corporations, VI.
Liability of firm for acts of agent while such for its predecessor, see Partnership, IV, A.
Liability of joint stock association for acts of its predecessor's agent, see Joint Stock Companies.

¶ 15. An agent of one party to a transaction may be appointed as agent of the adverse party for certain purposes, and each party will then stand in the relation of principal to the agent as to the matters by him intrusted to the agent, and as to those alone.—Cutter v. Powers, 200 Mich. 375.

¶ 16. The agency of one who for the buyer has taken charge of timber that has been sold and accepted is single throughout, although he was in the general employment of the vendor, both principals having knowledge of it; and if the point that one cannot be agent for two principals at the same time has any force it would not apply.—Colwell v. Keystone Iron Co., 36 Mich. 51.

¶ 17. A. employed B. to procure for him a loan from C. B. secured C.'s assent, and received a letter of account from C.'s banker authorizing him to draw for the amount, which he afterwards did. Held, that as between A. and C., B. must be considered A.'s agent in procuring the loan, and the letter of credit as only the mode of effecting it; and that the legal effect of the whole transaction was the same as if C. had delivered his own check, or the money, directly to A.—Clark v. McGraw, 14 Mich. 139.

¶ 18. A., a mortgagor, wishing to borrow more money on the property, applied to a banker, who negotiated a loan from B., who advanced money with part of which the existing mortgages were to be discharged, thus giving B. the first lien. The money was left in the banker's hands, he promising to have the title cleared. All the mortgages were discharged but one; before that was paid off the banker failed. Held, that the banker was A.'s agent, and not B.'s, and that the loss of the amount of the unpaid mortgage must fall on A.—Engleman v. Reuse, 61 Mich. 395.

¶ 19. The agency for the mortgage of a firm of attorneys to receive payment of the principal of a mortgage not in their possession, a payment having been made to one of them, who misappropriated the proceeds, is not established by evidence that, without any request by the mortgagee, they had collected the interest on the mortgage, and that, a short time before the payment, some correspondence had passed between them with reference to having the mortgagor procure a renewal of the insurance, where the loan was procured by them for the mortgagor, who paid them by a note included in the security of the mortgage, and which, according to their understanding, also covered their services in collecting interest, and it was the custom of the firm to see that the parties for whom they procured mortgage loans kept up their insurance.—Van Deusen v. Ingraham, 110 Mich. 38.

¶ 20. Where the holder of an unrecorded assignment of a mortgage permits the mortgagee, with whom he has an open account, and who has been intrusted with the care of his money, to collect and receive payments on principal and interest of such mortgage, the mortgagee is his agent, and payment in full to the mortgagee discharges the mortgage.—Bissell v. Dowling, 117 Mich. 646.

¶ 21. A payment on a mortgage is held not to have been made to an agent of the mortgagee where a third person to whom it was paid wrote the mortgagee at the mortgagor's request asking for a release of part of the land and suggesting that he could obtain a payment on the mortgage before delivery of the release and subsequently the release was sent and payment made but retained by the third person and for some time thereafter the mortgagor continued to pay interest on the full debt and neither the mortgagor nor his vendee ever notified the mortgagee that the payment had been made.—Fair v. Bowen, 127 Mich. 411.

¶ 22. A bank through which the parties on payment of an outstanding mortgage and the payment of the purchase price and the making of a new mortgage paid the money necessary to perfect the transaction, which bank paid to each the moneys due him, is to be regarded as the agent of the vendor; and the purchaser is not liable for a misapplication of the money on the old mortgage, which covered other lands, thus leaving the purchase price unpaid, the vendor at the time receiving all that he demanded as his share.—Newman v. Baker, 131 Mich. 89.

¶ 23. A. gave B. a power of attorney to settle a claim due him, and afterwards, without revoking B.'s authority, agreed with C. to give him half of the amount collected, the agreement reciting that the claim was in C.'s hands for collection. A. received without objection half of a payment collected by B. and transmitted to A. through C. B. signed receipts as A.'s attorney in fact, and did not claim to act as C.'s agent. Held, that he was A.'s agent, not C.'s, and that C. was not liable for his misfeasance.—Hoag v. Graves, 81 Mich. 628.

¶ 24. Evidence that the plaintiff is an undertaker hiring hearses from a liveryman, that he insisted that the liveryman purchase more hearses if he wanted to keep his business, and introduced him to the defendant's agent, who sold him the hearses, will not make him an agent for both parties so as to defeat an action for commissions.—Flattery v. James Cunningham, Son & Co., 125 Mich. 467.

¶ 25. Under a contract for the sale of fruit, creating an obligation on the purchaser to accept drafts at a certain place or to notify the seller of a change in the arrangement for payment, the banker with whom the purchaser deposited at such place and to whom a draft was forwarded by the seller was the purchaser's agent, and he was chargeable for the banker's neglect in informing the seller that he had provided for a different place of payment; but the bank through whom the seller acted was the latter's agent making him chargeable for information received by such bank.—Town v. Jepson, 133 Mich. 673.

¶ 26. The agent of the assignee of a land contract is the agent of the assignor for the purpose of settlement of a debt for a furnace placed upon the property by the assignor where the latter through his agent pays money to the agent of the assignee for the purpose of payment of such debt.—Cutter v. Powers, 200 Mich. 375.

¶ 27. In an action by the purchaser of stock against an agent and his alleged principal for damages resulting from the sale of the stock, the purchase of which was alleged to have been induced by false representations, evidence held sufficient to sustain a finding that the one defendant was acting as agent for the other and not as agent of the corporations in which his principal held the majority of stock.—Bartholomew v. Walsh, 191 Mich. 252.

§ 7. Relationship of subagents.

Delegability of agency to subagent, see post § 29.

Right of subagent to agreed portion of commissions from agent, see post ¶ 548.

Agency of correspondents of collecting banks, see Banking, VI.

¶ 28. If an agent employs a subagent for his principal, and by his authority, express or implied, such subagent is the agent of the principal, and is directly responsible to the latter for his conduct.—Finch v. Karste, 97 Mich. 20.

§ 8. Agency coupled with interest.

Revocation by death or otherwise, see post § 15.

Mutual rights in property dealt with, see post § 97.

¶ 29. An agency coupled with an interest arises where, by agreement, A. is to lend B.'s money to borrowers at an agreed rate of interest, A. to collect and account for all above one per cent, his compensation.—Perkins v. Hershey, 77 Mich. 504.

§ 9. Burden of proof, presumptions and evidence.

See also post ¶¶ 107, 224.

Of revocation or termination, see post § 17.

As to the authority of the agent, see post § 39.

As to ratification, see post §§ 66-68.

In actions between principal and agent, see post § 105.

Applications of the general rule that the admissions and declarations of agents are admissible against the principal, but that the agency cannot be proved against the principal by the agent's declarations alone, see Evidence, VII, C.

Admissibility of opinion of witness that conversation led him to believe agency existed, see Evidence, VI, A.

Parol evidence to contradict power of attorney by showing a sale from maker to holder, where third person sues, see Evidence, V, B.

¶ 30. One's agency and authority to act for an absent brother—e. g., in redeeming from foreclosure—may be presumed where the necessities of the case warrant the inference.—Squire v. Wright, 85 Mich. 76.

¶ 31. In an action for the price of supplies sold for a certain saloon where it is al-

leged that defendant brewing company sold the saloon in question but authorized the buyer to order supplies in its name an instruction is proper which places on defendant the burden of proving that plaintiff's agent who sold the goods knew at the time of the sale that the buyer had purchased the saloon and was not defendant's agent.—Rochester Distilling Co. v. Traverse City Brewing Co., 174 Mich. 318.

¶ 32. When a disorderly person is arrested by a special police officer, the presumption is that the officer is acting in an official capacity, and not as an agent for the party who by law is required to pay him.—Foster v. Grand Rapids Ry. Co., 140 Mich. 689.

¶ 33. Agency cannot be proved by the statements, declarations or admissions of the agent made out of court, but must be established by tracing its source to some word or act of the alleged principal.—Fisk v. Liverpool & London & Globe Ins. Co., 198 Mich. 270.

¶ 34. An alleged agent may testify directly to the fact that he is an agent, in which case the rule against proving agency by declarations of the agent out of court does not apply. An agent is a competent witness to testify as to the fact of his agency. —Spears v. Black, 190 Mich. 693.

¶ 35. The fact that a defendant railroad company was engaged in procuring aid and rights of way has no tendency to show that it was building its own road, or that any particular person employed in that work was doing so as a servant of defendant.—Bond v. Pontiac, O. & P. A. R. Co., 62 Mich. 643.

¶ 36. Evidence of the pecuniary circumstances of an alleged agent is irrelevant to establish agency.—North v. Metz, 57 Mich. 612.

¶ 37. The authority of a husband to act for his wife in the making of a loan will not be presumed from the fact that he has acted for her in other matters, but must be proved by legal evidence; and evidence of other transactions in which he acted for his wife does not prove his authority to act in a particular case, and such evidence may be disregarded.—Three Rivers National Bank v. Gilchrist, 83 Mich. 253.

¶ 38. Evidence of the pecuniary circumstances of the alleged agent is irrelevant to establish the agency.—North v. Metz, 57 Mich. 612.

¶ 39. The fact that a third person received from a seller the proceeds of sales does not tend to show that the seller is the receiver's agent; it may be merely a repayment of advances, especially where so testified, and in an action against the receiver as the seller's principal, plaintiff has the burden of proving the agency.—Campbell v. Sherman, 49 Mich. 534.

¶ 40. Extortion of a bonus from the borrower of money is too common a procedure on the part of the lender's agent to be very significant for the purpose of showing that he was the borrower's agent rather than the lender's.—Matteson v. Blackmer, 46 Mich. 393.

¶ 41. In an action involving the question whether P. in purchasing certain property was the agent of defendant, testimony of a witness relative to what P. told him in regard to the agency is made admissible where it has first been drawn out in cross-examination of the witness that P. had told him all about it.—Johnson v. Doon, 131 Mich. 452.

¶ 42. In an action upon a claim against the estate of a deceased agent who had been employed to loan and collect money for plaintiff, a memorandum book kept by the agent containing a record of the business done for plaintiff both before and after the date of a settlement between them was had, is admissible as showing the nature and extent of their business relations, the prior entries being restricted to proving relationship only. —Jewell v. Jewell's Estate, 139 Mich. 578.

§ 10. ——Weight and sufficiency.

As to proof that person representing carrier, telegraph company, or other responsible superior, was its agent in dealings with the public or with plaintiff, see also generally Carriers; Corporations, XVII; Master and Servant, IV; Telegraphs and Telephones; etc.

¶ 43. In some cases the fact of agency may be inferred from a single act.—Lyell v. Sanbourn, 2 Mich. 109.

¶ 44. If the facts and circumstances, or the habit and course of dealing, show a subsequent and continued ratification of the acts done they will be sufficient to establish the agency.—Lyell v. Sanbourn, 2 Mich. 109.

¶ 45. Agency may be inferred from the fact that circulars and letterheads of a person describe one as his agent.—Thelsen v. Detroit Taxicab & Transfer Co., 200 Mich. 136.

¶ 46. In an action of replevin where the question was one of authority of a third person to act as agent for the owner in the sale to plaintiff of standing timber, defendant claiming to have purchased from the owner at a date previous to plaintiff's having purchased from an agent, where the agent

swore that the owner had written him two letters offered in evidence authorizing him to sell and that he had notified the defendant to that effect, and the defendant himself testified that when he called on the owner he was told that the latter had no knowledge of the value of the timber sold, but he would write to his agent and he could see him and perhaps make a deal for the timber, there was sufficient evidence to go to the jury, especially where the agent's authority had not been revoked.—White v. King, 87 Mich. 107.

¶ 47. In an action for labor performed for a partnership by one who had been employed by the husband of one of the partners, the evidence showed that the copartnership articles authorized her to appoint her husband as her agent, who should exercise with reference to the business of the firm powers such as she might have exercised had the appointment not been made. The firm paid plaintiff on account, honored orders drawn upon them, and furnished plaintiff through the husband with teams for the work done. Held, that there was evidence of the husband's agency, and that he was clothed by the articles with the general authority of a partner.—Meyer v. Montgomery, 87 Mich. 278.

¶ 48. Where one who has built a barn on defendant's farm testified that he contracted with her son, supposed to be acting for defendant's husband, the fact that defendant owns the farm, boards the workmen employed on the building and urges on the work of building does not make her liable.—Hillier v. Eldred, 91 Mich. 54.

¶ 49. Agency in taking lumber may be inferred from proof that the alleged principal inquired about lumber for sale, expressed satisfaction with some shown him, stated that he wanted it for a mill which C., his cousin, was to build, and that he would send for it within a few days, coupled with proof that a few days later C. came and got the lumber.—Hathaway v. Judie, 95 Mich. 241.

¶ 50. A finding that a local real-estate agent, who negotiated for the sale of land, was an agent of the nonresident owner, is justified by proof that he was paid by the owner, and that the land contract was sent to him for delivery to the purchaser.—Dodge v. Tullock, 110 Mich. 480.

¶ 51. Where a son acts for his father in procuring a mortgage, undertakes the whole negotiation, decides upon the security, satisfies himself as to the title, attends to the execution of the papers, receives the money from his father and pays it over to the mortgagor,—in short does everything an agent could do,—and his father accepts the benefits of the transaction, he may properly be regarded as his father's agent in spite of his testimony to the contrary, especially if he admits being his agent just before and after these acts; it is idle under such circumstances for him to claim to have been agent for the person giving the mortgage.—Matteson v. Blackmer, 46 Mich. 393.

¶ 52. Evidence consisting of conflicting testimony and a memorandum reviewed and held to show the complainant to be the absolute purchaser of a note and mortgage rather than the assignee and agent of the mortgagee for the purpose of foreclosure, where the memorandum was consistent only with a sale.—Tomlinson v. Cornett, 128 Mich. 171.

¶ 53. The relationship of principal and agent in a particular transaction settling a claim for repayment of a loan is established by testimony that the agent was in sole and absolute control of the moneys, notes, mortgages, loans and other financial transactions of the principal and that he customarily exercised his own discretion in dealing in matters of this kind, without consultation or advice of his principal, and as freely as if he were acting in his own behalf, reporting after the fact.—Bullock v. Tompkins' Estate, 125 Mich. 17.

¶ 54. In an action by the representative of the estate of the assignor of a contract for the purchase of land against the agent of the assignee to recover money intrusted to defendant to pay a debt for a furnace placed on the premises by deceased, evidence held sufficient to show agency of defendant for such purpose.—Cutter v. Powers, 200 Mich. 375.

¶ 55. In an action by a purchaser of lots against the vendor to recover money paid on the contracts after rescission by the purchaser on the ground of fraud, evidence held sufficient to show the agency of a firm acting for defendant in the sale of the lots.—Billig v. Goodrich, 199 Mich. 423.

¶ 56. In an action against an agent to recover the amount received for sheep of plaintiff sold by defendant and not accounted for, where plaintiff claimed that a certain number of sheep were intrusted to claimant under an arrangement whereby they were to be let out to double within a certain period, and, upon return, the increased flock was let out on similar terms for a similar period, and at the end of the second period was, with the further increase, sold by defendant, evidence held sufficient to establish a contract of agency and plaintiff's interest in the sheep.—Miller v. Young, 196 Mich. 276.

§ 11. Questions of law and fact; instructions.

As to authority of agent, see post §§ 42, 43.
In actions between agent and principal, see post § 106.

¶ 57. Agency is generally a mere question of fact.—Roberts v. Pepple, 55 Mich. 367.

¶ 58. Whether a disputed agency exists is a question for the jury under proper instructions, where there is any evidence tending to prove its existence.—Hart Milling & Power Co. v. McCrillis & Son, 185 Mich. 693.

¶ 59. If the evidence respecting the agency to collect a note is ambiguous, the court cannot pass upon it, but must submit it to the jury.—Moore v. Hall, 48 Mich. 143.

¶ 60. When the correspondence and subsequent dealings between the parties in evidence raise a question as to the fact of agency about which minds might differ, it was for the jury to determine.—Fontaine Crossing & Electrical Co. v. Rauch, 117 Mich. 401.

¶ 61. If the evidence of plaintiff on the issue of an alleged agency is questioned as being sufficient, taken as true, to make out an agency, that question is one of law; and an instruction that, if believed, such testimony establishes agency does not invade the province of the jury.—Partridge v. Sterling, 79 Mich. 302.

¶ 62. Whether a person soliciting advertising for a publishing company was the agent of such company, was a question for the jury, in assumpsit upon an alleged advertising contract, where it appeared that defendant had written a letter to such company ordering the insertion of certain advertising, that the letter so written was dictated by such solicitor in defendant's office to a stenographer in the office, and was signed by defendant.—Mail & Express Co. v. Wood, 140 Mich. 505.

¶ 63. Whether the relation of agency existed between the vendor of a fruit farm, who listed such farm with real estate agents, who in turn listed it with another broker, who sold to plaintiff, so as to bind such vendor by statements made to plaintiff by such broker regarding such farm, was a question of fact to be submitted upon the evidence to the jury; and it was error to instruct the jury that defendant was so bound, in an action to recover payments made on the purchase price on the ground of misrepresentations and fraud in the sale.—Mestler v. Jeffries, 145 Mich. 598.

¶ 64. In an action by a railway company upon an aid subscription which defendant claimed was not to have been turned over to the company by the person who took it, except upon certain conditions, it could not be assumed by the court that such person was the agent of the subscribers rather than of the company; the question, if there was any dispute about it, would be one for the jury.—Saginaw, T. & H. R. Co. v. Chappell, 56 Mich. 190.

¶ 65. On an issue as to the agency of a son for his father in making a sale of hay, evidence showing that the father and son occupied contiguous farms, that one of them stated that their hay would probably all be sold together, that the son thereafter went to the purchaser's residence and made the contract, that the purchaser later sent a man to bale the hay, and that such man commenced work on the farm of the father, together with some proof of ratification, was sufficient to take the case to the jury.—Beasore v. Stephens, 155 Mich. 403.

¶ 66. The question whether a Massachusetts corporation was merely the agent of a Rhode Island corporation where the officers and stockholders of the two were identical, held properly submitted to the jury in an action against the latter corporation for merchandise shipped by the plaintiff to the former corporation, where there had been a long course of dealings between the plaintiff and the Rhode Island corporation in which the Massachusetts corporation had been held out by the former corporation as its selling agent.—Hart Milling & Power Co. v. A. B. McCrillis & Son, 185 Mich. 693.

B. DURATION AND TERMINATION.

§ 12. Term and duration.

Construction of terms as between agent and principal, see post § 95.

Revocation as breach of agency contract, see post § 95.

¶ 67. Where a contract of agency fixes no period for its duration, definite or indefinite, with reference to which it may be presumed that both parties contracted, each party has the right to terminate it at will.—Garlock v. Motz Tire & Rubber Co., 192 Mich. 665.

¶ 68. Where the duration of a contract of agency is not fixed the agent may terminate it on giving reasonable notice.—Barrows v. Cushway, 37 Mich. 481.

¶ 69. A contract of agency, bearing the date of June 14, 1899, for a term of three years and from year to year thereafter until terminated by either party by giving six months' written notice, was held to be terminated on June 14, 1905, and not before; where written notice of termination was sent the agent on November 7, 1903, signed by the successor of the company which signed the original contract, and where on February 9, 1904, a written notice of termination of such

contract was sent such agent, signed by the name of the company which signed such contract, and containing a statement that such company had gone out of business, and that its successor declined to continue the existence of the agency; such latter notice alone being effective. and the relation terminating at the next anniversary following the required six months' notice.—Stone v. Fox Machine Co., 145 Mich. 689.

§ 13. Termination by operation of law; death.

Under power of attorney from two persons, see also post ¶ 165.

Exhaustion of agency by single exercise of authority, see also post ¶ 197.

¶ 70. Power delegated to an agent to "fix and determine" a matter over which he has no original power outside of the agency is expended when he has once acted.—People ex rel. Douvielle v. Manistee County Sup'rs, 40 Mich. 585.

¶ 71. The agent's death terminates the agency.—Adriance v. Rutherford, 57 Mich. 170.

¶ 72. A power whereby an attorney was appointed to sell all the property of an estate belonging to the heirs, the signers, and to receive and distribute the proceeds, containing an express provision that the power was irrevocable and should survive if any of the signers died, is revoked by the death of two of the signers prior to the exercise of the power, it not being a power coupled with an interest.—Weaver v. Richards, 144 Mich., 395.

¶73. Power vested by an administratrix in a collection agent to settle a judgment, terminated upon her discharge as administratrix.—Upton v. Dennis, 133 Mich. 238.

§ 14. Change into other relation.

Effect of notice in one capacity as binding principal in other capacity, see post § 74.

¶ 74. The failure of an agent to observe secret instructions respecting delivery of the thing sold for his principal and collection of the price does not change the relation of agency into that of a debtor for the price.—Birdsell Mfg. Co. v. Brown, 96 Mich. 213.

§ 15. Agency coupled with interest or title.

What constitutes interest, see ante § 8.

Mutual rights under, see post IV, A.

¶ 75. The rule that death revokes a power is subject to the exception that where the instrument creating the power conveys to the attorney the legal title to the interest covered by the power it survives. This must be an interest in the thing itself and created by the instrument creating the power, and if it be an interest only in that which is to be produced by the exercise of the power it is not within the exception.—Weaver v. Richards, 144 Mich. 395.

¶ 76. A power of attorney coupled with an interest cannot be revoked without payment of the agreed compensation.—Baker v. Baird, 79 Mich. 255.

¶ 77. When, by indorsement for collection, authority is given to an agent to sue in his own name on negotiable paper, the legal title in trust is transferred, and the authority to collect is not revoked by the death of the principal and owners.—Moore v. Hall, 48 Mich. 143.

¶ 78. A provision in a mortgage, expressed by a power of attorney, authorizing the attorney to collect the rents from mortgaged premises and apply them upon the mortgage, and assigning the rents, not only from the leases then in existence, but from those thereafter to be made, as security for the mortgage debt until it should be fully paid, is not revoked by the death of the mortgagor. —Kelly v. Bowerman, 113 Mich. 446.

§ 16. Necessity and sufficiency of notice of revocation.

Effect of failure to receive notice, see also post ¶ 102.

Liability for acts done after revocation, see also post § 48.

Notice of revocation as equitable assignment of contract to principal, see Assignments, II.

¶ 79. A general agency continues until in some way parties have been notified of its termination, or have sufficient facts in their possession to put them upon inquiry.—Bloomer v. Dau, 122 Mich. 522.

¶ 80. To all persons who have actual dealings with the agent, actual notice of the revocation must be given, or such notice of the fact must be brought home to them as would be sufficient to put an ordinarily prudent man upon inquiry.—Tousignant v. Shafer Iron Co., 96 Mich. 87.

¶ 81. Notwithstanding revocation, a former general agent continues, within the scope of his original authority, to bind the former principal as to those parties who have been and still are dealing with him in good faith, in reliance upon his former authority, until they have notice of its revocation.—Tousignant v. Shafer Iron Co., 96 Mich. 87.

¶ 82. One who has furnished board to employees under an arrangement with their

employer, whereby the board bills are reported to him, he deducting the amounts from the employees' wages and crediting them to the party furnishing such board, is entitled to recover against such employer for board furnished after such employer's superintendent assumed control of the business as principal, if he had no notice of the change of employers, and if such arrangement continued after the change.—Tousignant v. Shafer Iron Co., 96 Mich. 87.

¶ 83. Actual knowledge that there has been a change of principals, howsoever acquired, dispenses with any notice.—Jones v. Schafer Iron Co., 96 Mich. 98.

¶ 84. In an action for damages for breach of a contract where, pending negotiations by wire and mail for the purchase of cedar posts, the vendor wrote to the vendee that if certain posts were not sold he could have them at a stated price, and that he would know by a certain date if the posts were sold, such letter amounted in law to a withdrawal of said posts from sale until the date named, and was a sufficient notice to the vendee that he must deal with the vendor personally; and a sale by an agent in charge of the posts, made after such date, is held not binding upon the principal.—Keith v. Sands Maxwell Lumber Co., 88 Mich. 172.

§ 17. Presumptions and evidence, and jury questions.

¶ 85. A continuing agency is not presumable from the fact that one has occasionally been employed for temporary purposes.—Campbell v. Sherman, 49 Mich. 534.

¶ 86. An agency for making a sale is presumed to last until the transaction is completed.—Henkel v. Welsh, 41 Mich. 664.

¶ 87. An agent's authority to make a contract relative to the sale of property may have been shown to exist at a specified time, and may be presumed, in the absence of proof to the contrary, to continue until six months later.—Hensel v. Maas, 94 Mich. 563.

¶ 88. In the absence of proof to the contrary, authority to make a contract relative to the sale of property may be presumed to continue until six months later.—Hensel v. Maas, 94 Mich. 563.

¶ 89. The question whether a person buying certain property was the agent of defendant though the latter claimed a prior revocation of his authority is properly one for the jury under conflicting evidence.—Johnson v. Doon, 131 Mich. 452.

C. AGENCY BY IMPLICATION OR ESTOPPEL, OR INCIDENT TO RELATIONSHIP.

§ 18. In general.

Inference of agency from evidence (as distinguished from implication as matter of law), see ante § 10.

Presumptions as to existence of agency, see ante § 9.

Implication of authority from custom and usage, see post § 26.

Implication as to chief engineer's agency where railroad corporation is constructing its own road, see also post ¶ 176.

Implication from principal's being stockholder in alleged agent, see post ¶¶ 199, 200.

Adoption of acts of assumed agent, see post II, C.

Agency of husband for wife, see Husband and Wife, IV, B.

Agency of wife for husband, see Husband and Wife, III.

Agency of child for parent in contracting for necessaries, see Parent and Child, II.

Agency incident to joint adventure or partnership, see Joint Adventures; Partnership.

¶ 90. Whether persons, while acting in their own interest and making a request exclusively for their own advantage, can be deemed agents of a third person who would participate in the benefits that would arise from its being granted, quere.—Krueger v. Grand Rapids & I. R. Co., 51 Mich. 142.

¶ 91. All persons rightfully using a track put down in a public street by one who is granted a license therefor by the city on stringent conditions to prevent accident, and which is built for convenience of his business, and to be lawfully used for no other purpose, are to be deemed his agents, and he is liable for their conduct; the use of a special franchise under the direction and for the purposes of its owner can never be maintained except as his act.—McWilliams v. Detroit Central Mills Co., 31 Mich. 274.

¶ 92. A bishop of a diocese who owns the land is not liable in assumpsit for plans prepared by an architect at the instance of the priest in charge of the parish for a building to be erected on the land with the bishop's permission.—Engelbert v. Foley, 125 Mich. 405.

¶ 93. An agency between father and son does not arise from the mere voluntary payment of a debt of the latter by the parent and for which he was in no way legally responsible.—Cunningham v. Irwin, 182 Mich. 629.

¶ 94. The fact that a note and mortgage are made payable at a bank does not estab-

lish the agency of such bank for the purpose of receiving payment in the absence of the securities themselves.—Bloomer v. Dau, 122 Mich. 522.

§ 19. Agency by estoppel; holding out.

Estoppel to question authority of the agent, see post § 27.

Active controlling stockholder as recognized agent of corporation, see Corporations, XVII, C.

¶ 95. Where a principal by acts or conduct has knowingly caused or permitted another to appear to be his agent, either generally or for a particular purpose, he is estopped to deny such agency to the injury of third persons who have in good faith and in the exercise of reasonable prudence dealt with the agent on the faith of such appearances.—Pettinger v. Alpena Cedar Co., 175 Mich. 162.

¶ 96. In establishing an agency by estoppel, a plaintiff cannot introduce acts of defendant occurring after the transaction in question.—McBroom v. Cheboygan Brewing & Malting Co., 162 Mich. 323.

¶ 97. Agency in fact may be implied where one person by his conduct holds out another as his agent and thereby invests him with apparent or ostensible authority as agent.—Cronk v. Mulvaney, 168 Mich. 346.

¶ 98. An agency by estoppel can be established only where defendant has held the agent out as authorized, and plaintiff, relying thereon, has in good faith acted upon such representation.—McBroom v. Cheboygan Brewing & Malting Co., 162 Mich. 323.

¶ 99. One who has accepted the benefit of a purchase by an alleged purchasing agent cannot deny the agency.—Colburn v. I. Stephenson Co., 133 Mich. 437.

¶ 100. Plaintiff, relying upon representations of the physician and attorney for the insurance company, with which defendant carried its industrial insurance, that the injuries to his eye were not of a serious character (signed a release for his claim for an insignificant sum, and upon discovering that he was permanently blinded in one eye and the other affected repudiated the release, held, that it was error to direct a verdict on the ground that no agency was shown between defendant and the employees of the insurance company, since by pleading the release, refusing to accept a tender of the money paid, and claiming the benefit of it, defendant was estopped to deny agency.—Bertha v. Regal Motor Car Co., 180 Mich. 51.

¶ 101. Where attorneys have permitted a clerk to represent them at an appearance and adjournment in justice's court, they cannot dispute his authority to consent to a further adjournment.—Simon v. Sempliner, 86 Mich. 136.

¶ 102. Where a mortgagee withdrew the mortgage and note from the bank which had acted as collection agent, and at once mailed notice of the fact to the mortgagor who, by reason of a change of address, never received the notice, and where payment was made to the bank, which became insolvent without accounting to the mortgagee and before he knew of the payment, the mortgagee was not estopped to deny the authority of the bank by his delay of about four years after notice that payment had been made to the bank, in beginning foreclosure.—Bloomer v. Dau, 122 Mich. 522.

¶ 103. A principal, who was undisclosed as such because he had held out appearances that led brokers to believe that his brother of the same initials was the principal, though the real fact was that the brother was merely employed in the business and lending his name as principal, is estopped to assert his ownership as principal for the purpose of recovering the profits of wheat sold for the supposed principal and of preventing the application of the money to the repayment of advances and loans made in other transactions, supposedly for the brother.—Stebbins v. Walker, 46 Mich. 5.

¶ 104. Where a brewing company sells its saloon but holds the license in its name and authorizes the buyer to order goods in the name of the company, such company may be held liable for goods purchased by the buyer in the company's name where the seller of such goods had no knowledge of the sale of the saloon.—Rochester Distilling Co. v. Traverse City Brewing Co., 174 Mich. 318.

¶ 105. A defendant is bound by the acts of one whom it holds out as its agent on its letterheads and in its circulars.—Randall v. J. A. Fay & Eagan Co., 158 Mich. 630.

§ 20. ——Acts or declarations of alleged agent.

As creating estoppel to deny authority, see post § 28.

¶ 106. No one has a right to rely on an agent's statements concerning his own agency.—Bond v. Pontiac, O. & P. A. R. Co., 62 Mich. 643.

II. RIGHTS AND LIABILITIES OF PRINCIPAL AS TO THIRD PERSONS.

A. AUTHORITY AND RESPONSIBILITY IN GENERAL.

§ 21. In general; necessity that agency exist.

[Note. Since there must be an agency in law or in fact before there can be any question of authority, the decisions turning on a question of the existence of an agency have been collected in division I, preceding this. The decisions collected in this division II and in divisions III and IV presuppose that there must have been and was an agency and that the question turned on its limits and extent.]

Creation and existence of the agency, see ante I.

Termination of agency by death of principal, see ante § 13.

Necessity that act should have been done for principal in order to be ratifiable by him, see post § 54.

Ratification as equivalent to original authority, see post §§ 63-65.

Necessity of proving agency before proving acts of agent to bind principal, see Trial, V, B.

¶ 107. Where an attempt is made to hold one responsible for the acts of another claimed to be his agent, the agency must be clearly shown.—Campbell v. Sherman, 49 Mich. 534.

¶ 108. The authority of an agent must be established to bind the principal by his acts.—Theisen v. Detroit Taxicab & Transfer Co., 200 Mich. 186.

¶ 109. A principal is not liable for an indebtedness incurred in his name without authority by an agent, where he has never held out the agent as having such authority, or done anything to ratify the unauthorized act; and much less where the credit was originally given to the agent and not to the principal. Grover & Baker Sewing Machine Co. v. Polhemus, 34 Mich. 247.

§ 22. Scope and extent of responsibility of principal.

The principal's responsibility and liability depends on elements of representation or notice of the want of it as shown in the succeeding sections, viz., 23-76, which see.

Unauthorized and wrongful acts, see post II, B.

Liability as based on ratification, see post II, C.

Authority of superior agent to ratify act of another agent, see post § 61.

Notice to agent as affecting rights of principal, see post II, E.

Necessity of acting in name of or for behalf of principal, see post § 70.

Where agent represents two principals, see also ante § 6.

Jury questions and instructions, see post §§ 42, 43.

Declarations and acts of agents as admissions or res gestae receivable against principal, see Evidence, VII, C, VII, D.

Judgment against agent as former adjudication affecting principal, and vice versa, see Former Adjudication, V.

Power to subject principal's property to lien of innkeeper, see Inns.

¶ 110. A principal will be bound by the acts of one who has acted for him to the extent to which he has held him out as his agent.—Sorrell v. Brewster, 1 Mich. 373.

¶ 111. The principal is bound by all acts of the agent within the scope of his authority. Busch v. Wilcox, 82 Mich. 336, affirming on rehearing 82 Mich. 315.

§ 23. Duty to ascertain authority; notice of limitations.

Necessity of notice of revocation, see ante § 16.

Effect of notice on liability respecting acts outside of authority, see post II, B.

Duty of principal to ascertain facts in adopting contract, see post ¶ 390.

Notice as affecting right to rely on agent's representations of fact, see post ¶ 322.

Taking other than money in payment, see post § 36.

Liability for acts in disregard of instructions, see also post § 47.

Duty to inquire or know of limits on corporate officer's or agent's authority, see Corporations, XVII, C.

¶ 112. One who purchases from an agent must ascertain the latter's powers, and cannot act on anything that does not proceed from his principal, either as actual authority or in some form of binding admission.—Kornemann v. Monaghan, 24 Mich. 36.

¶ 113. Every person dealing with an assumed agent is bound, at his peril, to ascertain the nature and extent of the agent's authority.—Pettinger v. Alpena Cedar Co., 175 Mich. 162.

¶ 114. One dealing with an agent is bound to inquire into the extent of his authority, not from the agent, in the absence of written evidence thereof, but from the principal, if accessible.—Delta Lumber Co. v. Williams, 73 Mich. 86; Busch v. Wilcox, 82 Mich. 336.

¶ 115. One who deals with an agent is bound to inquire into his authority, and ignorance of the extent of such authority is

no excuse.—Hammond v. Michigan State Bank, W. 214; Hurley v. Watson, 68 Mich. 531.

¶ 116. Where a firm doing business in one place takes charge, under a chattel mortgage, of the business of an insolvent debtor in another place, and leaves him to carry it on in its name, it is not negligence for others to sell to the agent on the responsibility of the firm without inquiring into the agent's authority; the firm must take the risks of the arrangement, which is of a questionable nature.—Banner Tobacco Co. v. Jenison, 48 Mich. 459.

¶ 117. Where defendant previously to a sale told plaintiff that a certain person was his agent for buying logs, and plaintiff also knew of such person's buying logs for defendant prior to or about that time and not too far away, plaintiff was justified in believing that such person had a right to buy logs and make contracts binding defendant.—Thompson v. Clay, 60 Mich. 627.

¶ 118. Presentation of a bill for goods previously sold and delivered by a merchant's employee does not warrant the debtor thereon in paying it to him unless it is within the scope of his employment to receive payment; authority to so receive money cannot be implied from the fact of his employment; and his mere statement that he is authorized to receive it is not enough; nor is it enough that the bill is in the merchant's handwriting and on one of his billheads.—Hirshfield v. Waldron, 54 Mich. 649.

¶ 119. One who makes payments upon non-negotiable securities to a person assuming to act as agent should see to it that the securities are in the hands of that person.—Eaton v. Knowles, 61 Mich. 625.

¶ 120. For a case in which, in the absence of sufficient evidence of ratification or estoppel, a company was held not liable upon a conditional arrangement made by its agent with a party who knew that the arrangement was in excess of the agent's authority.—Atlas Min. Co. v. Johnston, 23 Mich. 36.

¶ 121. A solicitor for purchase of pianos without authority in fact to sell but only to report prospects placed an instrument on trial in defendant's house, and offered, in the presence of a member of the firm, to sell the same for $400, or $465, according to such partner, but this offer was refused. On a later occasion the solicitor told defendant that he would see his employers before the instrument was removed, and ascertain what they thought about it. Next day the solicitor returned, and represented that plaintiffs had authorized him to sell for $200, whereupon the bargain was concluded. Held, that the statement in regard to seeing his employers before making an offer, and his final proposition to sell at half price, were circumstances which as matter of law should have awakened suspicion of his lack of authority to consummate the sale.—Clark v. Haupt, 109 Mich. 212.

¶ 122. A purchaser of land who relies upon the statement of an agent that he is authorized to act for a mortgagee, and who makes a payment to such an agent without ascertaining whether the agent is authorized to receive it, must sustain the loss if the agent does not remit to the mortgagee.—Bacon v. Pomeroy, 118 Mich. 145.

¶ 123. One who sells a team of horses to an agent is bound to ascertain the scope of the agent's authority at his peril; the authority to buy horses of a certain color and size is not a general authority to buy any type of horse.—Schofield v. Conley, 126 Mich. 712.

¶ 124. Under a contract to furnish a tug and boom to inclose 500,000 logs, both tug and boom to be under the direction of the defendant, where plaintiffs did not assume risk of weather or accident unless due to negligence or disobedience of defendant's orders, neither of which was claimed, plaintiffs were not responsible for the consequences of the advice of the tug captain to the defendant that the boom would accommodate all of his logs, the same having run over 500,000 feet.—Hebard v. Shaw, 123 Mich. 514.

¶ 125. In order to show that a person acted as a general agent in respect to his principal as to matters outside of and beyond the terms of a written contract, it is incumbent on the person asserting such relationship to ascertain from the principal the scope of his agent's authority.—Reinforced Concrete Pipe Co. v. Boyes, 180 Mich. 609.

§ 24. ——Secret limitations and restrictions on authority.

See also post §§ 24, 25, 27, ¶ 146.

¶ 126. While a person dealing with an agent is bound to inquire into the extent of his authority and is not excused by ignorance of it, it also well settled that, having ascertained the general character or scope of the agency, such person may rely thereon to the extent of assuming that the agent has such powers as naturally and properly belong to his ascertained character, and if not put on inquiry is not bound to ascertain secret limitations and qualifications of his authority.—Grand Rapids Elect. Co. v. Walsh Mfg. Co., 142 Mich. 4.

¶ 127. The authority of a general agent, appointed to carry out the terms of a con-

tract by one of the parties thereto, cannot be limited within the scope of the business by private instructions of which the other party is ignorant.—Allis v. Voigt, 90 Mich. 125.

¶ 128. Secret instructions to the agent will not enable his principal to escape responsibility for acts which, in the usual course of the business, the public would have a right to understand were authorized.—Banner Tobacco v. Jenison, 48 Mich. 459.

¶ 129. The authority of a general agent, within the usual scope of the principal's business, cannot be limited as to third parties by private instructions from the principal.—Inglish v. Ayer, 79 Mich. 516.

¶ 130. One who sells cabbages not yet ready for the market to an agent held out to the public as having authority to contract for future delivery is not bound by a secret limitation between the principal and the agent that only cabbages ready for market can be contracted for by the latter.—Baker v. Barnett Produce Co., 113 Mich. 533.

¶ 131. Where an agent has full authority to sell notes indorsed in blank, and has special instructions as to the mode of selling and the disposition of the proceeds, a stranger who buys without notice of these instructions is not prejudiced by the agent's violation of them; he is concerned with nothing beyond the general authority.—Howry v. Eppinger, 34 Mich. 29.

§ 25. ——Acts of self interest or repugnant to agency.

Agency as between two principals, see ante § 6.

Liability for unauthorized acts of self interest, see post § 46.

Self interest or bad faith of agent destroying force of notice to bind principal, see post § 75.

Ratification of application of payments to own debt, see post § 373.

Notice to taker of commercial paper from fact that it is payable to agent making or negotiating it, see Negotiable Instruments, XIII, A.

¶ 132. An agent cannot act for his principal in the same transaction in two inconsistent capacities, hence, having performed a duty by giving a notice to quit, he has no authority to represent that it need not be heeded.—Pittsburgh & L. S. Iron Co. v. Kirkpatrick, 92 Mich. 252.

¶ 133. One dealing with an agent who has general authority to sell goods or collect debts is bound to know that the agent has no authority by virtue of his agency to apply or offset his own private debt to such third party in payment of the debt to the principal.—Hurley v. Watson, 68 Mich. 531.

¶ 134. An indorsement of promissory notes as agent by one to whom such notes have been intrusted as agent for the holder was notice sufficient to put the purchaser upon inquiry as to the authority of such agent to apply part of the proceeds from such sale to his individual indebtedness to such purchaser.—McBain v. Seligman, 58 Mich. 294.

¶ 135. An agent to effect contracts for the principal cannot without approval make a contract (insurance) with himself.—Zimmermann v. Dwelling House Ins. Co., 110 Mich. 399.

§ 26. Implication from custom and usage.

Implication from specific object of agency, see also post §§ 33-38.

Former collections as establishing custom, see post § 36.

Clerks left in sole charge of business, see post § 35.

¶ 136. Whether a general custom can establish a liability upon the part of a master for the contracts of his servant, quere; the general rule being that in such cases liability depends upon direct authority or special or individual custom.—Bourke v. James, 4 Mich. 336.

¶ 137. A manufacturer's agent employed to solicit orders for goods must, as to persons dealing with him, be deemed to have authority to accept such orders and to bind his principal by contracts of sale where such is the general usage, and where contracts so made by him have been repeatedly recognized by his principal.—Leo Austrian & Co. v. Springer, 94 Mich. 343.

¶ 138. A general custom authorizing manufacturers' agents engaged in soliciting orders to accept such orders without referring them to their principals binds the principals though they have no actual knowledge of the custom.—Leo Austrian & Co. v. Springer, 94 Mich. 343.

¶ 139. Plaintiff manufacturer of pianos made a contract to consign pianos to one Ray, a local dealer. By the contract Ray had authority to sell the same as plaintiff's agent for cash or credit. Ray traded a consigned piano to defendant for another piano. Held, in replevin, Ray's contract did not authorize him to exchange, but only to sell, and its terms could not be broadened by proving a custom in the trade for dealers to exchange.—Starr Piano Co. v. Morrison, 159 Mich. 583.

§ 27. Holding out appearances; estoppel to question authority.

[Note. The distinction, if any, between estoppel by acceptance of benefits of the act done and ratification by acceptance of benefits is technical rather than substantial, but for purposes of classification the former is treated here and the latter post § 58.]

Estoppel to question existence of agency, see ante § 19.

Previous collections of interest as implying authority to collect principal of debt, see post § 36.

Presumptions and evidence, see post §§ 39-41.

Inferences from course of dealing, see post §§ 40, 41.

Liability for acts within held out authority, see also post II, B.

Estoppel of corporation to deny authority of officer or agent, see Corporations, XVII, D.

¶ 140. Holding out one person by another as authorized to make a sale of a piano for the latter does not estop him from denying the validity of a sale by the person thus held out, unless the purchaser acted in good faith, and in the honest belief that the agent was authorized to make the sale, all elements of an estoppel must be present.—Clark v. Dillman, 108 Mich. 625.

¶ 141. The owner of property is not estopped from denying the authority of an assumed agent to act with reference thereto where the person dealing with such agent is ignorant of the owner's claim to such property.—Joy v. Vance, 104 Mich. 97.

¶ 142. Where authority is conferred upon an agent in ambiguous terms, and the agent, in good faith, adopts a permissible construction, the principal is estopped from asserting, as against third persons having dealings with such agent, that the authority assumed in accordance with such construction was not the authority intended to be conferred.—Berry v. Haldeman, 111 Mich. 667.

¶ 143. One who holds out another as his agent to borrow money is estopped to deny the authority as against one who knows of and relies upon such holding out in making a loan.—Jewett v. Bryant, 159 Mich. 345.

¶ 144. A corporation which has held out its foreman as authorized to make any reasonable contract for the employment of men is estopped from questioning such a contract made with an employee, although no express authority is shown for making it.—Tunison v. Detroit & L. S. Copper Co., 73 Mich. 452.

¶ 145. Neglect to prosecute for the unauthorized use of one's name on negotiable paper does not estop one from denying his liability on similar paper made thereafter.—Stroh v. Hinchman, 37 Mich. 490.

¶ 146. If an engineer, in pursuance of authority given him by a subcontract for the construction of a railroad for a company to declare a forfeiture in case of the subcontractor's inability to perform, prosecutes the work in behalf of the company, which latter has assumed performance, the company is liable for indebtedness incurred by him in such prosecution; and if, while he is contracting for work, employing men, and purchasing supplies in defendant's name and upon its credit, its officers are advised and remain silent, it cannot be heard to say that his action was without authority, even though his authority was originally limited by secret instructions.—Hirschmann v. Iron Range & H. B. R. Co., 97 Mich. 384; Michigan Slate Co. v. Iron Range & H. B. R. Co., 101 Mich. 14.

¶ 147. One who has written to a proposing seller that the writer's named agent would call on the seller and negotiate for a bargain cannot show after a bargain has been made in his name, paying part cash and giving his note for the balance, that the agreement between him and the agent was to buy in the agent's name on advances made by the principal.—Sorrel v. Brewster, 1 Mich. 373.

¶ 148. A contract of employment as a baseball player made with the captain to whom the player was directed as the defendant's sole manager, with the statement that whatever such captain did "went," was binding whether the captain was the defendant's sole manager or not.—Scheibeck v. Van Derbeck, 122 Mich. 29.

¶ 149. A principal who has received the proceeds of the sale of bonds sold through his agent cannot deny the authority of the agent to sell them.—Schmid v. Village of Frankfort, 111 Mich. 291.

¶ 150. A company is not estopped from denying liability for goods purchased from a third person by its agent where the agent was not authorized to purchase goods and the third person who knew the agent was selling goods for the company did not inquire as to his authority before taking orders, and where there is evidence tending to show that credit was extended to the agent, and though the agent had an office and a sign thereon representing himself as a manager for the company when the orders were given, such office was opened without consulting the company and the sign was discovered after the orders were given and its removal was then suggested.—Rothschild v. Sugar Beet Products Co., 174 Mich. 237.

¶ 151. Plaintiff sold goods for a period of years to defendant. In making shipments, the invoices of the plaintiff stated that no discounts were allowed other than those specified therein. Defendant's clerk testified that he called up the plaintiff by telephone and asked why the prices in the invoices were higher than those made, including discounts, by one Berger, plaintiff's salesman, and that the plaintiff told him to go ahead and arrange it with Berger, and that would be all right. Held, that under such facts the plaintiff was estopped to set up that the discounts allowed by Berger were unauthorized.—Marx v. King, 162 Mich. 258.

¶ 152. Where an agent of a company manufacturing speedometers entered into an oral contract to sell speedometers on commission, and sales are made under such agreement to the knowledge of the company, it cannot claim that its agent was not authorized to make such contract.—Fuchs v. Standard Thermometer Co., 178 Mich. 37.

¶ 153. The introduction of a person as a representative to look after certain work to be performed under a written contract was not a holding out of such person as the general agent of his principal so as to bind the latter as to matters beyond the terms of the written agreement.—Reinforced Concrete Pipe Co. v. Boyes, 180 Mich. 609.

§ 28. ——Agent's holding out of appearances.

As creating estoppel to deny agency, see ante § 20.
Reliance on agent's assurances, see also ante § 22.
Disability to ratify own act, see post § 61.
Construction of ambiguous terms by agent, see ante ¶ 142.
Agent describing himself as "manager," see also ante ¶ 150.

¶ 154. Holding one's self out as agent is no evidence of authority.—Jones v. Bloomgarden, 143 Mich. 826.

¶ 155. The apparent power of an agent is to be determined by the acts of the principal, and not by the acts of the agent.—Wierman v. Bay City Michigan Sugar Co., 142 Mich. 422; Marx v. King, 162 Mich. 258; Reinforced Concrete Pipe Co. v. Boyes, 180 Mich. 609; Ward v. Dunnebecke, 184 Mich. 703.

¶ 156. One's mere statement that he has authority as an agent does not bind the supposed principal.—Kornemann v. Monaghan, 24 Mich. 36.

¶ 157. One who deals with another, supposing him to be an agent, is not protected by his assumption of authority to act.—Rice v. Peninsular Club of Grand Rapids, 52 Mich. 87.

§ 29. Delegability of authority; subagencies.

Relation of subagent to principal, see ante § 7.
Liability for unauthorized delegation, see post ¶ 314.
Authority of one agent to ratify act of another, see post § 61.

¶ 158. Although it is generally true that local agents cannot, unless expressly authorized, delegate their authority to clerks, yet where such agents do business largely through clerks, who solicit insurance, make out applications and policies, and generally attend to the business of their employers, the acts of such clerks are binding as though done by the agents themselves.—Steele v. German Ins. Co., 93 Mich. 81.

¶ 159. A forwarder's clerk left in charge of the receipt of goods is conclusively presumed, if the customers have no knowledge of restrictions, to have authority to accept all contracts usual and proper in the business.—Hutchings v. Ladd, 16 Mich. 493.

§ 30. Construction of written authority.

Of powers of attorney, see post § 32.
Jury questions and instructions, see post §§ 42, 43.

¶ 160. The assignee of a contract wrote to the other party thereto notifying him of the assignment, and that his agent, the bearer, was "fully authorized" to do business for him, and that he was prepared to carry out the contract. The writing was construed by the agent and the other party as conferring authority upon the former to enter into a new agreement in relation to the subject-matter of the original contract. Held that such construction was permissible.—Berry v. Haldeman, 111 Mich. 667.

§ 31. ——Of written limitations and restrictions.

¶ 161. An order from defendant to plaintiff's general agent for a harvesting machine recited that the machine was purchased and sold under a warranty and agreement thereinafter set forth, which no one had any authority to add to, abridge, or change in any manner, and that keeping the machine during harvest, whether kept in use or not, should be deemed conclusive evidence that it filled the warranty. Defendant, upon ascertaining that the machine did not comply with the warranty, refused to keep it under the contract, and the agent who took the order persuaded defendant to retain the machine, and advised him that he might do so, and that if he kept it beyond the harvest it would be all right, and the machine would be plaintiff's and not defendant's. Held, in a suit to recover the purchase-price of the machine that the machine was retained by defendant under this new agreement, which the

agent had a right to make, and that defendant is not bound to pay for the machine because he held it over the harvest.—D. M. Osborne & Co. v. Baker, 103 Mich. 247.

§ 32. Authority under powers of attorney.

Ratification of excessive acts, see post ¶ 364.

¶ 162. Powers of attorney to sell land are strictly construed, and cannot be enlarged by construction.—Penfold v. Warner, 96 Mich. 179.

¶ 163. Powers of attorney are not to be extended by construction. A power to sell land does not authorize the attorney to mortgage it; and if the land is conveyed by a deed that it really intended as a security merely, such conveyance is unauthorized, and the grantee cannot maintain ejectment.—Jeffrey v. Hursh, 49 Mich. 31; Jeffrey v. Hursh, 58 Mich. 246.

¶ 164. A power of attorney which purports to specify the power conferred does not give the attorney the right to assign a mortgage held by his principal unless it expressly states that he may do so.—Post v. Springsted, 49 Mich. 90.

¶ 165. A power of attorney executed by husband and wife to sell, etc., "all real estate belonging to us, or either of us," is limited to lands then owned by the parties, and does not authorize sale, after the husband's death, of land quitclaimed by him to her after the execution of the power, and in which she had previously only an inchoate right of dower.—Penfold v. Warner, 96 Mich. 179.

¶ 166. A power of attorney authorizing the collection of all arrears due defendant as inspector of customs covers the collection of all claims against the government on defendant's part at its date.—Baker v. Baird, 79 Mich. 255.

¶ 167. A power of attorney from a contractual vendee authorizing the vendor to sue in the former's name, place, and stead, does not enable the vendor to sue in ejectment in his own name.—Kuite v. Lage, 152 Mich. 638.

§ 33. Scope of agency for specific purpose.

Secret limitations, see ante § 24.

Under written authority or power, see ante §§ 30-32.

Termination of agency by single exercise of authority, see ante ¶ 70.

Responsibility for erroneous advice of tug captain, see ante ¶ 124.

Presumptions and evidence as to agency and scope, see post §§ 39-41.

Jury questions and instructions, see post §§ 42, 43.

Authority of attorneys at law, and rights and liabilities depending thereon, see Attorneys and Counselors.

Express or implied authority of corporate officers and agents, see Corporations, XVII, C.

Authority of committee of corporation, see Corporations, XVII, C.

Authority of public officers and agents, see generally Officers and Public Employees; and see also topics treating of particular officers and agents of the public, e. g., Municipal Corporations, XV; Counties, VII; University of Michigan.

Authority of partners to bind firm, see Partnership, IV.

Scope of agency of husband and wife for each other, see Husband and Wife, III, IV. D.

Authority and rights of persons in possession of or having special or qualified property, see Bailments; Chattel Mortgages; Mortgages; Pledges; Vendors and Purchasers; Sales, XII (conditional sales).

Agents who may be served with process for corporations, see Process.

¶ 168. Where the treasurer of a railroad company was one of the committee that had executed the contract on its behalf for grading its proposed road, and the only one of them who had given any personal attention to the work or directions to the contractors, and he had stated that the company were unable to collect money fast enough to pay according to the contract, and had asked that the force of men employed be decreased, thereby causing delay in fulfilling the contract, it was held that the contractors would have a right to assume, in the absence of any notice to the contrary, that he was authorized to give such directions, and were justified in acting accordingly.—Grand Rapids & B. C. R. Co. v. Van Deusen, 29 Mich. 431.

¶ 169. A tenant abandoned the leased premises because of the lessor's failure to provide heating facilities as agreed. The tenant told the lessor's brother-in-law, who had acted for the lessor in the matter of the heating, that he intended to vacate, and asked him to take care of the water pipes, telling him also where the key was left. Held, that the tenant was justified in leaving the care of the pipes to the brother-in-law, even though the latter had no authority to accept a surrender of the premises.—Rogers v. Babcock, 139 Mich. 94.

¶ 170. The tenant in possession of a farm had the right to treat the agent of his landlord as having authority to receive the rent and discharge his obligation by making payment, where notice to quit or pay rent (Comp. L. 1897, § 11164) was intrusted to such agent for service, and was served by such agent upon the premises.—Cockerline v. Fisher, 140 Mich. 95.

¶ 170a. A teamster to whom a team of horses has been intrusted to take into the lumber woods and do teaming, has no apparent authority to sell the horses and divest the true owner of his property.—Nichols v. Monjeau, 132 Mich. 582.

§ 34. ——Superintendents, managers, overseers, foremen.

See also generally other sections in this division.
Holding out authority, see ante § 27.
When acting as adjusting and settlement agents, see post § 37.
Sufficiency of evidence, see post § 41.
Authority of architect or referee under building contract to decide questions, see Building and Construction Contracts, VI.
Authority of superintendents or managers of corporations, see Corporations, XVII, C.

¶ 171. A superintendent was held to have authority to consent to alterations and to waive strict performance of a building contract.—Andre v. Hardin, 32 Mich. 324.

¶ 172. Where after the purchase from a brick company of the brick upon its yard, burned and unburned, the vendee allows the president of the corporation to manage the yard and sell brick as his agent, and collect the proceeds of such sales, he becomes such an agent that his contracts are binding upon the vendee if made in the due course of the business; and payments made to such agent by a purchaser of brick who had no knowledge of the change of possession under the said first named purchase are binding upon the principal.—Todd v. Everett, 78 Mich. 595.

¶ 173. In an action by the owners of a tug against a log-towing company for towing services, it appeared that defendant sent an employee to plaintiffs with two letters, in one of which it introduced him as "our log-man," and stated that any orders from him would be the same as from its office. The other letter directed plaintiff to take said log-man and certain booms, and to tow a certain raft to a designated point, and, on arriving there, to send a telegram to defendant for orders. Held, that the term "log-man" is technical, and may have a signification limiting the range of the duties of the person to whom it is applied; that in the absence of such explanation, it cannot be said that defendant by said letters intended to restrict its log-man's authority to direct the speed of the tug (which plaintiffs claim he assumed to do), and as to what should be done in emergencies, and that if he gave such directions, and the same caused an increased strain upon the line so that it parted, and the line was not defective, or if the loss was aggravated by what was done under said directions, plaintiffs are not liable therefor. —Stevenson v. Michigan Log-Towing Co., 103 Mich. 412.

¶ 174. A conductor represents the company in the whole management of his train, and in ejecting a passenger he acts in the line of his employment, so that the company is liable for a wrongful expulsion.—Great Western Ry. Co. of Canada v. Miller, 19 Mich. 305.

¶ 175. Neither the assistant road-master of a railroad company nor the master of transportation can be presumed to have authority to represent the company in claiming disputed titles.—Drew v. Comstock, 57 Mich. 176.

¶ 176. No presumption can arise of any power in a chief engineer, even where a railroad company is acting in the completion of its own road, to make a contract for the erection of depot buildings. The definite location of depots belongs to the board of directors, unless clearly delegated elsewhere; and a chief engineer cannot be made the possessor, by delegation, of the double power of locating depots and contracting for building them, if he can be at all, without the authority of the board.—Bond v. Pontiac, O. & P. A. R. Co., 62 Mich. 643.

¶ 177. The secretary and manager of a beet sugar factory has authority to guarantee one who agrees to raise and deliver sugar beets to the factory against loss upon his crop.—Constantine v. Kalamazoo Beet Sugar Co., 132 Mich. 480.

¶ 178. Where it appears that the owner and proprietor of a hotel employed another as his agent in and about the hotel and in running it, and held such person out as manager of the house, a jury would be warranted in finding that the agent has authority to purchase the usual and necessary supplies for the hotel, and to bind his employer in making such purchases on credit.—Beecher v. Venn, 35 Mich. 466.

¶ 179. A member of a debtor firm carried on and managed the business in B.'s name for creditors, giving and taking notes generally in such name, B. having authorized him to do so. A particular purchase relating to the business was made by A. in his own name, and was so billed. Held, that A. had authority to pay for the same by executing a note in B.'s name.—Shipman v. Byles, 65 Mich. 690.

¶ 180. A New York branch house manager of a corporation, manufacturing and selling through him folding chairs, revolving bookcases, hospital supplies, and invalid goods, has no implied authority to buy and charge to his principal ordinary household furniture of a class not dealt in or carried in stock for the principal and to order delivery of such goods direct to private houses desig-

nated by him, all such dealings being outside the apparent scope of his authority.—Cowan v. Sargent Mfg. Co., 141 Mich. 87.

¶ 181. The superintendent of a factory, who as such had charge of its operations and of the lumber camps accessory to it, of a store in connection with it, of an opera house, and of the employment of many servants, has within the apparent scope of his agency the authority to purchase a dynamo costing about $600, needful for the purpose of lighting the factory, though in fact such authority was denied him by the principal, a foreign corporation, the president of which testified that the dynamo they had was sufficient.—Grand Rapids Elec. Co. v. Walsh Mfg. Co., 142 Mich. 4.

¶ 182. The chief surgeon of a railroad company has no implied authority to employ an assistant not appointed by the company to treat an injured employee, where such surgeon's express authority is limited to employing regularly appointed local surgeons of the company under contract relations with it.—Burke v. Chicago & W. M. R. Co., 114 Mich. 686.

¶ 183. Whether the general superintendent of a railroad company can bind the company by his employment of a doctor to attend an employee injured by their cars, quere; the court was equally divided.—Marquette & O. R. Co. v. Taft, 28 Mich. 289.

¶ 184. A railroad yard-master whose business it is to have charge of the yard and make up trains there, and who has a right to employ and discharge his help in these matters, and employ brakemen for himself and the road trains, and whose authority consists in employing men in his department, has no authority, by virtue of his office alone, to bind the railroad company which employs him to an agreement made by him to pay a surgeon for attending one of the men under him in the service of the company, who has been run over and injured by the company's cars.—Marquette & O. R. Co. v. Taft, 28 Mich. 289.

¶ 185. An employer operating a laundry is not liable for services rendered to an employee by a physician at the request of a forewoman who had no general authority for that purpose.—Holmes v. McAllister, 123 Mich. 493.

§ 35. ——Cashiers, clerks, bookkeepers and the like.

Forwarder's clerk, see ante ¶ 159.
Sufficiency of evidence, see post § 41.

¶ 186. A cashier, bookkeeper or corresponding clerk has not authority to compromise claims, settle unliquidated damages or release debts due to his principal.—Delta Lumber Co. v. Williams, 73 Mich. 86.

¶ 187. Proof that a person is clerk for another does not establish his right to receive for his employer payment of demands not shown to have any connection with the business; and evidence simply that payment of such demands was made to a clerk is not a sufficient showing of agency to receive the same to authorize evidence of admissions by such clerk of the payment to him.—Bowen v. Ruthland School Dist., No. 9, 36 Mich. 149.

¶ 188. A bookkeeper who had some discretion in small sales was directed to collect a balance due upon a particular sale or to get the goods. Held, that this did not give him such standing as an agent that his employer would be bound by his neglect to warn a third person, to whom the purchaser sold the goods, that there was an unpaid claim upon them.—Weaver v. Bechtel, 53 Mich. 516.

¶ 189. A bookkeeper has no authority by virtue of his office to make his employer liable for a third person's debts.—Ruppe v. Edwards, 52 Mich. 411.

¶ 190. On the purchase of a farm, it was agreed between the grantor and grantee that a certain part of the money which the grantee had secured by mortgaging the farm to a third party should be retained by the agent who made the loan, and be by him used in paying off a prior mortgage when due, or whenever the mortgagee would receive his money. If any surplus remained, it was to be paid to the grantor to apply upon the purchase price of the farm, upon which the rest of the loan had been applied. Either party had the right to terminate the agreement at any time. The grantee sold the farm, subject to the mortgages, and it was agreed between him and his grantor and the purchaser, and the clerks of the agent, who still held said deposit, he being absent at the time, and said clerks having sole charge of his business, that the arrangement under which the money was originally deposited should continue in force. Held, that the clerks had authority to make said agreement.—Havens v. Church, 104 Mich. 135.

¶ 191. A statement of a telegraph agent or operator that a message was not delivered, made before sending a duplicate message, is an act within the scope of his authority and admissible in evidence to show nondelivery.—Carland v. Western Union Tel. Co., 118 Mich. 369.

§ 36. ——Collecting and financial agents.

Whether agent represents paying party or creditor, see ante § 6.
Secret limitations as to authority, see also ante § 24.

Authority of agents for other purposes to make collections, see ante §§ 33-35, post §§ 37, 38.
Cashiers and clerks, see also ante § 35.
Sufficiency of evidence, see post § 41.
Notice to principal by notice to agent, see post II, E.

¶ 192. The authority of an agent to collect for his principal does not authorize him to take anything but money in payment.—Hurley v. Watson, 68 Mich. 531; Pitkin v. Harris, 69 Mich. 133.

¶ 193. One dealing with an agent for collection of debts is chargeable with knowledge that, in the absence of special authority, he can accept money alone in payment.—May v. Genesee County Savings Bank, 120 Mich. 330.

¶ 194. An agent authorized to collect a note is not authorized to receive a mortgage on wood as security to be disposed of in payment.—Pitkin v. Harris, 69 Mich. 133.

¶ 195. An agent empowered to redeem from a mortgage has authority to pay not only the amount due thereon, but to bind his principal to pay whatever expense has already been necessarily incurred in taking steps to enforce the security.—Shutes v. Woodard, 57 Mich. 213.

¶ 196. A mortgage company is impliedly authorized to receive payment of the principal of a mortgage which is in the possession of the mortgagee, where the latter has instructed it to inform the mortgagors in mortgages owned by her, including that in question, that they must pay at once or the mortgages will be foreclosed, and the company has been accustomed to collect the principal of her mortgages, and remit the sums collected to her upon receipt from her of a discharge of the mortgage together with the original papers.—Wilson v. La Tour, 108 Mich. 547.

¶ 197. The holder of a mortgage who, while still retaining the securities in his possession, forwards to a third person the coupon interest notes for collection as they mature, does not as a matter of law thereby constitute such person an agent for the collection of subsequent instalments of interest or of the principal.—Joy v. Vance, 104 Mich. 97; Trowbridge v. Ross, 105 Mich. 598.

¶ 198. That one has from time to time collected the interest on a mortgage does not of itself justify the inference that he is authorized to receive payment of the mortgage without the surrender of the securities.—Bromley v. Lathrop, 105 Mich. 492.

¶ 199. A mortgagee who has been accustomed to send the interest coupons to a mortgage company for collection does not thereby constitute the company an agent to collect the principal, even though the mortgagee is a stockholder in the company.—Wilson v. Campbell, 110 Mich. 580.

¶ 200. A letter from a mortgagee's agent, directing a firm that has looked after the collection of the interest upon the mortgage to call in the loan or foreclose, if certain interest moneys are not paid at once, does not, where the interest is promptly paid, authorize a mortgage company subsequently incorporated, and controlled by the individuals who composed the firm, to receive payment of the principal.—Terry v. Durand Land Co., 112 Mich. 665.

¶ 201. The discharge of a mortgage is not effected by the execution of a renewal mortgage to one authorized to collect the mortgage, and the transfer of the new mortgage by him to a third person in satisfaction of a pre-existing indebtedness.—Brooke v. Struthers, 110 Mich. 562.

¶ 202. One who acted as the agent of the mortgagee in making a particular loan and mortgage and was intrusted with all matters relating to the collection of interest and principal upon the loans of the mortgagee is authorized to receive payments in full satisfaction of the mortgage so as to bind the principal.—Ellis v. Maurer, 125 Mich. 400.

¶ 203. The fact that an agent is authorized to receive interest on a mortgage does not establish his authority to receive the principal, or any part of it, or justify a mortgagor in believing that the agent can act for the mortgagee generally.—Bacon v. Pomeroy, 118 Mich. 145.

¶ 204. An agent's authority to draw bills of exchange, payable on time or at sight, does not include authority to draw post-dated bills.—New York Iron Mine v. Citizens' Bank, 44 Mich. 344.

¶ 205. A railroad subcontractor, whose relation to the contractor is declared by an express provision in the contract between them to be that only of a disbursing agent, has no authority to obtain supplies on the contractor's credit.—Wells v. Martin, 32 Mich. 478.

¶ 206. A financial agent has implied power to enter into a novation whereby he promises to pay the debts which are a lien upon land which is deeded to him in satisfaction of his principal's claim for repayment of loans, where it is shown that he has absolute control over his principal's investments, that he has at other times taken conveyances and assumed prior obligations, paid off first mortgages, furnished repairs and supplies for

properties, and otherwise protected his principal's interests.—Bullock v. Tompkins' Estate, 125 Mich. 17.

¶ 207. The fact that a traveling salesman has authority to make collections for his firm does not authorize him to indorse the names of his employers to notes, nor to negotiate notes given to them.—Lonier v. Ann Arbor Sav. Bank, 162 Mich. 541.

§ 37. ——Agency to adjust or settle claims.

See also ante ¶ 118.

Authority of agents for other purposes to effect settlements, see ante §§ 33-36, post § 38.

Sufficiency of evidence, see post § 41.

Reservation of claim contrary to known limit of authority, see Accord and Satisfaction, ¶ 52.

Authority of insurance agents and adjusters, see Insurance.

¶ 208. Where an authorized agent settles an account and gives an order on third parties, acceptances and payment by them bind the party liable on the account; but if the settlement was not authorized, and was not made with a view of enabling the creditor to get his pay or a promise to pay from the debtor, he is not bound by it.—Mink v. Morrison, 42 Mich. 567.

¶ 209. Where two division superintendents of a railroad company represented the company on the final settlement of an employee's claim against the latter for a personal injury, which settlement the company has carried out by paying the amount then agreed to be paid, it is proper, in an action by the employee against the company for breach of a contract—claimed to be a part of such settlement, and to have been made by such superintendents in behalf of the company—under which he was to be furnished with employment for life at a fixed monthly salary, to allow the jury to find that said officers had authority to make said contract.—Brighton v. Lake Shore & M. S. R. Co., 103 Mich. 420.

¶ 210. When after selling machinery and entering into an agreement with a buyer, whereby he is given seven months in which to test the machine and reject if unsatisfactory, the seller is notified by the buyer that the machine is unsatisfactory and he in turn notified the buyer that the manufacturer of the machine has been notified, and subsequently the manufacturer of the machine sends an agent to examine and rectify the machine, and this agent takes an agreement from the buyer by which he is given thirty days for trial and agrees to furnish a written acceptance at the end of that time, it will be held that the facts show that the second agreement was made with the authority and for the benefit of the seller.—James Leffel & Co. v. Platt, 126 Mich. 443.

§ 38. ——Buying and selling and contracting agents.

Duty to ascertain and secret limitations, see ante §§ 23-25.

Implication from custom and usage, see also ante § 26.

When acting as agents for adjustment of claims, see ante § 37.

Sufficiency of evidence, see post § 41.

Authority of agent to impute notice received to principal, see post II, E.

Contracting with, buying from, or selling to principal, see post § 92.

Brokers and factors, see generally Brokers and Factors.

¶ 211. Authority to an agent to sell property does not authorize him to exchange it for other property.—Trudo v. Anderson, 10 Mich. 357.

¶ 212. Commercial agents have no right to sell merchandise of their principal as part of a lot with other merchandise, when the principal has never agreed to be bound by any sale not made separately.—Coe v. Nash, 28 Mich. 259.

¶ 213. In the absence of authority conferred, or a valid usage, an agent cannot sell property on credit; the sale must be for cash.—Kops Bros. Co. v. Smith, 137 Mich. 28.

¶ 214. It seems that an agent with general written authority to bargain for and buy goods of a specified kind, who finds the amount of cash and drafts furnished to be insufficient to cover the purchase, may bind his principal for the balance by taking credit in his name.—Sorrell v. Brewster, 1 Mich. 373, but see annotation questioning this in 1 Mich. 373, annotated edition.

¶ 215. Where, upon an order procured by their agent, the vendors of goods sent them directly to the purchaser, together with a bill in their name, payment to the agent will be no defense to an action by the vendors for the goods, in the absence of proof of the agent's authority to collect, or of such prior dealings between purchaser and vendors as would lead the purchaser to believe that the agent had such authority.—Kornemann v. Monaghan, 24 Mich. 36.

¶ 216. An agent who is authorized to let a logging contract for his principal is authorized to do everything necessary to bring about such contract, and to make representations respecting the character of the lands, as being well situated for logging purposes;

the character and quality of the pine, whether large or small, cork or sapling; and the quantity of timber on the land suitable for saw-logs.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 217. A nonresident vendor's local agent negotiated the sale of an engine which was shipped to the agent. The only knowledge of the vendees as to the identity of the engine sent with the one ordered was the agent's statement, and he informed them that if they did not wish to take the engine they need not do so, they claiming that it did not fulfil the requirements of their order and of the representations made to them. Held, that they had a right to assume that the agent had authority to bind his principal in respect to the taking of the engine.—Palmer v. Roath, 86 Mich. 602.

¶ 218. Persons who negotiated a sale of sawmill premises covered by a trust mortgage to creditors, were held upon the evidence not to have had authority to agree in behalf of the creditors that money would be advanced to make repairs on the property, such authority not appearing in a creditor's agreement appointing a managing committee to buy in the property and resell it, and not being evinced by subsequent negotiations.—Sheridan v. Peninsular Savings Bank, 116 Mich. 545.

¶ 219. A woman does not, by authorizing her husband to purchase a mortgage and have it assigned to her and collect thereon, give him authority to compromise a claim against the assignor under the assignment.—Eaton v. Knowles, 61 Mich. 625.

¶ 220. An agent of a company was not authorized to incur debts for which it is liable where it seems that his only authority was to sell its products, and that the goods were usually shipped directly to the buyer after the orders were taken by such agent and the price was sent to the company which sent the agent his commissions.—Rothschild v. Sugar Beet Products Co., 174 Mich. 237.

¶ 221. An agent to make an offer is also agent to receive the reply.—Ferguson v. Hemingway, 38 Mich. 159.

¶ 222. The general authority of a lake carrier's shipping agent may reasonably include authority to agree for delivery at destination within a specified time.—Rudell v. Ogdensburgh Transit Co., 117 Mich. 568.

§ 39. Burden of proof and presumptions.

As to existence of the agency, see ante § 9.
As to continuance until revoked, see ante § 17.

¶ 223. Where title to a note is claimed through the payees' indorsement by their agent, plaintiff has the burden of showing such agent's authority.—Newton v. Principaal, 82 Mich. 271.

¶ 224. Where, in replevin for a piano, defendant claims to have purchased the instrument from an employee of plaintiffs, who was their agent for that purpose, or at least held out by them as such, the burden of proof to establish such agency, or an estoppel on the part of plaintiffs to deny it, is upon defendant.—Clark v. Dillman, 108 Mich. 625.

¶ 225. Persons dealing with a general agent have the right to act upon the presumption that he is authorized to do and perform all things within the usual scope of his principal's business.—Inglish v. Ayer, 79 Mich. 516; Leo Austrian & Co. v. Springer, 94 Mich. 343.

¶ 226. It is presumed that an agency to make a sale continues until sale is consummated.—Henkel v. Welsh, 41 Mich. 664.

¶ 227. In an action on the contract of a railroad company to employ an injured brakeman, talks with the train master and the general superintendent are admissible as evidence to prove the contract, as it is assumed that the general superintendent has authority covering such contracts in the absence of evidence to the contrary, though it could not be assumed as to the train master.—Sax v. Detroit, G. H. & M. R. Co., 125 Mich. 252.

§ 40. Evidence as to authority.

See also post ¶ 310.
As to existence of the agency, see ante §§ 9, 10.
As to ratification, see post §§ 67, 68.
General law of evidence, see Evidence.
Admissibility of acts or declarations by agent out of court, see Evidence, VIII, C.
Admissibility of writings (letters) to prove agency or ratification, see Evidence, VIII, A.

¶ 228. Where the authority of agent is verbal he may testify as to the extent of his authority.—Spears v. Black, 190 Mich. 693.

¶ 229. Evidence of persons who have dealt with the principal through the agent is competent to show the character of the agency.—Leo Austrian & Co. v. Springer, 94 Mich. 343.

¶ 230. Where an agent's authority is at issue the statements and dealings of his principal with third persons in recognition of it are relevant.—Haughton v. Maurer, 55 Mich. 323.

¶ 231. It is not proper to admit evidence showing that a salesman gave discounts to other dealers for the purpose of proving that his principal held him out as authorized to make discounts in the case in question.—Marx v. King, 162 Mich. 258.

¶ 232. The recognition of paper on which one's name has been used without authority may be shown not as proving, but as having a tendency, along with other evidence, to prove an implied authority to make such paper afterwards.—Stroh v. Hinchman, 37 Mich. 490.

¶ 233. In an action to recover for goods ordered by defendant's alleged agent, orders drawn on other parties, and not shown to have been recognized by defendants, are inadmissible to prove the agency.—Ironwood Store Co. v. Harrison, 75 Mich. 197.

¶ 234. Testimony tending to show that plaintiff, an attorney at law, was employed by a third party to act as attorney for the defendant in a certain proceeding, and that the defendant had ratified the act of such third party, was sufficient to have the case go to the jury on the question of the authority of such third party to make the contract in question for defendant with plaintiff.—Bissell v. Moore, 119 Mich. 222.

¶ 235. Where the operations of a company engaged in constructing a railroad were in a part of the state far distant from the company's general offices, it is competent, in an action against the company for the price of supplies furnished on the order of the sole representative of the company in that locality, for plaintiffs to show what power had been assumed by him, the extent to which he had been contracting in the company's name, declarations by him as to his authority and any instances in which such powers had been brought home to the knowledge of the company or its officers.—Hirschmann v. Iron Range & H. B. R. Co., 97 Mich. 384; Michigan Slate Co. v. Iron Range & H. B. R. Co., 101 Mich. 14.

¶ 236. Receiving payment of interest through a mortgage company which was original mortgagee for eight years, recognizing an extension made by it, and accepting interest coupons made payable to it covering interest to accrue, do not show that the assignee of a mortgage had done anything to estop him from relying upon his ownership and possession of the mortgage and its accompanying notes, and from repudiating payment of the principal to the mortgagee whose authority extended only to receiving interest.—Bromley v. Lathrop, 105 Mich. 492.

¶ 237. The exclusion of evidence that an agent was not authorized to make sales of musical instruments generally, offered by plaintiffs in replevin for a piano claimed to have been sold by such agent, is error, where actual agency may be within the issues left to the jury.—Clark v. Dillman, 108 Mich. 625.

¶ 238. A bank was sued by a depositor for moneys paid out on checks signed in his name by other persons. Held, that plaintiff's testimony that when sick he signed checks himself, and that he never authorized his daughter and others who attended to writing his letters to do so, had no tendency to show that he never gave such authority to the signer of the checks, and was inadmissible for that purpose.—American Nat. Bank v. Bushey, 45 Mich. 135.

¶ 239. Suit was brought by an indorser against the makers of a draft purporting to be drawn by an agent, and it was shown that the drawer had previously made a similar draft to the order of the same person, and it had been paid. Held, proper to show what the drawer had said in the former case as to his authority to draw, for the purpose of showing that he assumed to act in the same capacity in both cases, since his conduct in the earlier case gave color to his assumption of authority in the latter.—McDonough v. Heyman, 38 Mich. 334.

¶ 240. On an issue as to the authority of an agent intrusted with the sale of promissory notes for his principal, to apply part of the proceeds of such sale upon his individual indebtedness to the purchasers thereof, it was error to admit in evidence an individual contract between such agent and such purchaser showing such indebtedness, where no attempt was made to connect the principal with such contract.—McBain v. Seligman, 58 Mich. 294.

¶ 241. Where the authority of defendant's bookkeeper to employ plaintiffs to defend garnishment proceedings, and the knowledge on the part of defendant's officers that plaintiffs claimed to be acting as its attorneys, are in question, defendant's president should be permitted to testify why he did not employ counsel in the suit after having been advised of its progress and of plaintiff's appearance therein as attorneys for defendant.—DeLong v. Muskegon Booming Co., 88 Mich. 282.

§ 41. ——Weight and sufficiency.

See also ante ¶ 19, post ¶ 311.
What evidence is relevant and admissible, see ante § 40.
Sufficiency of the evidence as a question for the jury, see post § 42.

¶ 242. A general agency may be inferred from facts and circumstances—from the habit and course of dealing.—Lyell v. Sanbourn, 2 Mich. 109.

¶ 243. Authority of a bookkeeper to sign orders for the payment of money can be inferred where there is evidence of the giving of such orders, and their payment by the principal, and where there is also evidence that the principal had stated that he would pay the orders.—Ryerson v. Tourcotte, 121 Mich. 78.

¶ 244. A railroad company's purchasing agent sent to a firm in a town on the road an order for square timber, and the firm, being unable to fill the same, called upon the plaintiff, stating that the company wanted the timber at once and had instructed them to get somebody else to fill the order in case of inability to do so themselves. Plaintiff, for shipment, delivered the timber to the local station agent without inquiring if he had authority to purchase or contract for the company, which he had not, and the agent billed the consignment to the company in the name of the plaintiff as consignor. The company made out a voucher—following the order—which ran to the firm and forwarded it to the station agent, the latter paid the money to the firm, and they kept it, paying the plaintiff nothing. On the company's being sued in assumpsit, it is held that it had no implied liability since no authority to bind it to plaintiff was shown. —Butler v. Michigan Cent. R. Co., 60 Mich. 83.

¶ 245. In a particular case it was held that there was evidence sufficient to go to the jury on the question of the authority of defendant's attorney in fact to execute the note in suit.—Buhl v. Smith, 69 Mich. 552.

¶ 246. A brother of the seller, given authority to collect instalments on a sewing machine, who has collected all but $5 of the price agreed to be paid, title to be retained until the purchase price was fully paid, and who agreed to release it if a claim for defect was waived, may be found to have had authority to make the release.—O'Connor v. Le Roux, 78 Mich. 48.

¶ 247. Testimony tending to show that the manager of a merchant tailoring establishment, who had been forbidden by the proprietor to make purchases without express authority, informed his principal that certain goods were required, and that there was an agent in town representing a good house through whom they could be ordered, and that the principal answered that the agent knew what was required better than he did, is sufficient, if believed, to authorize a jury to draw the inference that the agent was authorized to make the purchase.—Lesher v. Loudon, 85 Mich. 52.

¶ 248. In settling an attorney's suit against his clients, the attorney's son, who, at the time, was in practice with his father, and who had been consulted—as had also his father—by defendant's counsel in the settlement, gave a receipt as the agent of his father, the latter being confined to his house by poor health. Said receipt was accepted by the father's attorneys as a valid settlement, and they received money paid thereon. Held, that the jury was justified in finding that the son had authority to settle all claims of his father against defendants, and that it was not error to refuse an instruction that the son's authority must be shown by direct proof, or that the presumptions confined his authority to settling the matters involved in the suit.—Hitchcock v. Davis, 87 Mich. 629.

¶ 249. The fact that ties were sold to be loaded on a vessel, that an alleged agent attended to loading them, that defendant wrote to him about them, and that the agent continued to act for defendant after the execution of the contract, is sufficient to show agent's authority to sign for defendant an agreement for purchase of cedar ties from plaintiff.—Inglish v. Ayer, 92 Mich. 370.

¶ 250. The general agent of a corporation engaged in the manufacture of agricultural machinery settled with one of its agents with whom he had originally contracted for services, said agent securing the balance due from him to the corporation by a chattel mortgage. Afterwards the general agent contracted with another party to handle said machinery (which agreement was recognized by the company), and agreed with the mortgagor that, if he would assist said party in so doing, the mortgage should be canceled. At the close of the season the mortgagor claimed to have performed his agreement, which the mortgagee denied, and brought replevin for the mortgaged property. On the trial the above facts appeared, and in addition a witness for plaintiff testified that the authority usually conferred by plaintiff on its traveling agents was limited to proposing contracts for approval at the home office; but it appeared from the cross-examination of the witness that he had no direct knowledge of the extent of the authority of the general agent who made the agreement with defendant. Held, that the testimony was prima facie sufficient to show the authority of said general agent to make the contract in question.—Aultman, Miller & Co. v. Dodson, 104 Mich. 507.

¶ 251. Defendant, having contracted through a demonstrator employed by plaintiff for the purchase of a piano, called at plaintiff's place of business and asked him if the price should be paid to such employee. Plaintiff replied that he preferred to have payments made at the office, but that he would send an authorized agent to collect the money. Subsequently the employee negotiating the sale presented to defendant a receipt on one

of plaintiff's printed blanks, signed in plaintiff's name, by himself as agent. Held, in an action of replevin for the piano, that the facts stated were sufficient to support a finding that defendant was justified in making payment to such person.—Warren v. Halley, 107 Mich. 120.

¶ 252. A person who has custody of a note and mortgage, and collects the interest and pays the same to the mortgagee, the latter accepting without question, is to be regarded as having had authority so to collect.—Donaldson v. Wilson, 79 Mich. 181.

¶ 253. A finding that defendant's traveling agent had authority to employ plaintiff as a salesman in a store, the proprietors of which had been given by said agent the exclusive agency in their city for the sale of defendant's wares, is supported by evidence that defendant accepted the contract made with the proprietors of the store, and shipped to them the wares to be sold; that said contract provided that the defendant should advertise, and that way aid said proprietors in making sales, also for the hiring of a party to aid in the advertising, for which purpose, among others, plaintiff was employed; that said agent came to said city to establish an exclusive agency, and that all he did in relation thereto was ratified and approved by the defendant; that a contract of advertising was entered into by defendant through the agent; that some considerable advertising was done, one bill for which defendant paid, and afterwards wrote to the newspaper company that the agent had some little leeway, but had not notified the defendant of the bill before, and requested the newspaper company not to accept any expense on defendant's account in the future, except with a written order from defendant's office, but stating that defendant hoped to do some further advertising next spring with the newspaper.—Booth v. Majestic Mfg. Co., 105 Mich. 562.

¶ 254. A finding that a given person was authorized to receive the principal of a mortgage in the possession of the mortgagee is sustained by evidence that the latter placed moneys in the hands of such person from time to time, to loan when opportunity offered, and that he collected the interest and principal of loans so made, obtaining discharges of the mortgages as they were paid, crediting the amount to the mortgagee, and reinvesting the same for him.—Ziegan v. Stricker, 110 Mich. 282.

¶ 255. Evidence that an agent for persons, including complainant, to whom certain mortgages were assigned made it a uniform practice to collect the interest and principal of such securities through a firm composed of the assignors, and later through a mortgage company in which they were the managing stockholders, and that this practice was sometimes by express direction to make such collections in particular cases, and at others by sending papers and discharges when informed that payments had been made, does not establish a general agency on the part of the mortgage company to collect all funds due the assignee, so as to discharge the mortgage debt by a payment to the company of the principal which it had no express authority to collect, and for which it failed to account.—Church Ass'n of Michigan v. Walton, 114 Mich. 677.

¶ 256. Authority of a real estate agent to represent the seller in collecting money, is not shown, so as to make the latter liable for money received by such agent upon a real estate contract after its assignment by the defendant to such agent, by testimony that defendant had acknowledged execution of the contract and of a deed pursuant thereto, and that such agent had acted for her in the selling transaction; that he had always done her business and that she had great confidence in him, and that she had offered to compromise to avoid litigation.—Rohde v. Marquis, 135 Mich. 48.

¶ 257. Evidence of agency on behalf of the owner of a building to make an original promise to pay a subcontractor for work to be done on it, is sufficient to go to the jury, where the alleged agent was a prospective son-in-law of the owner, expecting to live in the house, and in a conversation, though not the first one, the owner stated to the subcontractor that he would leave it all to the son-in-law "to look after the business for him," there being also testimony of a hearsay character but not objected to on that ground that the son-in-law stated that he was the owner's agent.—Wilhelm v. Voss, 118 Mich. 106.

¶ 258. Transactions between a purchaser of land and an agent, consisting of payments of money to be applied as interest on a mortgage held by the vendor, there being no evidence of the agent's authority to act for the mortgagee or vendor, must be considered as consistent with specific authority and, with the giving of instructions for each case, wherefore general authority of the agent to accept the principal of the mortgage will not be inferred.—Bacon v. Pomeroy, 118 Mich. 145.

¶ 259. Apparent authority of the son to contract for the auditing of defendant's books is not shown by evidence that defendant's business was in charge of a general manager, that the son of defendant was employed in a department of such business but without any authority to control or manage the concern, and that he contracted with plaintiff to audit such books, and that even though his name appeared in the city directory as assistant manager of such business, plaintiff had

no knowledge of that fact previous to the making or performance of the contract.—Thiel Detective Service Co. v. Seavey, 145 Mich. 674.

¶ 260. In an action to recover for goods purchased by defendant's alleged agent, where the defense was that such agent purchased the goods for her own account, evidence held sufficient to sustain a finding that the agent in question was defendant's general agent and practically managed his business.—Feist v. Root, 189 Mich. 595.

¶ 261. In an action to recover the purchase price of meat sold to defendant's son, for his meat market, but on the credit of defendant, evidence held insufficient to sustain a finding of the trial court that there was no evidence of anything said or done by defendant, with knowledge on her part that plaintiff might be led to rely thereon, tending to show that the son had authority to buy any goods in her name or upon her credit, so as not to estop her from denying such agency to the injury of plaintiff.—Plankinton Packing Co. v. Berry, 199 Mich. 212.

¶ 262. In an action by a bank as owner of a bill of lading for a car of produce against the railroad company to recover damages for negligence in transportation and in delivering the produce to a stranger without requiring the surrender of the original bill of lading properly indorsed, evidence held sufficient to sustain a finding that an agent of the consignor, who was sent to the place to which the produce was sent, upon refusal of the consignee to accept the shipment, to make an inspection of the car and dispose of its contents, had no authority to allow the railroad company to deliver produce to a certain party without surrender of the bill of lading.—First Nat. Bank of Allegan v. Grand Rapids & I. Ry. Co., 195 Mich. 1.

¶ 263. In an action to recover the agreed price for the construction by plaintiff of a certain pattern to be used in casting a certain sheet metal cutting machine manufactured by defendant, where it appeared that a certain casting company had, at defendant's request, taken the pattern to its shop for the purpose of casting such machines, evidence held to show that the company had no authority from defendant to accept such pattern as complying with plaintiff's contract with defendant.—Waldecker v. Smith, 197 Mich. 58.

¶ 264. In an action by a vendor against the assignee of a contract purchaser of land to recover the balance of the purchase price evidence held insufficient to show that anyone acting for plaintiff had authority to make representations in relation to the boundary lines to the original purchaser.—Underwood v. Town, 201 Mich. 55.

¶ 265. The authority of a person to make a contract on behalf of another held not established by the evidence.—Ward v. Dunnebecke, 184 Mich. 703.

§ 42. Questions of law and fact.

Submission of law question to jury as harmless error, see Harmless Error.

Submission of question of written authority to jury as harmless error, see Harmless Error.

¶ 266. The question of a general agency should not be submitted to the jury when the evidence tends only to show a special one.—Barnes v. Gardner, 60 Mich. 133.

¶ 267. Where there is no evidence of original authority of one codefendant to bind the other by the lease sued on, but there was testimony impeaching the denial of the one, alleged to have had authority, that he lacked it, it is error to let the issue of authority go to the jury over a request to eliminate that issue.—McPherson v. Pinch, 119 Mich. 36.

¶ 268. It is for a jury to decide whether an oral authority has been correctly construed.—Spalding v. Archibald, 52 Mich. 365.

¶ 269. Whether, in a particular case, a merchant in New York, shipping goods to his correspondent in the interior, had authority to make a contract on behalf of the correspondent for shipment, on different terms from those ordinarily adopted by common carriers, is a question of fact to be determined by the jury from the evidence; and the court cannot properly be asked to make any charge that shall absolutely dispose of the fact in controversy.—American Transp. Co. v. Moore, 5 Mich. 368, affirmed 24 How. 1, 16 L. ed. 674.

¶ 270. The ownership of the paper discounted or sold to defendant, and the nature and extent of the authority of the agent selling it, were questions of fact for the jury, in an action where the principal sought to recover from defendant that part of the purchase price of such paper, which defendant, upon the authority of such agent, retained as a credit on such agent's individual liability to defendant.—McBain v. Seligman, 58 Mich. 294.

¶ 271. In replevin for a piano paid for to an employee who was hired to demonstrate pianos for a salesman, but who was the active negotiator of the sale and who appeared with a blank form of receipt and

collected the price without authority, after plaintiff promised to send an authorized agent to collect, the case was properly submitted to the jury upon the single question whether plaintiff's conduct had been such as to justify defendant in believing that such person was authorized to receive the money, there being no evidence that he had express authority to make collections; and it was not error to refuse instructions that would not aid in determining this question.—Warren v. Halley, 107 Mich. 120.

¶ 272. The question of the actual authority of an agent of plaintiffs to make a contract for the sale of a piano for a specified price is properly left to the jury, where there is some testimony showing an admission by plaintiffs of such authority.—Clark v. Dillman, 108 Mich. 625.

¶ 273. In a cause the merits of which depend largely on the authority of defendant's local agent to make the contract sued upon, such authority, if sufficiently shown by the evidence, is a question properly to be submitted to the jury.—Van Vranken v. Union News Co., 78 Mich. 217.

¶ 274. The principal foreman at the Michigan works of a foreign corporation which had no officers resident at such works hired and discharged during a number of years all the men employed there. He had no instructions how to hire men, and no express authority was shown in him to hire except by the day, but many of the men worked through the season under contracts whose length was unknown. Held, that the question whether he had apparent authority to hire men by the season was properly submitted to the jury.—Tunison v. Detroit & L. S. Copper Co., 73 Mich. 452.

¶ 275. The ordinary power of a division superintendent of a railroad company does not include the settlement of claims for injuries or the making of contracts for employing for life persons who have been injured; and where the evidence is all to the effect that the superintendent has not such authority, it is error to submit the question to the jury.—Maxson v. Michigan Cent. R. Co., 117 Mich. 218.

¶ 276. In an action for work and labor against the owner of a farm, testimony by the defendant that he had contracted with his brother to clear land and cut hay and that defendant's brother hired the plaintiff and testimony by the brother that he had no authority to hire the plaintiff for the defendant, taken with the testimony by the plaintiff that the brother told him he and the defendant had two or three farms, and that the defendant paid the plaintiff $1 to buy seed corn with, raises an issue of agency for the jury and a directed verdict for the plaintiff is erroneous.—McClure v. Murphey, 126 Mich. 134.

¶ 277. The authority of an agent to purchase a team of horses for his principal is a question of fact.—Schofield v. Conley, 126 Mich. 712.

¶ 278. In an action to recover for services as a baseball player, where there was testimony that defendant in referring plaintiff to the captain as his sole manager, stated that whatever he did "went," the question of the authority of such captain to contract with plaintiff was for the jury.—Schelbeck v. Van Derbeck, 122 Mich. 29.

¶ 279. The question whether the captain of a yacht had authority to hire an engineer for the season is properly left to the jury where the evidence shows that, about the time the engineer claims to have been so hired by oral contract, the attorney for the owner prepared a blank contract for the hiring of the engineer for the season, which was signed by the owner and a blank left for the signature of the engineer, though never signed by him.—Gerardo v. Brush, 120 Mich. 405.

¶ 280. In an action by an injured brakeman for breach of contract to re-employ, conclusive evidence that the officer made the contract without any authority from the defendant railroad company, requires a verdict directed for the defendant.—Sax v. Detroit, G. H. & M. R. Co., 129 Mich. 502.

¶ 281. In a suit in trespass vi et armis the evidence disclosed that defendant Brandan was the agent of defendant sewing machine company, in full charge of its local business; that plaintiff sent her machine to him to be repaired; that he gave her one which she supposed belonged to defendant to use; that he later sold it to her; and that upon her failure to make a final payment on the same he forcibly took it away from her home, inflicting personal injury on plaintiff. There was evidence that defendant company had given the machine to Brandan, but plaintiff did not know this and dealt with him as agent of the company. Held, that the court properly refused to direct a verdict for the defendant company on the ground that Brandan in committing the assault acted outside the scope of his authority.—Zart v. Singer Sew. Mach. Co., 162 Mich. 387.

¶ 282. In a suit by a bartender for wages where the evidence showed that plaintiff had been employed by the head bartender, the question as to the authority of the agent to contract for the owner, held properly submitted to the jury.—Devich v. Dick, 177 Mich. 173.

¶ 283. In an action to recover for goods purchased by defendant's alleged agent, where the defense is that the agent purchased the goods on her own account, the question for whom the goods were purchased is for the jury on all the evidence.—Feist v. Root, 189 Mich. 595.

¶ 284. In an action to recover on a written logging contract, where plaintiff was ordered by an agent of the defendant to change the character of the operation and perform extra services to meet an emergency, the agent agreeing that defendant would pay for such services, the submission of the question of such agent's authority to the jury held not erroneous under the evidence.—Martindale v. Lobdell-Emery Mfg. Co., 189 Mich. 477.

¶ 285. In an action to recover money paid for stock to an absconding agent of an insurance company evidence held sufficient to present, as a question of fact for the jury, the authority of such agent to act as such in soliciting subscriptions.—De Hoop v. Peninsular Life Ins. Co., 193 Mich. 380.

§ 43. Instructions.

¶ 286. A charge that the authority of an agent to make a contract is not evidence that he had authority six months later, and one that authority at the time should be determined on the evidence, including what took place at a certain interview (the one six months before), are contradictory and misleading.—Hensel v. Maas, 94 Mich. 563.

¶ 287. An instruction that a person, not being an agent to deliver goods sold, had no right to collect the purchase price without special authority to do so, was properly refused, where it excluded a theory that plaintiff had held out such agent as having authority to collect.—Warren v. Halley, 107 Mich. 120.

¶ 288. An instruction that written authority to defendant's agent to fix the rate of wages to be paid need not have been shown in a servant's action for overtime work alleged to have been rendered under promise of pay, but that some authority must be found "as indicated by his conduct and his duties here and his relation to the railroad company (defendant) and his relation to the men under him," was proper where he testified that he had authority to employ and discharge men, but was limited by the payroll as to how much he could pay them, and that the fixing of wages was a matter for his superiors.—Bidwell v. Grand Trunk W. R. Co., 148 Mich. 524.

¶ 289. In an action for damages for breach of a contract to deliver apples which defendant claimed was entered into by his son without his consent, held that an instruction as to the liability of the principal for the acts of an agent having general authority to make contracts should be approved where there was testimony to justify a finding that the son had general authority from his father to make the contract.—Hecht v. Ebers, 189 Mich. 573.

¶ 290. In an action for the purchase price of a new line of goods which defendant claimed that a clerk, in his absence, did not have authority to buy, held that an instruction on the authority of an agent to act for his principal which left it to the jury to speculate as to whether the particular goods were such as would be handled in such a business, and as to whether there was an implied understanding that such goods might be purchased, was erroneous in view of undisputed testimony stating the limits of the agent's authority to be restricted to the purchase of certain other goods.—Acorn Refining Co. v. Knowlson, 188 Mich. 123.

¶ 291. In an action to recover the price and value of a new line of goods which defendant's agent did not have express authority to buy, he having only partial charge of the business in his employer's absence, and express authority to buy certain lines of goods, the plaintiff claiming that the order was unconditional, and the defendant that the goods were consigned for sale, held that an instruction upon the binding of a principal for the acts of his agent by holding him out as having authority to act was confusing and erroneous, as there was no evidence that the plaintiff or his salesman had or attempted to get any information regarding the authority of defendant's clerk to buy the goods.—Acorn Refining Co. v. Knowlson, 188 Mich. 123.

B. UNAUTHORIZED AND TORTIOUS ACTS OF AGENT.

§ 44. In general; who may question.

What acts are within authority, see ante 11, A.

What acts may be ratified, see post § 54.

Right of stranger to question ratification, see post § 65.

Liability of agent to principal for breach of duty, see post § 96.

Responsibility of principal for alteration of instrument by agent, and effect of such alteration, see Alteration of Instruments.

¶ 292. A principal is not bound by acts done by the agent outside of the scope of his authority.—Haggerty v. Flint & P. M. R. Co., 59 Mich. 366.

¶ 293. Dealings or engagements of the agent beyond the scope of his authority do not bind the principal.—Bond v. Pontiac, O. &

P. A. R. Co., 62 Mich. 643; Delta Lumber Co. v. Williams, 73 Mich. 86.

¶ 294. A principal is not bound by a settlement made by his alleged agent assuming to act without authority and without consideration passing to the principal.—Baird v. Randall, 58 Mich. 176.

¶ 295. A principal is bound by the acts of his agent where he has held him out as having authority.—Marx v. King, 162 Mich. 258.

¶ 296. A principal is bound by the act of an agent who has only exceeded his authority or has violated special instructions, unless the party with whom he dealt had notice of the want of authority in the particular case.—Rice v. Peninsular Club of Grand Rapids, 52 Mich. 87.

¶ 297. Where an agent performs two acts at the same time, one of which he was not authorized to do, and the two are not so interwoven that they cannot be separated, but constitute different parts of the same contract, that which the agent was authorized to do is binding on the principal, and the other only is void.—Hammond v. Michigan State Bank, W. 214.

¶ 298. Both parties are equally responsible for the unauthorized acts of a third person whom they have mutually chosen to act between them, and where one of them has done all that by the agreement he was to do he is not to be held liable to the other for the failure of their mutual agent to do his part.—Crippen v. Hope, 34 Mich. 55.

¶ 299. One who deals with the agent of another has a right to presume that the agent is acting honestly with his principal, and does not become liable if he is not.—Metropolitan Life Ins. Co., 72 Mich. 388.

¶ 300. One, who has made a conditional subscription to a project on condition that the subscription is not to be delivered until the subscriber authorizes it, is not prevented from showing it in defense by the fact that the payee's agent in whose custody the writing was placed negotiated the contract without authority to make such a contract.—Davis v. Kneale, 97 Mich. 72.

¶ 301. A promise of an employer to pay for services rendered by a physician to an injured employee at the request of a forewoman having no authority to employ the physician, imports no more than the promise to pay the debt of another, which is void under the statute of frauds.—Holmes v. McAllister, 123 Mich. 493.

¶ 302. The rule that "where one of two innocent parties must suffer by the fraud of a third, he shall suffer who by his indiscretion has enabled such third person to commit the fraud," had no application in trover where although defendant purchased the property in question from an employee of plaintiff, the defendant purchased it as the property of such employee.—Ball-Barnhart-Putnam Co. v. Lane, 135 Mich. 275.

¶ 303. A municipality sued on bonds cannot impeach the title of the plaintiff holder by showing want of authority of a transferor's agent to transfer them to plaintiff unless the principal stood entitled to deny such authority.—Schmid v. Village of Frankfort, 141 Mich. 291.

§ 45. Acts done for benefit or interest of principal.

Jury question as to act having been a representative one, see post ¶ 458.

¶ 304. An agent who was furnished a horse, which he was to take care of, caused it to be kept on his principal's credit, without authority. Held, that the principal was not liable, even though the horse was used in his business to his profit.—Grover & Baker Sewing Machine Co. v. Polkemus, 34 Mich. 247.

¶ 305. A station agent of a railroad company having had no authority to employ a porter, permitted one to work as such, and this was known to but not ratified by the roadmaster. Held, that the company's liability for work performed by such porter, not employed by the proper officers, cannot be based upon the ground that it was necessary and beneficial.—Willis v. Toledo, A. A. & N. M. R. Co., 72 Mich. 160.

§ 46. Acts for agent's interest or adverse to principal.

As notice to other party of limitation on authority, see ante § 25.

As defeating right to commissions, see post § 101.

Making principal's paper payable to himself as notice preventing taking in good faith, see Negotiable Instruments, XIII.

Notice to purchaser of land from chain of title showing dealings by agent in his own interest, see Notice and Record of Title, I, B.

Crime of corrupting agents by bonus or gratuity, see Comp. L. 1915, § 15590.

¶ 306. One employed in an adverse capacity cannot bind his principal by anything he may do without authority prejudicial to his principal's interests.—Powell v. Conant, 33 Mich. 396.

¶ 307. Where a man doing business as his wife's agent, and authorized by her to sell

certain notes to raise money for the business, indorsed them as agent to one who, the husband consenting, retained part of the price to satisfy the husband's original indebtedness to him, the wife could recover from the creditor the amount so retained.—McBain v. Seligman, 58 Mich. 294.

¶ 308. A. carried on and managed for creditors a business in B.'s name, giving and taking notes generally in such name, B. having authorized him to do so. A particular purchase relating to the business was made by A. in his own name, and was so billed. Held, that A. had authority to pay for the same by executing a note in B.'s name.—Shipman v. Byles, 65 Mich. 690.

§ 47. Acts in disregard of instructions.

Duty to inquire as to authority and effect of secret limitations, see ante §§ 23-25.

Liability for money received by auctioneer on sale variant from published terms, see Auctions and Auctioneers.

Liability of one party to escrow where depositary violates terms to damage of other party, see Escrows.

¶ 309. A principal is not bound by the act of a special agent when done in disregard of his instructions, unless, perhaps, where the principal's own negligence has enabled the agent to perpetrate a fraud thereby.—Saginaw, T. & H. R. Co. v. Chappell, 56 Mich. 190.

¶ 310. The fact that one who acted in the sale of land, for himself and a co-tenant, had been instructed by the latter not to sell by the acre, could not affect a purchaser who bought in that way, and evidence of such instructions would not be admissible in an action against the vendor for fraud in misrepresenting the number of acres to the purchaser.—Starkweather v. Benjamin, 32 Mich. 305.

¶ 311. A purchasing agent had bought seven or eight lots of lumber for defendants, and had instructions to purchase another cargo when he was notified that defendants did not desire him to buy any more on their account unless he could obtain better bargains. On the day he received this notice he bargained for another lot with plaintiffs, defendants to pay expense of moving and inspection, and he wrote to defendants informing them of the terms of the contract and asking if they would take it. Receiving no answer, at the end of two days he commenced to receive the lumber for defendants. Subsequently he received a delayed letter from defendants telling him to ship no more lumber. He wrote them what he had done, and they wrote and telegraphed that they could not take the lumber. Held, in an action by plaintiff for the expense of moving and inspecting the lumber, that the agent had no authority to contract, and that defendants were not liable for anything.—Miller v. Frost's Detroit Lumber & Wooden Ware Works, 66 Mich. 455.

¶ 312. The owner of timber land was bound by the act of an agent licensing the cutting of timber in excess of his authority, where it appeared that such agent had authority to contract for part of such standing timber; and where the licensee acted in good faith and in ignorance of any limitations or restrictions of the apparent authority of such agent; and such principal was bound by such apparent authority and not by the actual or express authority of such agent, whether such agency was a general or a special one.—Antrim Iron Co. v. Anderson, 140 Mich. 702.

§ 48. Acts done after revocation of authority.

Necessity of notice of revocation, see ante § 16.

Effect of notice after agency ceases, see post §§ 72, 74.

¶ 313. Where a person who had bought several lots of lumber for defendants, having, however, no general authority to buy, purchased for them another lot after they had notified him to buy no more on their account unless he could make better bargains, defendant's having refused to receive such lot, were not liable even for the inspection of it.—Miller v. Frost's Detroit Lumber & Wooden Ware Works, 66 Mich. 455.

§ 49. Negligence or tort by agent.

In a great number of personal injury cases as well as cases of injury to property the act or neglect of a servant or agent, while entering into the cause of action, is not the gravamen thereof; and the principle of respondeat superior is not questioned or applied. For instances of this kind, see topics treating of such causes of action, e. g., Carriers; Highways; Railroads; Street Railways; and the like.

See also ante ¶ 188.

Liability of carrier for acts of servants or agents, see Carriers.

Liability of master to servant for negligence of other servant or vice principal, or to third person for torts by servants, see Master and Servant, III, IV.

Malice or wantonness of agent making principal liable for exemplary damages, see Damages, VII.

Liability by ratification of agent's act, see post § 58.

Liability of agent, see post III.

¶ 314. The mere act of conferring an authority that may properly be delegated does not constitute such negligence as to make one innocent party who confers such power responsible for a loss caused to another by the

agent's dishonesty; nor can he be responsible if the other party has been negligent.—New York Iron Mine v. First Nat. Bank of Negaunee, 39 Mich. 644.

¶ 315. An agent with special instructions cannot make his principal liable to a third person by a neglect to do something wholly outside of his instructions.—Weaver v. Bechtel, 53 Mich. 516.

¶ 316. The owner of a store can be held liable for a tort committed by a clerk only if said clerk was acting in his capacity as a clerk in doing the act and within the scope of his employment.—Ducre v. Sparrow-Kroell Lumber Co., 168 Mich. 49.

¶ 317. A saloonkeeper is liable in damages for unlawful sales by his bartender.—Gullikson v. Gjorud, 82 Mich. 503.

¶ 318. The carrier is not liable as a principal for the wantonness and aggravation of the conductor in ejecting a passenger.—Great Western Ry. Co. of Canada v. Miller, 19 Mich. 305.

¶ 319. Where a mortgage containing covenants against incumbrances was given to a loan agent to take up three existing mortgages, and where the agent, after assigning the mortgage, pays only two of the three old mortgages, the failure of the agent to make payment of the third mortgage cannot be visited upon either the holder of such unpaid prior mortgage or upon the innocent assignee of the new one, and the holder of such prior mortgage is entitled to foreclose, and the holder of the new mortgage is entitled to recover the full amount of his mortgage.—Bissell v. Hively, 123 Mich. 106.

¶ 320. Owners of property did not, by employing one who had on a previous occasion embezzled money from them as a shipping clerk, where he was not expected to receive money, incur the risk of his thefts, and preclude themselves from recovering, in trover, property stolen by such employee.—Ball-Barnhart-Putnam Co. v. Lane, 135 Mich. 275.

§ 50. Misrepresentations of fact.

Agency as between two alleged principals, see also ante ¶ 23.

Responsibility of principal for representations of buying and selling or contracting agents, see ante § 38.

Adoption by ratification, see post § 58.

Persons liable for deceit or fraud, see generally Fraud and Deceit.

¶ 321. A principal's liability extends to the agent's frauds or misrepresentations committed or made while acting within the scope of his authority, whether real or (in case of subsequent ratification) assumed.—Busch v. Wilcox, 82 Mich. 336, affirming on rehearing 82 Mich. 315.

¶ 322. One has no right to rely upon an agent's representations as to the profits to be made by enlarging an electric plant, where, before the contract for the enlargement is executed the principal informs him that he must take his own risk in the matter.—Western Electric Co. v. Hart, 103 Mich. 477.

¶ 323. Where the owner of an equity in pine land acted as agent of the legal owner, his representations as to the timber's quantity and quality, and as to the land's being well situated for logging purposes, will, if relied on by the contractor for cutting the pine, who had no personal knowledge on the subject when he entered into the contract, be imputed to the legal owner, and the latter must answer for their accuracy though he had no knowledge about them until long after the execution of the contract.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 324. A foreman, even if a vice principal, has not the power to make representations as to the safety of appliances upon which his principal's employee is working which are obviously unsafe, and thus to bind his principal to respond in damages if injury results.—Toomey v. Eureka Iron & Steel Works, 89 Mich. 249.

¶ 325. In an action for deceit in misrepresenting the number of fruit trees upon a piece of land traded, where the broker had told plaintiff there were 175, if the defendant principal had told him before the trade was consummated that there were but from 80 to 90 the plaintiff could not thereafter treat the broker's representations as those of defendant.—Aldrich v. Scribner, 146 Mich. 609.

¶ 326. Where the agent of defendant in selling a lot to plaintiff represents that he is selling a corner lot when it is the adjoining lot, the agent having authority to make contracts to sell subject to approval, is acting within the scope of his authority in showing the lot to plaintiff and defendant is liable to plaintiff for damages sustained.—Smith v. Michigan Realty & Construction Co., 175 Mich. 600.

§ 51. Torts by public officers executing process as agents.

See generally such topics as Conversion; Trespass; Executions; Assault and Battery; False Imprisonment; Malicious Prosecution.

¶ 327. Whoever selects a person not qualified as a regular officer, e. g., a deputized constable, to serve a process should be held re-

sponsible for his behavior in the discharge of the duty.—Harvey v. McAdams, 32 Mich. 472.

¶ 328. One who employs another innocently and for a lawful purpose is not usually liable for his trespasses; so, of one who employs an officer to execute lawful process.—Sutherland v. Ingalls, 63 Mich. 620.

§ 52. Liability of principal where agent is also liable.

The general rule that all parties to a tort are jointly and severally liable is applied in topics dealing with the various torts, e. g., Assault; Conversion; Trespass; Libel; Fraud; Malicious Prosecution; False Imprisonment; Nuisance; Negligence; and topics treating of negligence respecting particular places of occupations, e. g., Carriers; Highways.

Coliability of agent, see post § 85.

¶ 329. The fact that the owner of an equity in pine lands, who assumed to be agent for the legal owner, has given to a contractor for cutting the pine his personal guaranty as to the truth of his representations about the quantity and quality of the pine, and the suitability of the land for logging purposes, all based on an estimate and report of another, does not relieve the legal owner from responsibility as principal for like representations, made earlier as agent; but simply adds the equitable owner's personal responsibility.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 330. Where the wrong is committed by an agent for the principal, under circumstances which make the principal liable, there are two actors, the principal and the agent and the injured party may sue either or both.—Cascarella v. National Grocer Co., 151 Mich. 15.

C. RATIFICATION AND ADOPTION, OR REPUDIATION.

§ 53. In general; knowledge and intent.

Acceptance, acquiescence and inaction with knowledge, see also post §§ 58, 59.

Evidence as to knowledge, see post § 66 et seq.

Ratification by corporation or its stockholders of acts of officers or directors without authority, see Corporations, XVII, D.

Ratification of partner's act by firm, see Partnership, IV.

¶ 331. A principal's conduct cannot be taken as a ratification of his agent's unauthorized acts unless such principal was at the time informed of the facts.—Palmer v. Williams, 24 Mich. 328.

¶ 332. There can be no ratification of an agent's acts without full knowledge of the acts claimed to be ratified.—Hurley v. Watson, 68 Mich. 531.

¶ 333. Ratification by the principal of a contract alleged to have been made by his agent for the purchase and delivery of coal is established only when it appears that at the time of the alleged ratification the principal knew that his agent had made the contract which it is claimed was made.—Pittsburgh & Ohio Min. Co. v. Scully, 145 Mich. 229.

¶ 334. A subsequent letter relied upon as conferring authority upon a collection agent to effect settlement of a judgment at less than its full amount, was not binding on the creditor (principal) who had no knowledge of the facts surrounding the settlement.—Upton v. Dennis, 133 Mich. 238.

¶ 335. An unauthorized contract by the son of defendant for the auditing of defendant's books was not ratified by defendant's general manager of her store where, even though such work was done with the knowledge and assistance of defendant's general manager, such manager had no knowledge that it was being done under a contract ostensibly on behalf of defendant, but believed that plaintiff was hired by such son.—Thiel Detective Service Co. v. Seavey, 145 Mich. 674.

¶ 336. Ratification of an agent's unauthorized purchases is not shown by the fact that they were paid for by the principal's checks, signed in its name by such agent as "manager" without evidence that the principal had any knowledge of such payments.—Cowan v. Sargent Mfg. Co., 141 Mich. 87.

¶ 337. Ratification of an alleged contract by a division superintendent to give a "life job" to an injured servant if he would not sue or make trouble is not shown by the fact that such servant was subsequently employed by the principal without also showing that it had knowledge of the contract.—Maxson v. Michigan Cent. R. Co., 117 Mich. 218.

§ 54. Acts capable of ratification or adoption.

Attempted adoption of act of unauthorized person in taking up estray, see Animals.

¶ 338. A principal may ratify an unauthorized act of his agent.—Harlow v. Jaseph, 183 Mich. 500.

¶ 339. An act that might originally have been so done as to be binding may be so ratified or assumed as to bind the immediate parties.—Sault Ste. Marie Highway Com'rs v. Van Dusan, 40 Mich. 429.

¶ 340. A lease of land for more than one year, void because executed by an agent without written authority, is not validated by the principal's signing a duplicate of

which the lessee has no knowledge.—Chesebrough v. Pingree, 72 Mich. 438.

¶ 341. For a case where, upon an unauthorized sale of land, instruments executed as duplicates were so different that one only was susceptible of ratification by the vendor, see Crane v. Portland, 9 Mich. 493.

¶ 342. One cannot be liable as for the ratification of a tort that was not committed in his interest; so held where suit was brought against the general agent of a sewing-machine company for a forcible trespass committed by employees while removing a machine by his direction and in compliance with the orders of the company from the premises of one who held it under a sewing-machine lease which had been forfeited.—Smith v. Lozo, 42 Mich. 6.

¶ 343. Consent, by a stranger to a contract for the purchase of land, to pay part of the amount remaining due thereon and some payments made pursuant thereto do not render him liable on the contract where it does not purport to have been made for him, since in such case there can be no ratification.—Ferris v. Snow, 130 Mich. 254.

¶ 344. Ratification of a pretended agent's unauthorized acts does not depend upon the question of the agent's good faith.—Heyn v. O'Hagen, 60 Mich. 150.

§ 55. Partial ratification or adoption.

Acts affecting two parties and ratified by one only, see ante § 54.

¶ 345. Ratification of agency must be entire; one cannot accept an agent's contract so far as it favors him and repudiate the rest of it.—Widner v. Olmstead, 14 Mich. 124; President, etc., of Peninsular Bank v. Hanmer, 14 Mich. 208; Hutchings v. Ladd, 16 Mich. 493; Eberts v. Selover, 44 Mich. 519; Bacon v. Johnson, 56 Mich. 182.

§ 56. Mode and sufficiency.

Evidence of ratification, see post §§ 67, 68.
Promise of undisclosed principal to pay, as ratification of acts, see post ¶ 454.
Ratification of settlement of account stated, see also Account Stated, ¶ 34.

¶ 346. Ratification of an unauthorized act may be express or implied, and when not express the facts and circumstances from which it may be inferred must be such as are inconsistent with a different intention.—Heyn v. O'Hagen, 60 Mich. 150.

¶ 347. A vendor of land who signs a contract for the sale brought to him by his agent, without reading it, is bound by a provision therein authorizing the purchaser to pay in merchandise, although the agent had no authority to insert the same.—Liska v. Lodge, 112 Mich. 635.

¶ 348. One who sues upon a note taken to his order by an agent employed in selling machines for him ratifies the act of his agent though the note was not given in payment for a machine, and is chargeable with his agent's knowledge that the original consideration for the note was illegal.—Johnston Harvester Co. v. Miller, 72 Mich. 265.

¶ 349. By suing for the unpaid purchase money one affirms his agent's contract of sale of land, and he cannot afterwards repudiate the sale on the ground of fraud.—Merrill v. Wilson, 66 Mich. 232.

¶ 350. Where an auctioneer employed to sell land upon terms specifically fixed by the owner made a sale according to such terms, but afterwards made a contract with another than the vendee and upon different terms for a sale of such property, the contract was not ratified by the owner's tendering a deed upon the basis of a performance of the terms as originally authorized.—Muffatt v. Gott, 74 Mich. 672.

¶ 351. An unauthorized sale of a machine by an agent to whom it had been consigned for sale on commission, is not ratified by an unaccepted offer to exchange the machine bought for another made for the purpose of satisfying the purchaser and inducing him to complete the purchase.—Brown v. Foster, 137 Mich. 35.

¶ 352. A sale and delivery of a machine consigned to agents for sale on commission, contrary to an agreement not to deliver until payment of the purchase price, is not ratified by an indicated willingness to let the sale stand provided the agents would pay the purchase price less their commission.—Brown v. Foster, 137 Mich. 35.

¶ 353. A contract for sale of land slightly variant in terms from that which the agent was authorized to make is ratified therein, where the agent referred the terms by letter to the principal with a request to telegraph acceptance, which the principal did.—Stuart v. Mattern, 141 Mich. 686.

§ 57. ——Specialties and contracts requiring written authority.

Execution of instrument by ratifying signature of another, see Execution of Instruments, II.

¶ 354. The authority of an agent to execute a written contract for the purchase of lands may be shown by an oral ratification; and the acts of the principal, from which

such ratification may be inferred, are competent evidence for that purpose.—Hammond v. Hannin, 21 Mich. 374.

¶ 355. The execution by a traveling salesman of a nonresident firm of a bond of indemnity, under seal, in the name of the firm, in an attachment suit brought to collect a debt due the firm and contracted in the ordinary course of their business, although without express authority under seal, may be ratified by parol.—Palmer v. Seligman, 77 Mich. 305.

§ 58. ——Acceptance of benefits or proceeds.

See also ante § 27, as to estoppel based on acceptance of benefits.

As evidence that agency existed, see ante § 10.

As basis for estoppel to deny agency, see ante § 19.

Acceptance of land in exchange by United States as ratification of officers' deed to other land, see Public Lands, II.

¶ 356. An arrangement made by an agent in excess of his authority is ratified if the principal retains its advantages.—Bacon v. Johnson, 56 Mich. 182; Nichols, Shepard & Co. v. Shaffer, 63 Mich. 599.

¶ 357. When a person adopts the unauthorized acts of another in his behalf, and has received the benefits accruing therefrom, he adopts and ratifies the instrumentalities by which the fruits were obtained.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 358. One who adopts unauthorized acts of another and receives and accepts benefits accruing therefrom, thereby adopts and ratifies the instrumentalities by which the results were obtained, and is estopped from denying that the agent was authorized to act.—Bertha v. Regal Motor Car Co., 180 Mich. 51.

¶ 359. A principal cannot take the fruits of a contract entered into by an agent without authority and not be bound by its terms.—Township of Wexford v. Seeley, 196 Mich. 634.

¶ 360. Where the proceeds of a draft, made without authority in the name of another, are received by the latter with full knowledge of the transaction, he must be held to have adopted the act of the original maker, and to be liable upon the draft.—McDonough v. Heyman, 38 Mich. 334.

¶ 361. A railroad company will not be held to have ratified the unauthorized hiring, by one of its local freight agents, of a person to assist in the detection of a thief who had stolen property in the hands of the company for transportation, by reason of the use by its detectives of information furnished by such person, leading to the arrest of the offender and the recovery of the property; such fact not constituting such an appropriation of the services of such person as to impose an obligation to pay for the same.—Somerville v. Wabash R. Co., 109 Mich. 294.

¶ 362. Where an agent by a misrepresentation sells a worthless bond, his principal, if he accepts the proceeds, ratifies his acts and becomes responsible.—Ripley v. Case, 86 Mich. 261.

¶ 363. An agent's action in excess of his authority in releasing a mortgaged chattel is ratified if the principal keeps what the agent took in lieu thereof.—Nichols, Shepard & Co. v. Shaffer, 63 Mich. 599.

¶ 364. Where one holding a power of attorney to sell and convey land has made conveyances within the expressed terms of the power, and the owner has sanctioned the sales by accepting the proceeds, she cannot afterwards contend that the power did not authorize the sales.—Vaughn v. Sheridan, 50 Mich. 155.

¶ 365. Payment of mortgage to mortgage company was held ratified by owner's accepting from company property to balance account with it which he knows credits amount of mortgage, and by his claiming, in receivership proceedings against company, that money paid be treated as trust fund for his benefit.—Bissell v. Dowling, 117 Mich. 646.

¶ 366. Where an owner of an equity in land has executed in the name of the legal owner a contract for cutting the pine, the legal owner, by receiving the logs cut thereunder and by making advances to the contractor as provided in the contract, adopts and ratifies it, and cannot afterwards dispute that the equitable owner was his agent to contract for the cutting with authority to make representations as to the quantity and quality of the pine, and as to the suitability of the land for logging purposes.—Busch v. Wilcox, 82 Mich. 315, affirmed on rehearing 82 Mich. 336.

¶ 367. The general attorney of an insurance company, after foreclosing a mortgage in its name, took a tax deed of the property, and after the tax title became absolute gave a quitclaim to the company, which it accepted. Held, a recognition of his agency in making the tax purchase.—Connecticut Mut. Life Ins. Co. v. Bulte, 45 Mich. 113.

¶ 368. In a bill to subject a real estate mortgage to the payment of the claims of the complainants who had supplied labor and material for a building erected by a con-

tractor to whom the mortgage ran, where it appeared that after the execution of the mortgage the contractor requested one of the defendants, who was a lumberman, to furnish lumber upon the mortgage being assigned to him, and where the lumberman had his agent examine the property to ascertain whether it was sufficient security and where the agent reported that it was, and thereupon the assignment was made, and the agent, without the knowledge of his principal, agreed that all bills for material should be paid by his principal and so informed complainants upon inquiry, the principal was bound to carry out the agreement made by his self-constituted agent pursuant to which the assignment was made.—Sokup v. Letellier, 123 Mich. 640.

¶ 369. Defendant gave promissory notes for shares in a factory to be constructed at the solicitation of one Dick, a special agent of the payee. Dick gave defendant a written agreement that if the factory should not be satisfactory the notes would be void. Plaintiff sued as transferee of the notes. Held, that by taking the notes, plaintiff ratified the whole transaction and could not set up that Dick was unauthorized to make the agreement.—Sherrod v. Duffy, 160 Mich. 488.

¶ 370. In an action on a township treasurer's bond, signed in the name of a banking partnership as surety, by an employee, in the absence of the active partner who had the entire management of the business, and without his consent, and for the purpose of obtaining a share of township funds to be deposited by the treasurer, where it appeared that notice of the act was given such active partner upon his return and deposits were received by the bank during the term of the bond, and some by the active partner personally, and the township board was not notified that such bond was invalid, evidence held sufficient to show that such active partner impliedly ratified the act of such employee in signing the bond for the partnership.—Township of Wexford v. Seeley, 196 Mich. 634.

§ 59. ——Acquiescence or inaction.

See also ante ¶ 48.
See also post § 62.
Knowledge without ratification, see also ante ¶ 305.
Recognition of acts as evidence of authority, see also ante § 40.
As disentitling principal to repudiate, see post § 60.
Omission to prosecute crime involved in excess of authority, see ante ¶ 145.

¶ 371. One who knows that another is collecting money on his mortgage and does not object, but allows him to keep it as a loan, makes him his agent to collect it.—Simon v. Brown, 38 Mich. 552.

¶ 372. One cannot sit by and see another constantly using his name in the purchase of goods, receive the invoices showing such purchase, give orders for the goods to be taken from the depot and express office, see the other dealing them off as his own, and then, when called upon for payment by one who has been acting in good faith, repudiate the whole transaction and deny the agency; such silence is a ratification of the act of the other, though no authority, express or implied, for the purchase was originally given.—Cooper v. Mulder, 74 Mich. 374.

¶ 373. Knowledge on the part of a firm of coal dealers that a clerk had for more than seven years been in the habit of applying his rent and other claims due from him to his landlord on account of coal purchased of said firm by the landlord, during which time no objection was made by said firm, amounts to a ratification of said unauthorized course of dealing.—Hurley v. Watson, 68 Mich. 531.

¶ 374. A., representing himself to be B.'s agent, bought goods which were shipped to B.'s address, but which A. secured and carried to his place of business. Invoices were sent by mail to B. and were received by him, and then he learned what had been done; but he failed to repudiate the act, and said nothing to the seller until the latter came to collect the bill, when, after part payment by A., B. promised the vendor to see the balance paid. Held, that B. was liable for the unpaid balance.—Heyn v. O'Hagen, 60 Mich. 150.

¶ 375. Defendants, on receiving a bill for supplies furnished to one who had a contract with them for getting in logs, asked for the order upon which the supplies had been shipped, and, after such order had been sent to them, waited for a long time without denying the claim against them, which delay was prejudicial to plaintiff. Held, that the order was ratified by defendant's conduct.—Dousman v. Peters, 85 Mich. 488.

§ 60. Repudiation.

Partial ratification and partial repudiation, see ante ¶ 345.
Mutual rights of principal and agent on disaffirmed transaction, see post § 98.

¶ 376. The erection of a $5,000 building on a $2,500 lot prior to the time when one of the common owners of it decided to repudiate the sale made through an agent with approval of the other common owner and with the knowledge of both, is sufficient part performance to disentitle her to repudiate.—Stuart v. Mattern, 141 Mich. 686.

¶ 377. A manufacturer was liable for salt bags, where, in an action for the sale price thereof, it appeared that such bags were ordered on the credit of such manufacturer, in pursuance of an arrangement between such agent and the manufacturer whereby such agent was to handle the entire output of such manufacturer, the manufacturer to furnish the bags, that such arrangement was known to the seller, and where such manufacturer kept the bags shipped to it for a long time and until after the negotiations with such agent had failed, whereupon it notified the seller that it did not want the bags.—Root & McBride Co. v. Walton Salt Ass'n, 140 Mich. 441.

§ 61. Authority of agent to ratify.

¶ 378. An agent, in order to ratify the unauthorized act of another agent, must have general power to perform the act which he ratifies and both must be agents of the same principal, and the agent whose act is in question must have professed to act as the agent of such common principal.—Ironwood Store Co. v. Harrison, 75 Mich. 197.

¶ 379. An unauthorized act of a stranger may be ratified by the party for whom he assumes to act, but not by his general agent, unless the power of appointing agents has been delegated to such agent.—Ironwood Store Co. v. Harrison, 75 Mich. 197.

¶ 380. An unauthorized agent is incompetent to ratify his own act.—Hotchin v. Kent, 8 Mich. 526; Trudo v. Anderson, 10 Mich. 357.

¶ 381. A contract, void because oral, cannot furnish authority to a carrier to ratify it by accepting the goods for shipment.—Grimes v. Van Vechten, 20 Mich. 410.

¶ 382. Whether ratification may be inferred from the act of an agent, when the principal himself could not lawfully have done the original act, and its consequences are beyond the control of both, quere.—Turner v. Phoenix Ins. Co. of Hartford, 55 Mich. 236.

¶ 383. The fact that the general agent of a manufacturing company made no disclaimer of liability for a share of the profits alleged to be due to an employee under a contract with the superintendent, is no evidence of ratification since such agent had no power to enter into such contract nor to ratify it.—Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242.

§ 62. Time for ratification or adoption.

See also ante § 59.

¶ 384. A principal cannot ratify the act of his agent, who has assumed without written authority to execute an agreement for the sale of his principal's land, so as to render the alleged agreement binding upon the other party after such party has disavowed liability thereunder.—Baldwin v. Schiappacasse, 109 Mich. 170.

§ 63. Effect and operation.

Acts involving other parties, see also ante ¶¶ 340, 341.

Ratification and continued recognition as evidence of agency, see ante § 10.

Ratification as evidence of right to commissions, see post § 105.

¶ 385. A subsequent ratification relates back and is equivalent to prior authority.—Lyell v. Sanbourn, 2 Mich. 109.

¶ 386. Ratification relates back to the time of performance of the acts ratified, and hence ratification of an agreement made with a tenant before he became a tenant for a year by entering upon a new term, is not nudum pactum though the ratification took place after he had entered upon the new term.—Rogers v. Babcock, 139 Mich. 94.

¶ 387. Where the action of one who acts as agent for another is adopted and followed by the assumed principal it is immaterial whether he had original authority or not.—Edwards v. Chandler, 14 Mich. 471.

¶ 388. The question of the extent of an agent's original authority is of little account where ratification of his agency is established.—Montague v. Dougan, 68 Mich. 98.

¶ 389. That a person undertaking to sell land for another had in the first place no sufficient authority as agent is immaterial where the vendee has taken possession and where the vendor has fully ratified the agreement and offers to perform it.—Hanchett v. McQueen, 32 Mich. 22; Bailey v. Cornell, 66 Mich. 107.

¶ 390. When a principal adopts the contract of a self-constituted agent, who has assumed to act for him without authority, he is bound to inquire and ascertain the extent to which the agent assumed to act in his behalf; and the principal, when he becomes such by adopting his acts, is bound by all acts within the scope of the assumed authority.—Busch v. Wilcox, 82 Mich. 336, affirming on rehearing 82 Mich. 315.

¶ 391. A wholesale house which makes a shipment of goods upon the advice of its traveling agent that the purchaser will turn over in payment, instead of cash, the note of a third person, naming the maker and indorser, and suggesting that the latter's financial standing be ascertained by the house

through a mercantile agency, cannot thereafter insist that the note received is insufficient because indorsed by the purchaser without recourse.—Peck Co. v. Gordon, 112 Mich. 487.

¶ 392. Executors who adopt a contract of sale made by an agent take it burdened with responsibility for the agent's fraudulent representations as to the premises sold.—Dodge v. Tullock, 110 Mich. 480.

§ 64. ——Under contract void for want of writing.

Invalidity of oral promise to pay for services rendered at request of agent lacking authority, see also ante ¶ 301.

¶ 393. Though ratification of agency by co-vendor in land contract executed for him on parol authority is insufficient under statute of frauds to validate the contract, it is sufficient as to receipt of money on joint account, and renders party jointly liable to refund to vendee payments made by latter. —Wright v. Dickinson, 67 Mich. 590.

§ 65. ——Persons affected or entitled.

Right of stranger to question want of authority, see ante § 44.

¶ 394. If the principal recognize and affirm the existence and acts of an agent, a mere stranger will not be permitted to controvert either.—Scott v. Detroit Young Men's Society Lessee, 1 D. 119, writ of error dism'd 5 How. (U. S.) 343, 12 L. ed. 181.

§ 66. Burden of proof and presumptions.

Admissibility of letters as documents showing or disproving ratification, see Evidence, VIII, A.

¶ 395. The burden of proving ratification rests on one who relies upon an agent's unauthorized act.—Hurley v. Watson, 68 Mich. 581.

§ 67. Admissibility of evidence.

¶ 396. Parol ratification of an agent's act in executing an indemnity bond may be shown by facts and circumstances.—Palmer v. Seligman, 77 Mich. 305.

¶ 397. Where a vendor in a contract to sell land which was executed by his co-vendor without sufficient authority has joined with the latter in a suit against their vendee to recover the unpaid purchase money, so much of the pleadings in such suit as are necessary to show the joinder are admissible to prove a ratification of the co-vendor's doings on the contract, and as tending to establish a joint liability.—Wright v. Dickinson, 67 Mich. 590.

¶ 398. As tending to prove ratification or adoption by co-vendor of vendee's payments on land contract executed on parol authority, jury in action by vendee to recover back such payments may consider, in determining whether there is a joint liability, the fact that such vendor approved the contract in writing after payments had been made, and that he joined with co-vendor in suit for balance of purchase money.—Wright v. Dickinson, 67 Mich. 590.

¶ 399. Where supplies have been furnished by plaintiff to one who had a contract with defendants for getting in logs, and where plaintiff claims that the contractor's order for such supplies was either authorized or subsequently ratified by defendants, testimony as to what was done with the supplies and what became of them was held competent and material as bearing upon the issues of authority and of subsequent ratification.—Dousman v. Peters, 85 Mich. 488.

¶ 400. As tending to prove ratification or adoption by co-vendor of vendee's payments on land contract executed on parol authority, the jury in vendee's action to recover back such payments may consider, in determining whether there is a joint liability, the fact that vendor approved the contract in writing after payments had been made, and that he joined with co-vendor in suit for balance for purchase money.—Wright v. Dickinson, 67 Mich. 590.

¶ 401. It is no evidence of ratification of a contract by an employee with the superintendent of a manufacturing company for a share of the profits of the company, that the books kept under the direction of the superintendent showed payments to the employee in excess of his salary, no officer of the corporation being informed that such overpayment was on account of such share of the profits.—Deffenbaugh v. Jackson Paper Mfg. Co., 120 Mich. 242.

§ 68. Weight and sufficiency of evidence.
See also ante ¶ 370.

¶ 402. Where, in plaintiff's absence, his clerk received from his debtor a draft, and accepted the same, to be applied, when paid, on the debtor's account, and after the draft fell due the plaintiff wrote the debtor respecting it, not repudiating the act of the clerk, and, on subsequently suing the debtor, offered to return the unpaid draft, it was held that these facts furnished evidence from which a jury might infer a ratification by plaintiff of the act of the clerk.—Jennison v. Parker, 7 Mich. 355.

¶ 403. Evidence that the alleged agent was employed by defendant in other similar transactions, and that defendant, after such agent had made for him the contract of sale in question, called upon the vendee and attempted to settle the matter by delivering

half of the quantity sold, is sufficient to go to the jury on the question of ratification. —Heffron v. Armsby, 61 Mich. 505.

¶ 404. A business that had failed with large debts was transferred to defendant, and the manager, one of the former owners, remained and continued the business for many years. Defendant lived in New York and took no active part therein. The manager was wont to sign notes in defendant's name, and defendant after some years in looking over the books, found such notes issued to a large amount, but made no objection or comment. Held, that such facts, coupled with uncontradicted testimony of defendant's statement that the manager had authority to issue such notes, were sufficient to go to the jury as to defendant's liability on a note so issued.—Buhl v. Smith, 69 Mich. 552.

¶ 405. A. having a contract with defendants for getting in logs, plaintiff shipped supplies to him on his order and afterwards sued defendants, claiming that the order was authorized or subsequently ratified by them. Held, under the correspondence between the parties, and in view of all the facts in the case, that it was properly left to the jury to determine whether or not plaintiff elected to hold A. and release defendants.—Dousman v. Peters, 85 Mich. 488.

¶ 406. Ratification of attorney's action in signing attachment bond in principal's name is shown by declarations of the client that he would "rest on" the attorney's action.—Hutchinson v. Smith, 86 Mich. 145.

¶ 407. When sued by a firm for goods sold, defendant claimed that he had sold goods to the firm's chief clerk who had charge of the books, and who, though he had no express authority to apply his individual debts on debts due the firm, agreed that the goods should go in discharge of the debt in suit. The firm's books showed certain credits given to defendant as if payment had been made in cash and the clerk kept an individual account on the firm's ledger in which items were entered of charges against him as turned upon defendant's account. One of the firm looked at the books every day and the other at odd times. Held, that it was proper to submit to the jury the question whether the clerk was authorized to make such an arrangement with defendant, and that as to sales made prior to the entries which could have informed the firm of its clerk's action in regard to defendant's account the firm could recover.—Hurley v. Watson, 92 Mich. 121.

¶ 408. Ratification of an unauthorized sale of a machine by an agent to whom it had been consigned for sale on commission, is not shown by an action against the agent in assumpsit for its value, where, though it amounted to a conversion, plaintiff could waive the tort and recover on the common counts.—Brown v. Foster, 137 Mich. 35.

¶ 409. In an action upon a lease, where the question of the authority of one of the defendants to bind the other defendant to accept the lease as altered after its execution by both defendants was in dispute, evidence that such defendant held himself out by bill heads as a proprietor; that he saw the lease in its changed form a few days after its execution and made no objection, and that upon plaintiff demanding rental he did not deny his liability but used language from which the jury would have been justified in inferring that he considered himself bound by the lease and obligated to pay, was sufficient to submit the question of ratification to the jury.—McPherson v. Pinch, 119 Mich. 36.

¶ 410. An agent for two tenants in common of lots negotiated a sale of them with the approval of one of such tenants who had the management for both. He died before conveyance and prior to receipt of a letter to him giving the details of the sale previously communicated to him by telegram. It was opened and read by the other common tenant, who was his sister, and replied to with expression of a wish by her that the property be sold as soon as possible and a desire for information as to interest and taxes mentioned in the letter to the brother. She had also conferred with the brother prior to his sending a telegram assenting to the sale. A draft to the brother's order was returned and indorsed to her and she cashed it, being part of the price. After visiting the purchasers and conferring she agreed to an amicable suit to perfect the conveyance and title in the purchasers, but when suit was filed she answered repudiating the sale. Held, she had ratified it.—Stuart v. Mattern, 141 Mich. 686.

¶ 411. In an action by a railroad company to recover demurrage charges on a shipment of sugar, where defendant pleaded in set-off damages due to breach of an agreement to rework the sugar after damage by a tornado while the sugar was in transit, which agreement was made by plaintiff's claim agent without authority, the fact that after plaintiff was advised of the agreement it delivered the sugar to defendant to be reworked according to the agreement held to warrant the jury in finding a ratification of the agreement, plaintiff's act and silence thereafter warranting an inference of acquiescence on its part.—Detroit, G. H. & M. Ry. Co. v. Owosso Sugar Co., 192 Mich. 533.

§ 69. Questions of law and fact; instructions. See also ante ¶ 68.

Instruction on ratification as harmless error, where original authority was clear, see Harmless Error.

¶ 412. Ratification by parol is a jury question where there is evidence tending to show it by inference to be drawn therefrom. —Palmer v. Seligman, 77 Mich. 305.

¶ 413. The question of the ratification by a defendant corporation of a contract made by its local agent is for the jury.—Van Vranken v. Union News Co., 78 Mich. 217.

¶ 414. In trover for goods bought by defendant from plaintiff's wife it was not error to refuse to charge that where friends or relatives undertake to sell a man's property in his absence very slight evidence is needed to prove ratification. The question is for the jury.—Hake v. Buell, 50 Mich. 89.

¶ 415. Whether the principal's silence affords a reasonable presumption of ratification, under the circumstances of the case, is generally a question for the jury.—Hurley v. Watson, 68 Mich. 531; First Nat. Bank of Sturgis v. Reed, 36 Mich. 263.

¶ 416. The evidence held sufficient to take to the jury the question whether the defendant, a stockholder, ratified the act of another stockholder in employing an accountant to audit the books of a corporation, so as to render the defendant individually liable for the services of the accountant.—McPherson v. Hovey, 186 Mich. 577.

¶ 417. The court should have instructed the jury as to what amounts to the ratification of the unauthorized act of a stranger, in an action for the price of a car load of lumber; where, lumber was ordered in defendant's name without his knowledge; but he, upon receipt of the invoice and of various letters and telegrams from the seller, failed to make any disclaimer, and instead, upon notification by the carrier's agent of the arrival of such car, turned the car together with the correspondence over to the person for whose use the lumber was ordered.—Long-Bell Lumber Co. v. Nyman, 145 Mich. 477.

¶ 418. In an action for the purchase price of a new line of goods which defendant claimed that his clerk had no authority to purchase in his absence, the plaintiff claiming that the order was unconditional and that defendant ratified the act of his agent because of his constructive notice of the sale through correspondence of his clerk with plaintiff, held, that an instruction on ratification of the act of the agent by constructive notice of the transaction was erroneous where there was evidence that the agent in the correspondence claimed that the order was on consignment.—Acorn Refining Co. v. Knowlson, 188 Mich. 123.

D. MANNER OF ACT OR WRITING TO BIND PRINCIPAL.

§ 70. In general; name or signature used.

Necessity that act purport to be for principal, see also ante ¶ 109.

Necessity that notice to agent be in connection with agency, see post § 72.

Liability of agent on contract ineffectual to bind principal, see post § 81.

Duty of agent to disclose agency if he would escape personal liability, see post § 86.

The general rule that an agent executing an instrument for and on behalf of the principal must do so in such manner and by such signature as to show an intention to bind the principal or purport to be his act done by an agent, is treated in Execution of Instruments, II.

¶ 419. It makes no difference whether an agent, in contracting for the sale of personalty, used his own name or that of his principal, so long as the bargain was carried out with the latter's consent and approval.—Stansell v. Leavitt, 51 Mich. 536.

¶ 420. Where an alleged liability is based on papers, and there is no attempt to show that they were executed by the person against whom it is asserted, there can be no recovery against him on a theory of agency, the dealings having all been had with another and on the latter's credit.—Sullivan v. Ross, 39 Mich. 511.

E. NOTICE OR KNOWLEDGE THROUGH AGENT.

§ 71. General rule.

Principal's knowledge as affecting agent, see post ¶ 482.

Notice or inquiry by other person of limits of authority, see ante §§ 23-25.

Ratification as including knowledge had by agent, see ante ¶ 348.

Notice to attorney as notice to client, see Attorneys and Counselors, II, C.

Notice to insurer through its agents, see also Insurance.

Notice to corporation through officers, agents or members, see Corporations, XVII, E.

Authority of corporation agent to be served for corporation, see Process; Notices.

Right of principal to avail of fraudulent representations made to agent in line of duty, though not communicated, see Fraud and Deceit, I; Sales, VIII, A.

Husband's knowledge imputable to wife, see Husband and Wife, IV, B.

¶ 421. Notice to an agent is notice to his principal.—Baker v. Pierson, 5 Mich. 456; Peoria Marine & Fire Ins. Co. v. Hall, 12 Mich. 202; Converse v. Blumrich, 14 Mich. 109.

¶ 422. A principal is chargeable with such facts as are known to his agent.—Macomb v. Wilkinson, 83 Mich. 486; Dailey v. Preferred Masonic Mut. Acc. Ass'n, 102 Mich. 289; Loveland v. Bump, 198 Mich. 564.

¶ 423. Notice to one's agent or to those who conduct one's business for him is actual notice to him.—Baker v. Pierson, 5 Mich. 456.

¶ 423a. Notice to a person acting in a very humble or inferior capacity is not notice to his employer.—Michigan Cent. R. Co. v. Doland, 32 Mich. 510.

¶ 423b. Notice to the foreman of a mill that sparks from its chimney are endangering adjacent property is, in the owner's absence, equivalent to notice to the owner, and evidence of it is admissible in an action for damages caused by a fire starting in that way, inasmuch as said notice may tend to hold the owner to a somewhat stricter measure of diligence.—Hoyt v. Jeffers, 30 Mich. 181.

¶ 423c. Notice of defects in merchandise may properly be given to the agent or broker through whom the sale has been made.—Henkel v. Welsh, 41 Mich. 664.

¶ 423d. Where an interpreter is employed in negotiating a sale, the party furnishing such interpreter is bound by the statements made to him, and it need not be shown that such statements were communicated by the interpreter to such party.—Highstone v. Burdette, 61 Mich. 54.

¶ 423e. Notice to the yard-master of a railroad company that certain frogs are unblocked, or that a switch-engine is defective, is notice to the company.—Ashman v. Flint & P. M. R. Co., 90 Mich. 567; Lyttle v. Chicago & W. M. R. Co., 84 Mich. 289.

¶ 423f. Where the mortgagee's brother acted as her agent in making the loan which was secured by mortgage from the grantee of an incompetent person, and where he had drafted the deed to the mortgagor and was present at its execution, she is not a bona fide mortgagee without notice.—Sponable v. Hanson, 87 Mich. 204.

¶ 423g. While notice to an agent is notice to his principal, yet the principal's knowledge cannot be imputed to the agent with respect to a matter in which the latter is acting in his own interest.—Luton v. Sharp, 94 Mich. 202.

¶ 424. The knowledge of agents within the scope of their agency is the knowledge of the principal.—McDonald v. Young, 198 Mich. 620.

¶ 425. A person whose agents and representatives are competent, and well-informed as to all matters affecting their principal's interests, cannot well plead want of notice of anything which his agents know.—Morgan v. Michigan Air Line R. Co., 57 Mich. 430.

§ 72. Relation of knowledge or notice to scope of agency.

¶ 426. The doctrine that notice to the agent is notice to the principal is based on the view that the agent represents the principal in the particular transaction and the latter is bound by the knowledge, which the agent then has.—Advertiser & Tribune Co. v. City of Detroit, 43 Mich. 116.

¶ 427. The knowledge of an agent who has sufficient authority to institute an action based upon it charges his principal with notice of all the facts under which he acts.—Campau v. Konan, 39 Mich. 362.

¶ 428. The general rule that notice to an agent is notice to his principal does not apply where the agent's relation to the subject-matter renders it certain that he will not disclose his knowledge to his principal.—Miller v. Scottish Union & Nat. Ins. Co., 101 Mich. 49.

¶ 429. Notice to a selling agent who negotiated an order for fruit, that it was unsatisfactory and would not be accepted unless the price was abated, is sufficient to bind the seller, his principal.—Hitchcock v. Griffin & Skelley Co., 99 Mich. 447.

¶ 430. Where one of several joint vendors is manager of the business and makes all the bargains, he must be presumed to act for all where there is a joint interest and joint duty; and notice to him in proceedings arising out of a breach of warranty caused by the existence of a lien upon the property sold is notice to the rest, unless in cases where the original lien has been extinguished and the existing lien springs from a contract with the buyer.—De Witt v. Prescott, 51 Mich. 298.

¶ 431. Notice to the foreman of a mill, in the absence of the owner, that the sparks from the chimney are endangering adjacent property is equivalent to notice to the owner.—Hoyt v. Jeffers, 30 Mich. 181.

¶ 432. Where the traveling salesman of a corporation has power to make a contract in its name, take payments thereon, receive a bond for its fulfillment and settle with the other party to the contract, his agency is sufficiently established to charge the corporation with notice of what was said and done in respect to liability on the bond at the time of the settlement.—Columbus Sewer Pipe Co. v. Ganser, 58 Mich. 385.

¶ 433. Where an attorney-at-law having funds to invest for a client bought for him a note, knowing that part of its consideration consisted of attorney's fees added to the amount claimed to be due on a statutory foreclosure, his client was charged with

knowledge of the facts.—Macomb v. Wilkinson, 88 Mich. 486.

¶ 434. A state agent of an insurance company representing it in making advances for the company to an agent who has given bond to pay over to the company what he may owe on account of such advances, has authority to receive for it from sureties on the bond notice that the agent had quit his relationship and that advances thereafter made would not be received upon the credit of the bond but upon the agent's personal credit.—Union Cent. Life Ins. Co. v. Smith, 105 Mich. 353.

¶ 435. The rule that knowledge of the agent is knowledge of the principal applies when the agent makes a loan, and takes notes as collateral security therefor, for his principal, and the latter subsequently claims to be a bona fide holder of such notes.—Loveland v. Bump, 198 Mich. 564.

¶ 436. Knowledge on the part of the servants having charge of a mule which kicked and killed another employee, of its vicious propensities, held imputable to their employer.—Robbins v. Magoon & Kimball Co., 186 Mich. 672.

¶ 437. The fact that a servant had heard others state that a mule which kicked and killed another employee, was a kicker, may be shown in an action against the employer, in order to impute to him the knowledge of the hearer.—Robbins v. Magoon & Kimball Co., 186 Mich. 672.

§ 73. Dealings in land titles.

Facts amounting to notice of particular title, claim or incumbrance, see Notice and Record of Title.

¶ 438. Where the purchase of a tract of land was negotiated by an agent, and where an adverse holding of the land was treated as diminishing the vendor's interest, the agent's knowledge of the adverse possession will be the purchaser's, and if the agent omits to inquire of the party in possession as to his title, the purchaser will not be regarded as a bona fide one without notice.—Russell v. Sweezey, 22 Mich. 235.

¶ 439. Notice to an agent of the condition of the title to land which he buys for his principal is notice also to the principal, whatever may be the actual knowledge of the latter.—Taylor v. Young, 56 Mich. 285.

¶ 440. Where the agent of a landowner from whom one wished to obtain a right of flowage had inspected the premises to see how much of them would be under water under the circumstances set forth, it was held that the principal must be charged with the knowledge of the agent, and could not claim to have been deceived by representations of the grantee as to the area,—Sanford v. Nuyman, 23 Mich. 326.

¶ 441. Where a debtor, owning lands incumbered by mortgages, gave his creditor a deed of the lands on a parol understanding that the creditor was to dispose of them for the payment of the mortgages and of his debt, and account to the debtor for the balance, and the creditor, instead of paying off the mortgages, bought them as agent for, and in the name of, a third person, who claimed not to be aware of this understanding, held, that the latter was chargeable with notice of the facts of which his agent was cognizant, and took the land subject to the debtor's equities, and could not cut off those equities by selling the land mortgaged, under the power of sale, and bidding it in himself.—Emerson v. Atwater, 7 Mich. 12.

¶ 442. Where one takes a mortgage which another has caused to be executed directly to him he must adopt the acts of that other as his agent in procuring it and be held chargeable with notice of all the facts of the transaction known to the other. He can have no greater rights under the mortgage than if he had himself procured it of the mortgagor by the same means used by the other.—Terry v. Tuttle, 24 Mich. 206.

¶ 443. The fact that the agent of the mortgagee was in the city where the mortgaged property was located once or twice a year, after a purchaser from the mortgagor had gone into possession of part of the mortgaged premises, is not such notice to the mortgagee as would put a prudent man upon inquiry.—Balen v. Lewis, 130 Mich. 567.

§ 74. Notice acquired in other agency, transaction or capacity.

See also ante ¶ 25.

¶ 444. The principal is bound only by such notice or knowledge as comes to the agent while he is agent.—Bonewell v. North American Acc. Ins. Co., 167 Mich. 274.

¶ 445. Where the same person is acting in the double relation of agent for both parties, his knowledge that his power to incur indebtedness or make expenditures for one of his principals is limited to such as are incurred and made with the consent of those who with himself constitute such principal, cannot be regarded as affecting the other principal who acts in entire good faith in furnishing supplies of which the former actually gets the benefit, and which the former has repeatedly permitted to be furnished without objection.—Michigan Slate Co. v. Iron Range & H. B. R. Co., 101 Mich. 14.

¶ 446. Notice to an agent of a particular fact in a certain transaction does not affect his principal with notice of the same fact in a subsequent transaction, where the agent at the time of the latter transaction does not remember the previous notice, and, in view of the circumstances, has no reason to suppose that the same inference is to be drawn from the same fact.—Great Western Ry. Co. of Canada v. Wheeler, 20 Mich. 419.

¶ 447. Where there had been a transfer of the property of a railroad company sued for personal injuries but the employees of the old company had continued in the service of the new owner, the declaration of the master mechanic as to notice of incompetency of an employee and fellow servant of one injured could not be considered as evidence of the incompetency in itself; but if the incompetency were otherwise shown, notice to him received before the transfer of the property would continue to be notice to the subsequent owner and master and would bind it.—McClure v. Detroit Southern R. Co., 146 Mich. 457.

¶ 448. The knowledge of the arbitrary mark of a consignee of goods possessed by a former officer or agent of a railroad company is not the company's knowledge so as to affect the company with notice of his ownership of goods thus marked in subsequent transactions.—Great Western Ry. Co. of Canada v. Wheeler, 20 Mich. 419.

§ 75. Effect of adverse interest or fraud of agent.

¶ 449. Where defendant knew that an agent was acting in antagonism to plaintiff and that a notice to the agent would not be communicated to plaintiff, notice to the agent was not notice to the principal.—Brown v. Harris, 139 Mich. 372.

F. UNDISCLOSED PRINCIPAL'S RIGHTS AND LIABILITIES.

§ 76. In general.

Estoppel to claim relation of principal, see ante § 19.

Rights and liabilities of agent, see post §§ 82, 86.

Wife as undisclosed principal of husband, see Husband and Wife, IV, B.

¶ 450. An undisclosed principal who is the only person entitled may sue upon a sale made by his agent.—Jenness v. Shaw, 35 Mich. 20.

¶ 451. A principal's right to sue upon a contract made by his agent is established if the agent notifies the other party that he must account to the principal; such a notification operates as an equitable assignment of the agent's interest in the contract.—Dustin v. Radford, 57 Mich. 163.

¶ 452. Where a creditor accepts money from his debtor to apply upon the purchase price of cattle, and thereafter refuses to deliver the cattle, and attempts to apply the amount upon the prior indebtedness, a third party, whose agent the debtor was in making the purchase, and who furnished the money therefor, is entitled, upon such refusal, to recover the amount so paid, even though the creditor had no notice that the money belonged to such third party.—Bearce v. Fahrnow, 109 Mich. 315.

¶ 453. Acts of an agent on behalf of his undisclosed principal, in purchasing boats in the agent's own name are binding upon the principal, but the rule is not of much importance where the seller of the boats knew of the furnishing of the money for that purpose by the principal.—Murphy v. Charlton, 118 Mich. 141.

¶ 454. When a husband, acting for his wife, telegraphed to a Nevada lodge that he guaranteed payment of the undertaker's charges in attending the dead body of his father-in-law, and, upon learning that a Michigan lodge had telegraphed a similar guaranty, told members of that lodge that the charges would be paid, he thereby ratified the unauthorized act of the Michigan lodge, and is liable to the undertaker as the undisclosed principal for whom both the Michigan and Nevada lodges acted.—Hillman v. Hulett, 149 Mich. 289. (Blair, Montgomery and Hooker, JJ., dissenting.)

G. ACTIONS BY AND AGAINST THIRD PERSONS.

§ 77. Right to sue or defend.

Right of agent to sue in own name, see post § 89.

Right to recover from third person where agent acted without authority, see ante II, B.

Judgment against agent as binding principal, and vice versa, see Former Adjudication, V.

Right of undisclosed principal to sue or claim benefit, see ante § 76.

¶ 455. A principal's right to sue upon a contract made by his agent is established if the agent notifies the other party that he must account to the principal; such a notification operates as an equitable assignment of the agent's interest in the contract.—Dustin v. Radford, 57 Mich. 163.

§ 78. Form of action, pleading and procedure.

[Note. Relatively few procedural questions arise involving agency except the issues of existence of the agency, its duration or termination, the authority or ratification, and these have already been

treated in earlier parts of the topic. As they do not always arise in actions either "by" or "against" third persons, but sometimes collaterally, it has been deemed better to collect the decisions in one place which belong to either of these issues. See cross references following.]

Burden of proof, presumptions and evidence as to existence of the agency generally, see ante §§ 9, 10.

Burden of proof, presumptions and evidence as to the authority of the agent, see ante §§ 39-41.

Evidence of termination or revocation, see ante § 17.

Questions for jury and instructions as to fact of agency see ante § 11.

Jury questions and instructions as to authority, see ante §§ 42, 43.

Directing verdict on ground of estoppel to question agency, see ante ¶ 100.

Burden of proof, presumptions, evidence, jury questions, and instructions on ratification, see ante §§ 66-69.

Separate action against agent for tort, see post ¶ 486.

The action by or against the third person will necessarily be governed by the procedural law applicable to that kind of cause which is pleaded. Accordingly see topics such as Assumpsit; Contracts; Conversion; Fraud; Sales; Trespass; and see also topics treating of the specific matters or incidents of actions, e. g., Evidence; Pleading; Instructions; Trial; etc.

General law of procedure and evidence, see Evidence; Pleading; Parties; Trial; and like topics.

General rule that verdict and judgment must be for principal if agent be found not guilty. see Judgments, II, C; Verdicts, III.

Sufficiency of general issue to present question of authority, see Assumpsit; Pleading, IX.

Proof of account stated by agent, see Account Stated, ¶ 34.

Proper agents to serve for corporation, see Process.

¶ 456. A. wrote to B.: "I have on hand a lot of furs which I am anxious to sell." B. replied: "I have this day written to C., who is my agent, to make you a visit for the purpose of purchasing your furs, and I hope that you and he will be able to make a bargain for a lot of furs." C. afterwards called on A. and bought the furs, paying part cash and giving a note for the rest in B.'s name. Held, that B. was liable to A. for the unpaid sum as for goods sold and delivered, counts on the note being nolled.—Sorrell v. Brewster, 1 Mich. 378.

¶ 457. Where an agent enters into written contract for his principal in his own name, the principal must enforce it in the name of the nominal contracting party.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 458. A customer of plaintiffs, one Heusel, executed a note filled out by defendant bank and payable to plaintiffs. Plaintiffs' collecting agent, one Donaldson, went to the customer's desk and indorsed the note. Defendant's cashier let Donaldson have the money on the note. The cashier testified that he supposed he was making the loan to Mr. Heusel and not a discount to the agent, but that he thought Donaldson, who indorsed the note, was one of the plaintiffs. Held, in a suit for conversion of the note based on the unauthorized indorsement that the evidence was conflicting and the trial court erred in directing a verdict for defendant.—Lonier v. Ann Arbor Sav. Bank, 162 Mich. 541.

¶ 459. In an action against an agent and his alleged principal for damages resulting from the sale of corporate stock, the purchase of which was alleged to have been induced under false representations, made by the agent if at all, an instruction that it is possible to find one of the defendants guilty and the other not guilty held to be erroneous on judgment against the principal alone.—Bartholomew v. Walsh, 101 Mich. 252.

III. RIGHTS AND LIABILITIES OF AGENT AS TO THIRD PERSONS.

§ 79. In general.

Rights and liabilities on given transaction outside of the questions involving the law of agency are treated in topics dealing with the particular transaction or liability urged. See such topics as Contracts; Negligence, etc.

Finding that agent was bound as finding of fact conclusive on appeal or error, see Appeal and Error, XII, E.

¶ 460. An agent does not become personally liable unless his principal is unknown, or there is no responsible principal, or the agent exceeds his powers, or becomes liable by an undertaking in his own name.—Preston v. Preston, 1 D. 292.

¶ 461. In an action to recover damages for defendant's failure to fulfil his agreement to insure plaintiff's dwelling house, defendant claimed that, in whatever he did, he acted as agent for a third person, who held a mortgage on the property. Held, that an instruction that, if the jury should find that defendant was acting as such agent, and that he disclosed that fact to plaintiff, the latter could not recover was sufficiently favorable to defendant.—Banks v. Cramer, 109 Mich. 168.

§ 80. Contracts in name of or for principal.

Liability as dependent on sufficiency of execution in name of principal, see also Execution of Instruments, II.

¶ 462. Where a contract is made by an agent, and the principal is disclosed and the agent is known to be acting as such, the latter cannot be made personally liable unless he agreed to be so.—Whitney v. Wyman, 101 U. S. 392, 25 L. ed. 1050.

§ 81. ——Unauthorized assumption of authority.

Liability of corporate officer on contract made without authority, see Corporations, XVII, F.

¶ 463. Where an agent undertakes to contract on another's behalf and contracts in a manner that does not bind his principal, he will be personally responsible, as he is bound to know the exact extent of his authority.—Newberry v. Slafter, 98 Mich. 468.

§ 82. Contracts in agent's own name.

See also ante ¶¶ 179, 308.

Notice to look to principal as equitable assignment to him, see ante ¶ 455.

Liability of cashier on contract in his name, see Banking, X.

¶ 464. Agents may bind themselves by their contracts, notwithstanding it be known to both parties that the contract is not for their benefit directly, but is for the benefit of another; and, having done so, they cannot evade their clearly-expressed liability under the contract by showing that they were agents.—Landyskowski v. Lark, 108 Mich. 500.

¶ 465. A written undertaking by the cashier of a national bank to save harmless one who should sign a replevin bond for customers of the bank renders him individually liable for such an undertaking, being ultra vires for the bank, and not clearly appearing upon its face to have been intended as the bank's undertaking.—Knickerbocker v. Wilcox, 83 Mich. 200.

§ 83. In money had and received by agent.

See also post ¶ 481.

Profits made by dealing with principal's property, see post ¶ 503.

¶ 466. One who, as another's agent, has received payment on a demand beyond what is due, and has paid over the money before notice of the mistake, is not liable to an action by the debtor.—Granger v. Hathaway, 17 Mich. 500.

¶ 467. If an agent, to whom money is paid by a mortgagor after the foreclosure of the mortgage to apply upon the decree, makes prompt remittance to his principal, he cannot be held liable for his failure to make the proper application of the money.—Miller v. Sealey, 90 Mich. 218.

¶ 468. Where the agent of the vendor in an oral bargain for the sale of land has paid over the money to his principal, the vendee, seeking to repudiate the contract and suing to recover what he paid, cannot hold the agent liable, but must look to the principal if to any one.—Bailey v. Cornell, 66 Mich. 107.

¶ 469. A solicitor of life insurance who gives an agent's receipt for the first premium upon a proposed policy, which recites that, if the risk is not accepted, the sum collected shall be returned, incurs no personal liability to the applicant as to the amount advanced, where the latter deals with him merely as agent for a disclosed principal, although the policy issued is not such as the contract calls for.—Bleau v. Wright, 110 Mich. 183.

§ 84. In property dealt with.

Jury question as to individual contract or one for principal, see ante ¶ 458.

Rights of assignee against agent holding under repudiated prior assignment, see Assignments, III, IV.

¶ 470. An agent for the exchange of property, who fraudulently retains the goods received in exchange, and turns over to his principal other like goods of an inferior quality, the principal in no way acquiescing therein, cannot maintain replevin against one who levies upon the goods retained by him under an execution against the principal, although the latter has failed to tender back the goods which he has received.—Carroll v. McKale, 111 Mich. 348.

§ 85. Torts in course of agency.

Liability of depositary of escrow for violating conditions for delivery, see Escrows.

Defense of principal's property as justification of assault on intruder, see Assault and Battery, II.

¶ 471. An agent's liability for causing an illegal arrest does not depend on his instructions from his principal.—Josselyn v. McAllister, 22 Mich. 300.

¶ 472. An agent is not exempt from liability for a fraud knowingly committed on behalf of a principal, even though the agent receives no personal benefit from the fraud, and the principal is at the bottom of it.—Weber v. Weber, 47 Mich. 569.

¶ 473. One who, while erecting for his wife a house upon her lot, permits a sidewalk taken up by one of his men to remain torn up, in consequence whereof a person is injured, is liable to such person as for an act of misfeasance.—Ellis v. McNaughton, 76 Mich. 237.

¶ 474. A contractor or laborer who, acting under a drain commissioner, constructs a tunnel as a public drain, and who has no control over its maintenance, is not liable for damages to a distant landowner's crops caused by a subsequent flow of water therefrom; such damages, if any, not being the immediate result of such work, but being caused by the subsequent maintenance of the tunnel.—Chapel v. Smith, 80 Mich. 100.

¶ 475. An agent in charge of a building is bound to inspect the condition of its windows to avoid possible injury to persons passing on a public street, through the falling of glass.—Bannigan v. Woodbury, 166 Mich. 491.

¶ 476. An action will lie against an agent for a fraud knowingly committed in behalf of his principal, even though the agent received no personal benefit from the fraud.—Haener v. McKenzie, 188 Mich. 27.

§ 86. Acts or contracts for undisclosed principal.

See also ante ¶ 464.
Rights and liabilities of undisclosed principal, see ante II, F.

¶ 477. The duty rests upon an agent, if he would avoid personal liability, to disclose his agency, and not upon others to discover it, and it is not enough that the other party has means of ascertaining the name of the principal, and the agent must either bring to him actual knowledge or that which to a reasonable man is equivalent to knowledge, or he will be bound.—Harmon v. Parker, 193 Mich. 542.

¶ 478. One who contracts as a principal cannot escape liability after suit is brought by proving that he was acting as agent.—McGovern v. Bennett, 146 Mich. 558.

¶ 479. The defendant permitted his brother to order liquors of the plaintiff and accepted the goods and sold them from his brother's saloon. Defendant held himself out to the plaintiff and the public as the owner of the saloon. Held, he was liable for the purchase price of the liquors, and could not set up the fact that he was only an agent of his brother.—Rochester Distilling Co. v. Bostrum, 158 Mich. 543.

¶ 480. Where, for the benefit of a company of which he is a member, A. agrees to pay B. if he will continue certain work, A. is liable to B. if he did not disclose his agency.—Mitchell v. Beck, 88 Mich. 342.

¶ 481. An agent is liable for money paid to him without consideration and by him paid over to his principal if the party dealing with him had no notice of the agency.—Smith v. Kelly, 43 Mich. 390.

§ 87. Individual dealings and rights.

Setting off own debt against obligation to principal, see also ante ¶ 153.
Whether contract was with agent or with principal as party, see Contracts, II.
Contract as that of corporation or of officer making it, see Corporations, XVII, F.

¶ 482. The principal's knowledge is not imputable to an agent in respect to a matter in which the latter is acting in his own interest.—Luton v. Sharp, 94 Mich. 202.

§ 88. Liability of other party.

¶ 483. An agent cannot recover as for services rendered to the opposite party, where they were rendered entirely for the principal and without request by the other party.—Graham v. Taggart, 44 Mich. 383.

§ 89. Actions and procedure.

See explanatory note ante under § 78.
Instruction, see also ante ¶ 461.
Authority of agent of administrator for collection to sue in his own name, see Estates of Decedents, V, B.
Right of indorsee agent to sue in his own name on bill or note, see Negotiable Instruments, XIV.
Injunction against agent's disposal of property held under rescinded assignment, see Injunctions, II, F.
Condemnation proceedings by agent empowered for that purpose, see Eminent Domain, I.

¶ 484. A servant, agent or attorney cannot enforce in his own name the rights of his principal or master.—People ex rel. McBride v. Kent County Sup'rs, 38 Mich. 421.

¶ 485. Under Comp. L. 1897, § 10421, providing that assumpsit lies to recover damages for injuries in all cases where a person is injured by fraudulent representations or conduct, assumpsit will lie to recover damages for deceit against an agent who is merely the mouthpiece of his principal.—Hallett v. Gordon, 128 Mich. 364.

¶ 486. An agent, when liable for a fraud committed in a principal's behalf, may as well be sued separately as any joint wrong-doer sued alone in an action of tort.—Weber v. Weber, 47 Mich. 569.

IV. MUTUAL RIGHTS, DUTIES AND LIABILITIES.

A. GENERAL DUTIES AND CONTRACT RIGHTS.

§ 90. Agent's duty; good faith and diligence.

See also post § 91.
Agency as a contract, see ante § 1.
Evidence and instructions, see post § 106.

¶ 487. A member of a building and loan association appointed as a member of a committee to audit accounts of the secretary of such association, is bound to exercise only ordinary skill in the examination of such books and papers as are submitted to him. —Alpena Loan & Building Ass'n v. Denison, 121 Mich. 159.

§ 91. Adverse dealings or self interest of agent.

See also ante ¶ 2.

As defeating right to commissions, see post § 101.

Double agency of brokers, and right to compensation, see Brokers and Factors.

Invalidity of contracts made by officers and agents with or for themselves, see also Corporations, XVII; Contracts, IV (legality and public policy; Public Contracts.

Dealings by husband or wife as agent for other with subject of agency, see Husband and Wife, I-IV.

¶ 488. An agent cannot bind two parties having opposing interests in the same transactions, nor can he be at the same time a party and the agent of the opposite party, unless both parties know of the dual relation and assent to it.—Dull v. Royal Ins. Co., 159 Mich. 671.

¶ 489. An agent appointed to let a contract for his principal must secure the best terms he can, and if, in letting it, he surreptitiously takes an interest in it himself, the transaction is void. Actual fraud in the agent or injury to the principal is immaterial.—Flint & P. M. Ry. Co. v. Dewey, 14 Mich. 477.

¶ 490. An agent who owes his principal the duty of obtaining the best obtainable price cannot take a contract to which he himself is secretly a party.—Green v. Knoch, 92 Mich. 26.

¶ 491. An agent of a corporation who had done his full duty in making a purchase of certain of its stock at the lowest possible price, could not be required to deliver to the corporation certain other shares of its stock transferred to him by the seller in the transaction in which he acted as agent, subsequent to the completion of the transaction. —Lamb Knit-Goods Co. v. Lamb, 119 Mich. 568.

¶ 492. Where an agent pays back taxes on land at the direction of his principal, and then without her knowledge takes a tax deed for the same in his own name, he commits a fraud upon her.—Backus v. Cowley, 162 Mich. 585.

§ 92. Contracting with principal; buying and selling.

¶ 493. An insurance agent cannot accept his own application for insurance.—Zimmermann v. Dwelling House Ins. Co., 110 Mich. 399.

¶ 494. One acting as agent for the owner of property has no right to make himself the agent of others for the purchase of the property, nor to take any advantage of the confidence his position inspires to obtain the title himself.—Moore v. Mandelbaum, 8 Mich. 433.

¶ 495. An agent to sell cannot make a valid purchase from his principal without fully and fairly disclosing all the propositions he has received, and all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of the sale.—Moore v. Mandlebaum, 8 Mich. 433.

¶ 496. A sale made by an agent to himself is void in law.—Clute v. Barron, 2 Mich. 192.

¶ 497. An agent, whether of the public or of individuals, who is authorized to sell property for the best price that can be obtained for it cannot become the purchaser, either in his own name or that of another, whether the sale be public or private.—Ingerson v. Starkweather, W. 346; Clute v. Barron, 2 Mich. 192; Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139; and see Beaubien v. Poupard, H. 206; Walton v. Torrey, H. 259.

¶ 498. An agent for the sale of property may not sell to himself.—Hutton v. Sherrard, 183 Mich. 356.

¶ 499. An agent for the sale of real estate cannot purchase such realty upon his own behalf at foreclosure sale to the exclusion of his principal, as his duties are incompatible with such act; and if he does purchase he becomes a trustee for the principal when he acquires title.—Kimball v. Ranney, 122 Mich. 160.

¶ 500. An agent may be a purchaser from his principal so long as he acts in good faith and his principal is informed of the situation.—Walsh v. Goulden, 130 Mich. 531.

¶ 501. The application of the rule that an agent for the sale of property cannot purchase such property upon his own behalf to the exclusion of his principal, was not affected by the fact that the agent some 10 or 12 days before a foreclosure sale of the property notified his principal that he would purchase for his own benefit.—Kimball v. Ranney, 122 Mich. 160.

¶ 502. Authority to an agent to buy a certain mare for his principal at a limited

price does not justify the agent in sending a third person to buy it, and then buying it of the third person at an advance, though within the prescribed limit.—Armstrong v. Elliott, 29 Mich. 485.

¶ 503. Plaintiff, a resident of Ohio, as one of the heirs of her mother, of whose estate defendant was administrator, was the owner of an undivided fifth interest in 80 acres of land which she agreed to sell for $450 to another heir upon the advice of the defendant, and to whom the plaintiff forwarded a deed in which the consideration was fixed at $450, with the name of the grantee in blank. The proposed purchaser did not take the deed and defendant thereupon inserted his wife's name as the grantee without her knowledge, and forwarded the $450 to the plaintiff. A few weeks later defendant sold the land to the original proposed grantee for $600. In an action to recover the difference in price, held, that the defendant was acting as the agent of plaintiff, and that the money received from the purchaser belonged to plaintiff.—McNutt v. Dix, 83 Mich. 328.

¶ 504. An attorney in fact has not, by reason of his relation, authority to assign his principal's mortgage to himself.—Post v. Springsted, 49 Mich. 90.

¶ 505. An agent cannot make a valid purchase from his principal without fully and fairly disclosing all the facts and circumstances within his knowledge in any way calculated to enable the principal to judge of the propriety of the sale.—Beedle v. Crane, 91 Mich. 429.

¶ 506. A principal whose real estate agent purchased on his own behalf the principal's property at foreclosure sale, was not estopped from seeking relief in equity, by his act in obtaining an order for a resale and then upon finding that he could not comply with the conditions or that it would not pay him to do so, accepting the surplus of the purchase price and then waiting three or four years before instituting proceedings; where the agent had refused a tender of the amount received, with an added sum, and where the principal stood ready to account for the amount received.—Kimball v. Ranney, 122 Mich. 160.

¶ 507. The rule that an agent may not bind his principal by a purchase from himself without the principal's assent, such contracts being void or at least voidable, had no application in an action by a principal to recover the amount received by its agent for certain machinery which the principal supposed belonged to a third party, where the principal kept the machinery and apparently found it acceptable.—Antiseptic Fibre Package Co. v. Klein, 119 Mich. 225.

§ 93. Agency contracts, construction and breach.

Nature and form of the contract, see ante I, A; and see generally Contracts.
Accounting, compensation and lien, see post IV, B.
Remedies and procedure, see post IV, C.
Evidence, jury questions and instructions, see post § 106.
General law of contracts, see Contracts.
Formation of contracts by offer and acceptance, see Contracts, III, B.
Contracts with servants, see also Master and Servant, II.
Measure and elements of damages for breach of agency contract, see Damages.

¶ 508. A contract creating an exclusive agency for the sale of land, to be performed within one year need not be in writing, but so far as its terms are in writing and accepted and acted upon by the parties, the writing controls.—Axe v. Tolbert, 179 Mich. 556.

¶ 509. Where one becomes sole agent to sell specific articles that he obtains only by purchase, the agency covers only the exclusive privilege of handling the goods in the territory allotted to him, and does not prevent an order for the articles being a sale to the agent.—Bill Pub. Co. v. Durgin, 101 Mich. 458.

¶ 510. One who accepts an agency for the sale of plaintiff's goods in a certain territory impliedly agrees to hold out the goods to the public and further his principal's interest.—Mueller v. Bethesda Spring Co., 88 Mich. 390.

¶ 511. A written contract between a manufacturer and its foreign agent contemplates that such agent should be the exclusive foreign representative of the principal, and that it should make its sales through him, where such contract provides, among other things, that such principal do no advertising in any European papers without including the name and address of such agent as their sole European agent, and that the principal will turn all inquiries from such territory over to such agent and will not knowingly supply goods to any other person or persons in such territory.—Stone v. Fox Machine Co., 145 Mich. 689.

¶ 512. A contract appointing a selling agent and providing that the manufacturer shall not advertise in any European papers without including the name and address of such agent as sole European agent, is to be construed to mean papers printed and published in Europe, and not American papers printed in this country.—Stone v. Fox Machine Co., 145 Mich. 689.

¶ 513. An agent for the sale of stock may recover commissions and for breach of a written agreement, notwithstanding the agreement contains a provision that his father is to subscribe for ten shares of stock at a meeting to be held in the future, but not to be bound for such subscription except in so far as the agent's commissions will cover the purchase price of the stock, there being nothing in the agreement to show that the father was to keep the understanding secret on making the subscription and no evidence that he ever did misrepresent his position in regard to the subscription.—Zabel v. New State Tel. Co., 127 Mich. 402.

¶ 514. The selling of baskets at a less price than agreed upon by the parties to the contract in question, and thereby inducing customers of defendants who retailed their own goods, to purchase of plaintiff, was a violation of the contract, justifying the dismissal of plaintiff, who sold the article on commission.—Dodge v. Reynolds, 135 Mich. 692.

§ 94. ——Guaranties and the like by agent.

¶ 515. An agreement by an agent to stand as security for all loss the principal might sustain on loans made by the agent, by reason of insufficient security or defect of title, does not apply to prior loans.—Perkins v. Hershey, 77 Mich. 504.

¶ 516. Where one who is agent for the sale of another's property, and has agreed not to sell for credit except to those who are good and responsible, and to take no paper but good, first-class, collectible paper, and such as he is willing to guaranty, takes paper he knows is worthless, and turns it over to his employer, who is ignorant of its character, the agent makes himself liable as guarantor of the paper, and is not entitled to have it returned to him as a condition precedent to judgment against him on such guaranty.—Clark v. Roberts, 26 Mich. 506.

§ 95. ——Revoking or terminating agency.

See also Brokers.

Duration and termination of the relation, see ante I, B.

Necessity of paying compensation before revoking agency coupled with interest, see also ante ¶ 76.

Contracts with servants, see Master and Servant, II.

¶ 517. A contract of agency providing that it shall remain in force as long as the agent continues active, and produces results, but reserving to the principal the right to abrogate it, if dissatisfied with results, or with the manner of handling the business, indicates some period of duration for its continuance, which is to be determined by reading the provision with the remainder of the contract, with reference to what is desired and sought to be accomplished thereby.—Garlock v. Motz Tire & Rubber Co., 192 Mich. 665.

¶ 518. A contract of agency providing no fixed time for its duration, but providing that it shall remain in force as long as the agent continues active and produces results, and reserving to the principal the right to abrogate it, if dissatisfied with results, or with the manner of handling the business, held properly construed as warranting the principal in abrogating the agreement and in establishing a branch house in the territory allotted to the agent, and in refusing to furnish the agent more of its goods, whenever the principal became satisfied that such was the better method of conducting its business in that territory.—Garlock v. Motz Tire & Rubber Co., 192 Mich. 665.

¶ 519. The mere fact that a contract of agency does not provide for a definite period of duration is not controlling if some period is necessarily implied, especially if an independent consideration, other than a promise, moves to the promisor, or if it is terminable on expressed conditions.—Garlock v. Motz Tire & Rubber Co., 192 Mich. 665.

¶ 520. A contract leaving an agent free to terminate it at will is to be construed as leaving the principal free to discharge the agent at will, and generally without liability, although the agent has commenced performance.—Garlock v. Motz Tire & Rubber Co., 192 Mich. 665.

¶ 521. A contract of employment of a business manager reserving the right to terminate for conduct "unsatisfactory * * * or for other cause" enables the employer to discharge the employee without liability if in his opinion another available man would better subserve his interests.—Teichner v. Pope Manufacturing Co., 125 Mich. 91.

¶ 522. An employment of an agent for the sale of personal property upon a commission basis can be revoked, and the revocation cannot be complained of, unless colorable and unfair, and unless the new bargain was such as came within the same substantial terms which would have entitled to compensation under the old; and in such case the remedy would not be on a quantum meruit for services, whatever it might be as to the expenditures made in the service.—Hamilton v. Frothingham, 59 Mich. 253.

¶ 523. Defendant automobile company contracted with plaintiff for the latter to act as its agent in maintaining a sales garage. The contract provided that plaintiff should conduct the business to the satisfaction of

the defendant, and that the defendant should give the plaintiff sixty days' notice to correct any error or mistake in carrying out the contract. Held, the defendant could not arbitrarily cancel the contract, but, during the sixty days' period after the giving of notice, was obliged in good faith to reserve judgment, remain in a receptive mood, and co-operate with complainant for the purpose of removing the causes of dissatisfaction and continuing the contract.—Isbell v. Anderson Carriage Co., 170 Mich. 304.

§ 96. Liability for loss, failure or neglect.

Effect of breach of instructions to make agent a debtor, see ante § 14.
Evidence, jury questions, and instructions, see post § 106.
Liability of collecting banks, see Banking, VI.

¶ 524. Where a principal places money in the hands of an agent to pay a debt when ordered, if the agent refuses to obey such orders he becomes liable to the principal, irrespective of whether the instructions are violated through mistake or design.—Cutter v. Powers, 200 Mich. 375.

¶ 525. Where property has been left with another to sell, the latter is not liable for failure to collect payment, unless guilty of negligence, bad faith or dishonesty.—Fick v. Runnels, 48 Mich. 302.

¶ 526. An agent who had sold certain goods on time and received them back as unsatisfactory could not be charged by his principal with a share of their value after the latter had caused the agent to send them back to him and had kept them.—Filer v. Jenks, 38 Mich. 585.

¶ 527. Where, after a foreclosure decree has been taken, the mortgagor makes a payment to the party who negotiated the loan, but who is not the agent of the mortgagee, which he at once forwards to the mortgagee, and notifies the solicitors for both parties, he is not guilty of such negligence as makes him liable to the mortgagor for the money on the failure of the mortgagee and his solicitors to make such application.—Miller v. Seeley, 90 Mich. 218.

¶ 528. A creditor may recover from a collection agency for the amount of a claim forwarded to the collection agency, where judgment was obtained on the claim; execution levied on real estate, and the real estate bid in for the creditor on the advice of the collection agency and subsequently the title was cut off by a mortgage foreclosure sale of the real estate to the defendant collection agency.—National Wall Paper Co. v. Ames, 129 Mich. 526.

¶ 529. Negligence of a member of a committee appointed to audit accounts of a secretary of a building and loan association, cannot be inferred, although such secretary embezzled money from the association, where the evidence shows that the committee examined quarterly reports of the secretary and checked books, receipts and disbursements submitted by the secretary, it appearing that the embezzlement was effected by the secretary keeping a private set of books. In such case there was no lack of ordinary care in examining the books and papers.—Alpena Loan & Building Ass'n v. Denison, 121 Mich. 159.

§ 97. Rights in property dealt with.

Agency coupled with interest, what is, see ante § 8.
Where transaction is disaffirmed, see post § 98.
Right to lien or retention, see post § 103.
Evidence and questions of fact, see post § 106.
Rights of brokers and factors, see Brokers and Factors.

¶ 530. An agreement by which the negotiator of a loan is to receive one per cent a year from the mortgagee for guaranteeing the payment of interest indicates nothing more than a personal engagement to pay the one per cent, and gives him no interest in the mortgage.—Miller v. Seeley, 90 Mich. 218.

§ 98. Rights under disaffirmed transactions.

¶ 531. Where an agent, without authority from his principal, received goods in payment of a loan, but the principal repudiated the debtor's claim of payment, and continued to hold him for the debt; such agent was not liable to the principal for the value of the goods.—Perkins v. Hershey, 77 Mich. 504.

¶ 532. Where the main purpose of a contract was for the establishment of a selling agency of automobiles, and the sale and delivery of machines to the agency so established was incidental to this main purpose, after the principal had become entitled to abandon the contract of the agency, it was also entitled to cancel any orders for automobiles.—Wheaton v. Cadillac Automobile Co., 142 Mich. 21.

B. ACCOUNTING, COMPENSATION, REIMBURSEMENT AND LIEN.

§ 99. Accounting in general.

Settlements by accord and satisfaction, see Accord and Satisfaction.
Settlement of accounts by account stated, see also Account Stated.
Presumption as to rendition of moneys to principal, see post ¶ 562.
Predecessor as party to accounting suit, see post ¶ 558.
Agent's personal representatives as parties, see post ¶ 557.

General law of accounting suits, see Accounting Suits.
Right as affected by involvement of evidence of crime, see Accounting Suits, ¶ 11.
Mode of valuing commercial paper not yet due on an accounting, see Values.
Embezzlement by agent, see Crimes, II; Indictment; and see Comp. L. 1915, § 15317.

¶ 533. One who has long acted as another's agent and financial adviser is presumed to know the amounts he has received from and paid out for his principal, and cannot compel an accounting on the ground that he has paid certain debts and become an indorser; the account is not mutual.—Nash v. Burchard, 87 Mich. 85.

¶ 534. Where an employee is required to keep a true and accurate account of all moneys received by him, and to pay them over to his employer, a fiduciary relation exists, and the employer may proceed in equity for an accounting, and may pursue the fund.—Warren v. Holbrook, 95 Mich. 185.

¶ 535. While an employee who in addition to a salary is to receive as compensation a certain percentage of the profits of the business has a remedy in equity to secure an accounting as to the profits, such remedy is not exclusive, as a court of law has full power under How. St., § 7386, to appoint auditors to state the account.—Stockman v. Michell, 109 Mich. 348.

¶ 536. An agent owes to his principal the duty of rendering detailed accounts, and the act of the principal in waiving a weekly itemized statement of expenses is not a waiver of an accounting at some time.—Muir v. Kalamazoo Corset Co., 155 Mich. 441.

¶ 537. A principal is not guilty of laches who, after unsuccessful efforts to effect a redemption from foreclosure sale, at which his real estate agent purchased on his own behalf, delays three or four years before instituting proceedings to compel an accounting by such agent, where the latter has at all times denied the claims of his principal.—Kimball v. Ranney, 122 Mich. 160.

¶ 538. Upon a bill for an accounting against an employee charged with embezzlement the evidence was held sufficient to warrant a decree for money found in defendant's possession, where it clearly appeared that he took some money and some was found in his house, which he did not account for, that his pay was insufficient to support his family, his silence being taken as a circumstance against him.—Warren v. Holbrook, 95 Mich. 185.

§ 100. Compensation in general.

See also Master and Servant, II.
Presumption and burden to show custom, see post ¶ 563.
Reception of services or benefit thereof as consideration for obligation by opposite party to compensate, see Contracts, V, A.

¶ 539. Where an agent is employed at a fixed salary or rate, and the principal imposes upon him, or he performs additional duties, with enlarged powers, no extra compensation can be recovered unless there is an agreement to such effect or some custom supporting such recovery.—Muir v. Kalamazoo Corset Co., 155 Mich. 441.

¶ 540. Expressions of confidence in an employee, based on his own reports, may be shown in an action by him upon his contract of employment, but they do not estop the employer from showing his default, or explaining what he did or neglected.—Alberts v. Stearns, 50 Mich. 349.

¶ 541. In an action for balance of salary due, where defendant wrote plaintiff that on a certain day his compensation would depend upon his commission, and plaintiff testified that he at once duly mailed a letter declining to continue work on those terms, the jury were justified in reaching the conclusion that defendant consented to the payment of the salary; where, although defendant denied receiving plaintiff's letter, it subsequently directed him to continue his work.—Lee v. Huron Indemnity Union, 135 Mich. 291.

§ 101. Commission agreements.

See also ante ¶ 513.
See also Brokers and Factors.
As creating interest in agent, see also ante § 8.
As to double agency, see also ante ¶ 24.
Accounting suit to recover, see ante § 99.
Evidence and instructions, see post §§ 105, 106.
Necessity of writing when sale is of real estate, see Comp. L. 1915, § 11981, ¶ 5.

¶ 542. An agent to sell may not become the agent of the purchaser, or vice versa, so as to be entitled to commission from both unless both buyer and seller with full knowledge consent that the agent shall act for both and receive compensation from both.—Friar v. Smith, 120 Mich. 411.

¶ 543. An agent for the sale of typewriters, who, under his contract, was to receive the benefit of all sales made in a given state, is not entitled to commissions on the sale of a machine by the maker to a purchaser in another state, merely because it is shipped by the purchaser to its branch office within the agent's territory.—Wyckoff, Seamans & Benedict v. Bishop, 115 Mich. 414.

¶ 544. Where by agreement one is to be paid a certain commission on sales, and is

to have whatever he can get above list prices, the fact that he is subsequently allowed to sell for less than list prices does not entitle him to claim all he receives in excess of the reduced prices.—Rosenfield v. Fortier, 94 Mich. 29.

¶ 545. By accepting and filling orders received from one's salesman which are accompanied by a claim for excessive commissions, one is not estopped from subsequently disputing such claim.—Rosenfield v. Fortier, 94 Mich. 29.

¶ 546. Where a contract employing a sales agent provides for the payment of a salary and commission on sales, but also provides that a certain minimum amount of business shall be done to constitute a fulfillment of the contract, the sales agent can become entitled to neither the salary nor the commission until the minimum amount has been sold under the contract.—Haas v. Malto-Grapo Co., 148 Mich. 358.

¶ 547. Plaintiff, acting under an agency contract, who sold machinery and who with the advice and consent of his principal accepted in part payment second-hand machinery at a fixed value, and the remainder of the price evidenced by promissory notes secured by chattel mortgage which were never paid, and the second-hand machinery was again sold for other machinery, cash and securities, is entitled to his commission on the exchanged machinery as upon a sale for cash without waiting until his principal has realised upon the securities which it accepted or until the second lot of machinery taken in the second exchange is sold.—Bills v. A. W. Stevens Co., 146 Mich. 515.

¶ 548. In an action by a third person for commissions in assisting a salesman in making sales an issue is raised for the jury by testimony of the salesman that his employer authorized him to pay commissions, and that in some of the sales the employer knew of the agreed commission before the sale was completed, and denial of this testimony by the employer.—Flattery v. James Cunningham, Son & Co., 125 Mich. 467.

¶ 549. A contract between a member of a banking copartnership and another person whereby such person agreed to assist in procuring subscriptions of stock to a proposed state bank and to obtain such subscriptions before a stipulated time for a specified commission on the sale price on all stock sold, and providing that the agent should not be bound further than to procure the subscription in entirety before the time mentioned, construed as meaning that while the agent's active obligation to the enterprise bound him no further than obtaining subscribers, his compensation for services was contingent upon the stock being in fact sold.—In re Farmers' & Merchants' Bank of Lawrence, 194 Mich. 200; Smith v. Mosier, Id.

§ 102. Reimbursement and indemnity.

Indemnity and fidelity bonds and contracts in general, see Indemnity.

Contracts of guaranty, see Guaranty.

¶ 550. One for whom goods were ordered by another acting as agent, and who paid for them when received, cannot escape reimbursement of the agent on objection that the terms were not the same as the agent obtained for a similar purchase for himself at the same time, where no claim to such terms was made at the time of refusing acceptance.—Hatch v. McBrien, 83 Mich. 159.

¶ 551. A dealer who, acting as agent for defendant, placed an order for canned goods to be shipped with some of his own, and who as directed changed the grades and brands by sending in an amended order, may on receiving the goods and paying for them recover from defendant, who refused acceptance without objection to the failure to send grades ordered, the ones sent being better, the objection being on other grounds.—Hatch v. McBrien, 83 Mich. 159.

¶ 552. An agent's agreement not to charge his principal, for whom he loans money, anything for making loans or for collecting interest, does not prevent his recovering from the principal disbursements and attorney fee made and received in statutory foreclosure.—Lyon v. Sweeny, 91 Mich. 478.

§ 103. Lien and right to retain.

General law of liens, see Liens.

¶ 553. A mere clerk or agent whose wages are measured by profits has no lien on the property in his possession as against a chattel mortgage executed by his principal.—Wilcox v. Matthews, 44 Mich. 192.

¶ 554. A collecting agent who advances money to his principal for the debtor, under such circumstances that the latter becomes liable to the agent, rather than to the principal, cannot retain the amount of such advances from moneys subsequently collected.—Wilson v. Crosby, 109 Mich. 449.

C. REMEDIES AND PROCEDURE.

§ 104. In general.

Right to accounting, see ante § 99.

Right to sue concurrently for compensation earned and on contract releasing compensation agreement, see Abatement, ¶ 41.

Damages for breach of instructions and measure thereof, see Damages, II, D.

Time when limitations begin to run, see Limitations of Actions.

Remedies on contract generally, see Assumpsit; Contracts, X.

¶ 555. One who, being duly authorized, has collected money for his principal is liable to him in an action for money had and received.—Liesemer v. Burg, 106 Mich. 124.

¶ 556. Where certain machinery in possession of agents for the purpose of selling on commission, is wrongfully turned over to one who agrees to purchase if it shall prove satisfactory, the principal may waive the tort and sue the agent for its value on the common counts in assumpsit.—Brown v. Foster, 137 Mich. 35.

¶ 557. Executors of a deceased attorney in fact who had defrauded his principals and co-claimants by means of releases obtained from the latter after a settlement whereof the latter were ignorant, were properly made defendants to a bill by the defrauded parties for an accounting, they having taken measures to conceal part of the settlement moneys which had come into their hands from the testator.—Richardson v. Richardson, 100 Mich. 364.

¶ 558. An individual manufacturer, with whom an agent has had dealings, is not a proper party defendant to a bill for an accounting by such agent against a corporation and its successor, calling in question the transactions of such corporations, where the business of such manufacturer was merged in such corporation and the agent continues dealing with it and its successor.—Stone v. Fox Machine Co., 145 Mich. 689.

§ 105. Pleading and evidence.

Proof of the fact of agency, see ante §§ 9, 10.

General law of pleading and evidence, see Pleading; Evidence.

¶ 559. Where a declaration alleges the violation of defendant's authority as an agent to the damage of his principal, it is essential to recovery that he show the agency.—Hicks v. Steel, 142 Mich. 292.

¶ 560. Where by way of payment or set-off it is claimed that an employee has misappropriated money with which he has been intrusted, such misappropriation must be shown before a claim can be established against him on account thereof.—In re King's Estate, 94 Mich. 411.

¶ 561. In an action by a firm of merchants against an employee, their traveling salesman, for money claimed by the plaintiffs to have been paid him on false statements of his expense account against them, testimony to show that defendant had expended more than his salary besides supporting his family, and that he had no other source of revenue, is properly excluded, as there can be no presumption that he has wrongfully obtained so much as was not paid him in wages, in the absence of proof that his property was limited to his earnings.—Linn v. Gilman, 46 Mich. 628.

¶ 562. It appearing that an agent suing for compensation had received and handled money belonging to the principal, there is a presumption that such money received was applied by him to the payment of his claim against the employer rather than that it was misappropriated.—In re King's Estate, 94 Mich. 411.

¶ 563. On the question whether a superintendent of a mine was to have the employer's house rent free or was to pay rent for it, the question being raised on a set-off pleaded to his action for wages, and being dependent on a custom to allow it, he must prove the custom or the set-off will be allowed on the theory that there was an implied contract to pay rent.—Berringer v. Cobb, 58 Mich. 557.

¶ 564. In an action for commissions upon sales made by plaintiff for defendant evidence is admissible to show that defendant ratified sales made at prices less than those fixed in the original agreement between the parties.—Austin v. Burroughs, 62 Mich. 181.

¶ 565. Where a contract of agency for the sale of agricultural implements provided that the principal would accept, without indorsement, good notes taken for the sale of such implements, the agent in an action to recover a balance alleged to be due from him may show that, under contracts containing similar provisions, plaintiff had on previous occasions settled with defendant by taking notes not given for goods of plaintiff sold by defendant, as bearing upon the authority of a state agent to accept such notes in settlement, and as bearing upon the question of the truthfulness of his statements.—Superior Drill Co. v. Carpenter, 150 Mich. 262.

¶ 566. In an action by an agent of a lessee against sublessees to recover a balance of rent claimed to be due him individually where defendants claimed that payments were made pursuant to an agreement with the principal, it was not error to admit testimony offered by defendants to sustain their claim, they having already given evidence making plaintiff's agency a question for the jury.—Gleason v. Stone, 200 Mich. 187.

¶ 567. In an action by a furniture dealer for commissions orally agreed to be paid to him by a customer above wholesale or deal-

ers' rates to be procured for him by plaintiff from wholesale dealers, testimony was given to the effect that plaintiff, in the customer's presence, requested the head salesman of a wholesale dealer to let the customer have the goods at the prices that they would be sold to plaintiff, which were the same as wholesale or dealers' rates, that the salesman said he would do so, and that he did so sell. Held, that the jury was justified in finding that the furniture was furnished at dealers' rates, and that it was for the jury to determine whether the testimony—which was disputed—was true or not, and also to find from all the testimony what the agreement between the parties was.—Tompkins v. Hitchcock, 69 Mich. 123.

§ 106. Questions of fact and instructions.

As to existence of the agency, see ante § 11.

¶ 568. Plaintiff entered into a contract to act as the agent of the defendant automobile company in conducting a sales garage, and agreed to run the business to the satisfaction of defendant. The evidence of plaintiff indicated that he entered upon the discharge of the contract according to mutual plans of endeavor approved by defendant; that he held almost daily consultations with defendant's manager; and that said manager expressed from time to time entire satisfaction with plaintiff's work until defendant entered into surreptitious negotiations with another agent to handle its machines on commissions more advantageous to defendant; and that plaintiff occupied his time in demonstrating the cars, interviewing prospective customers, advertising, etc. Held, there was sufficient evidence to submit to the jury the question of bad faith of defendant in canceling the contract.—Isbell v. Anderson Carriage Co., 170 Mich. 304.

¶ 569. Defendant, having the confidence of plaintiff, induced him to transfer the collection of his insurance to certain adjusters and to turn over the whole conduct of his affairs to defendant. Defendant knowing that plaintiff had no agreement with said adjusters as to their compensation, and in contravention of an agreement as to the deposit of the money collected in a bank to plaintiff's credit, and without the knowledge or consent of plaintiff, authorized said adjusters to receive as compensation a grossly excessive sum. In a suit to recover from defendant for the loss of said money, held, the trial court erred in directing a verdict for defendant.—Dillon v. Craig, 168 Mich. 216.

¶ 570. In an action for commissions earned under a contract of employment, where plaintiff claims that defendant waived the rendering of weekly itemized accounts and thereafter sent money to plaintiff to disburse, with the understanding that no account should be rendered, the court properly refused to direct a verdict for defendant on the ground that plaintiff had failed to prove the amount of his disbursements.—Muir v. Kalamazoo Corset Co., 155 Mich. 441.

¶ 571. In an action against an agent to recover the amount received for sheep of plaintiff sold by defendant and not accounted for, where plaintiff claimed that a certain number of sheep were intrusted to claimant under an arrangement whereby they were to be let out to double in a term of four years, and, upon return, the increased flock was let out for a similar period and, with further increase, was sold at the end of the second period by defendant, held, on conflicting evidence, that it was a question for jury whether plaintiff had any interest in the flock.—Miller v. Young, 196 Mich. 276.

¶ 572. An instruction, in an action against a collection agent, from which the jury would be justified in charging defendant with payments admitted to have been made for the purpose of taking up certain notes of the debtor, which had been discounted by defendant, and the proceeds remitted to plaintiff, is error requiring reversal.—Wilson v. Crosby, 109 Mich. 449.

¶ 573. Where the court instructs that if the jury finds that a contract to pay commissions was made, and work was done under it by the plaintiff, it is binding on the defendant, the instruction does not imply that defendant is liable irrespective of the terms of the contract.—Dufford v. Parliament of the Prudent Patricians of Pompeii, 152 Mich. 151.

¶ 574. An instruction as to the exercise of discretion given to a plaintiff under a contract, whereby such plaintiff was to receive a certain sum of money for services and was to expend a stipulated amount every month for advertising, as he deemed advantageous to the sale of fiber-cloth blankets, such instruction stating that the plaintiff was bound to exercise reasonable discretion in advertising and to use his best efforts in introducing the goods as required by the contract, and submitting the question as to whether the plaintiff complied with the contract, where a small amount was expended for advertising in the spring months, is correct.—Kaempfer v. Lindsay, 121 Mich. 425.

¶ 575. In an action upon a claim against the estate of a deceased agent who had been employed by plaintiff to loan and collect money where a memorandum book kept by the agent showing the business done for the principal, both before and after the date of a

settlement between them, is admitted in evidence, instructions that it was for the jury to pass upon its completeness, and that they could consider none of the entries prior to the settlement on the question of liability, is proper.—Jewell v. Jewell's Estate, 139 Mich. 578.

¶ 576. On a question whether interest should be paid by defendant to plaintiff, whose agent he was, an instruction describing defendant as "agent or trustee" could not be prejudicial where it was immaterial, as far as interest was concerned, in which capacity he acted.—Schisler v. Null, 91 Mich. 321.

¶ 577. An instruction in an action by a principal against an agent that defendant claiming a settlement had the burden of proving that there had been a "fair and full settlement" is not misleading, where the court has already charged that in finding such settlement they would only have to consider the transactions and dealings had after its date.—Schisler v. Null, 91 Mich. 321.

¶ 578. In an action by the agent of lessees against sublessees to recover a balance of rent which plaintiff claimed was due him individually because he had paid the rent to the landlord in reliance upon the sublessees' agreement to pay the rent to him, an instruction that if the jury found that when the last month's rent was due the defendants promised to pay the rent for that month to him, knowing that he would pay that amount to the landlord, and, if plaintiff, relying upon such promise, paid the amount due as part of the rent due the landlord plaintiff was entitled to recover, and that in such an event there would be a sufficient consideration for the promise, and defendants, after such payment under the agreement would be estopped to deny liability to plaintiff, was as favorable to plaintiff as was permitted by the evidence.—Gleason v. Stone, 200 Mich. 187.

V. PARTICULAR KINDS OF AGENCIES.

§ 107. In general; cross-references.

Where only the general law of agency as generally applicable is involved, the matter is treated ante in this topic, although the agent was a broker, factor or insurance agent.

Attorneys at law as agents, see also Attorneys and Counselors.

Auctioneers, see Auctions and Auctioneers.

Brokers and factors, including agencies for consignment and sale on account of consignor, see Brokers and Factors.

Insurance agents, see generally Insurance, III.

General law of master and servant, see Master and Servant.

Officers and agents of corporations, see Corporations, XVII.

Agents and servants of railroads and street railroads, see Carriers; Railroads; Street Railways; Master and Servant.

State prison agent and contracts for convict labor, see Prisons and Jails.

AGENTS FOR SERVICE to AGREEMENTS.

Cross-References.

Agents for Service, see Process, II, B; Notices.

Aggravation and Mitigation of Damages, see Damages.

Aggrieved Parties—
- Right to appeal or to sue out error or certiorari, see Appeal and Error, IV; Certiorari.
- Right to urge error dependent on harm or prejudice to objector, see Appeal and Error, XI, D; Harmless Error.
- Right to raise constitutional question dependent on grievance, see Constitutional Law, IV.

Agistment, see Animals.

Agreed Case or Statement, see Appeal and Error; Submission of Controversy; Stipulations.

Agreed Tests or Scales, see Contracts; Sales.

Agreements, see Contracts; Sales; etc.; and see topics treating of the thing to which the agreement relates.

AGRICULTURE.

TREATS of agriculture and crops in general as distinguished from specific rights in respect thereof, as hereinafter referred to, and of agricultural societies and fairs.

Analysis.

§ 1. In general.
§ 2. Crops and farming contracts; emblements.
§ 3. Agricultural societies and fairs.
§ 4. ——Liability for negligence and other torts.

§ 1. In general.

Cultivation of land as act of adverse possession, see Adverse Possession § 22.

Matters relating to the State Agricultural College, see University of Michigan.

Applicability of Workmen's Compensation Law to State Agricultural College, see Workmen's Compensation Law, II.

Agricultural subjects for expert testimony, see Evidence, VI.

¶ 1. The legislature cannot appropriate public funds in aid of a voluntary private association of persons "actively interested in the improvement" of a given crop, since it would amount to a use of public funds for private purposes although indirectly beneficial to the state at large in the betterment of crops.—Michigan Corn Improvement Ass'n v. Auditor General, 150 Mich. 69.

What are agricultural and kindred pursuits within exemptions from compensation acts, see note, 16 N. C. C. A. 592-605.

Injury to employees engaged in agricultural pursuits, see note, 11 N. C. C. A. 847-856.

Liability for permitting growth of noxious weeds, see note 11, N. C. C. A. 1056-1062.

§ 2. Crops and farming contracts; emblements.

Crops as the subject of contract or tort, where the nature of the property is not a controlling factor, will be treated in specific topics, such as Conversion; Chattel Mortgages; Sales; Replevin.

The right to crops as an incident of the land in the case of sales or conveyances thereof, or of leases or mortgages or of succession in title to such land will be treated in Vendors and Purchasers; Landlord and Tenant; Mortgages; Deeds; Life Estates; Estates of Decedents; Descent; Wills.

Rights of husband and wife in crops on their lands, see Husband and Wife.

Crops planted on another's land as accession thereto, see Accession, § 5.

Authority of agent to negotiate crop contracts for his principal's factory, see Agency, ¶ 177.

¶ 2. Where a mere intruder upon the land of another plants crops thereon, such crops, so long as they remain unsevered, are the property of the owner of the land.—Heilwig v. Nybeck, 179 Mich. 292.

¶ 3. One contracting to sow wheat on the land of another on shares acquires only the right to sow and harvest the wheat, and an entrance to plough up the wheat and sow and harvest another substitute crop is a trespass.—Stebbins v. Demorest, 138 Mich. 297.

¶ 4. Plaintiff rented a farm of defendant under a lease to be terminated in case of sale of the farm by defendant, and placed his uncle in possession, who planted with his own seeds, using his own tools, a portion of the land. The uncle testified and the evidence clearly showed that the growing crops belonged to the uncle, and that he was not the plaintiff's hired man. In a suit for the value of said growing crop, held, the action was clearly one for the value of emblements, and plaintiff not being the owner of the crop was not entitled to recover.—Van Dyke v. McCormick, 165 Mich. 368.

§ 3. Agricultural societies and fairs.

Corporate matters, such as meetings, records, contracts, conveyances, mortgages, acts of officers and responsibility for them, in which the society stands on a parity with other corporations, are treated in Corporations.

Taxes in aid of agricultural societies, see Taxes.

¶ 5. Comp. L. 1857, chap. 54, authorizing agricultural societies to hold fairs and "distribute premiums for the best and most meritorious animals," is not a "special law" authorizing horse racing, within the meaning of R. S., chap. 40, § 1 (Comp. L. 1857, chap. 189); and prior to the amendment made in 1877 to section 1 no action could be maintained for the nonpayment of an order upon the treasurer of an agricultural association for the premium won in a "trial of speed" at a horse fair.—Bronson Agricultural & Breeders' Ass'n v. Ramsdell, 24 Mich. 441.

¶ 6. County agricultural societies organized under How. St., §§ 2303-2312, being quasi-public in character, may be incorporated for a period longer than thirty years, and may be authorized by special act to dispose of grounds and invest proceeds.—Kent County Agric. Soc. v. Houseman, 81 Mich. 609.

¶ 7. The doctrine of nonuser is not applicable to a county agricultural society, the lessee of which has held annual fairs and carried out all purposes of the organization, its directors and officers meanwhile continuing to perform their duties.—Kent County Agric. Soc. v. Houseman, 81 Mich. 609.

¶ 8. The president and secretary of a county agricultural society, organized under How. St., §§ 2303-2312, are ex officio directors, and entitled to vote on all matters the same as those who are specifically called "directors."—Kent County Agric. Soc. v. Housemen, 81 Mich. 609.

¶ 9. In the absence of an election the directors and officers of a county agricultural society organized under How. St., §§ 2303-2312, hold over.—Kent County Agric. Soc. v. Houseman, 81 Mich. 609.

§ 4. ——Liability for negligence and other torts.

¶ 10. Defendant agricultural society was organized under section 5953, 2 Comp. L. 1897.

While its object was not primarily to enrich its stockholders, but to foster agriculture, it still was engaged in making sufficient money to carry on its enterprise. Held, it owed the same duty as a private corporation to provide safe seats in its grand stand, and was liable for injuries resulting to a visitor from a breach of such duty.—Logan v. Agricultural Society Lenawee County, 156 Mich. 537.

¶ 11. An agricultural society's duty to inspect its grand stand is not fulfilled by the mere employment of efficient inspectors; it must see that these inspectors actually do their work with reasonable care.—Logan v. Agricultural Society Lenawee County, 156 Mich. 537.

¶ 12. Plaintiff bought a seat in defendant society's grand stand to witness the races, and was injured by the breaking of the seat board, whereby plaintiff fell to the ground. The declaration stated that the defendant was in duty bound to use care in erecting a safe seat; that the seat board on the under side was rotten and defective; that a proper discharge of defendant's duty to inspect would have revealed its condition; and that such defects were not apparent to plaintiff. It also alleged facts showing defendant failed so to inspect, and it set out plaintiff's injury. Defendant put in no demurrer, but pleaded the general issue. Held, the declaration sufficiently stated a cause of action to support a verdict rendered in plaintiff's favor.—Logan v. Agricultural Society Lenawee County, 156 Mich. 537.

¶ 13. Plaintiff was injured by the breaking of a seat board of the grand stand of an agricultural society. Held, evidence offered by defendant that the directors of the society were farmers, was inadmissible on the question of the degree of care required.—Logan v. Agricultural Society Lenawee County, 156 Mich. 537.

¶ 14. Plaintiff was injured by the breaking of a seat board in defendant's grand stand whereby she fell to the ground. The evidence showed that defendant employed competent inspectors; that one of them walked about under the structure in the effort to see defects; that another tested the seats by walking and stamping on them on top; that plaintiff weighed only 143 pounds; that the rottenness of the planks was visible from the under side; and that the nails pulled out of the board, which broke. Held, the question whether defendant properly inspected was for the jury.—Logan v. Agricultural Society Lenawee County, 156 Mich. 537.

Liability of agricultural societies or fair associations for negligence, see note, 8 N. C. C. A. 198-207.

AID to ALIENATION.

Cross-References.

Aid Bonds, see Municipal Bonds; Municipal Corporations; Railroads, V.
Aider of Indictment or of Pleading, see Indictment, I, D; Pleading, XI; and see also Harmless Error; Indictment, XV.
Aider of Record, see Appeal and Error; Indictment; Judgments.
Aiders and Abettors, see Crimes; Indictment.
Aldermen, see Municipal Corporations.
Alias, pleading names, see Indictment; Pleading.
Alias Writs, see Attachment; Executions; Process.
Alibi, see Indictment, VIII.
Alienating Affections, see Husband and Wife, V, B; and as to damages for, see Damages.
Alienation of Property, see specific topics treating of the various modes of transferring or incumbering title, e. g., Assignments; Deeds; Mortgages; Chattel Mortgages; Sales; etc.
Suspension of the power of alienation, see Perpetuities; Wills.
Power of corporations or of the public, see Corporations, XIII, D; Municipal Corporations, X; Counties, III.

ALIENS AND CITIZENS.

TREATS of the status and disabilities of aliens and the condition and status of citizens and of acquisition and loss of citizenship.

Analysis.

§ 1. Alienage; its rights and disabilities.
§ 2. ——Descent to, through or from aliens.
§ 3. Naturalization.
§ 4. Citizenship, expatriation and repatriation.

§ 1. Alienage; its rights and disabilities.

Eligibility for certain rights and duties, see also such specific topics as Jury, II; Elections, III.

Administration of estates of aliens, see Estates of Decedents; and as to intervention of consuls or foreign ministers therein, see Ambassadors.

Numerous rights and disabilities depend on residence or nonresidence, and as far as nonresident aliens are involved, such topics as treat of the specific right should be consulted, e. g., Limitations of Actions; Homesteads; Process; Depositions.

¶ 1. The laws and treaties of the United States manifest no policy to put aliens on as good a footing as citizens.—Crane v. Reeder, 21 Mich. 24.

¶ 2. Alienage is, at common law, a disqualification to hold lands in fee.—Crane v. Reeder, 21 Mich. 24.

Right of alien to pursue statutory remedy for death, see note, 8 N. C. C. A. 67-80.

Alien and nonresident dependents within provision of Workmen's Compensation Acts, see note, 16 N. C. C. A. 210-226.

Dependents and dependency under Workmen's Compensation Acts, see note, 6 N. C. C. A. 241-287; 13 N. C. C. A. 544-556.

§ 2. ——Descent to, through or from aliens.

¶ 3. Article 9 of Jay's treaty of 1794 (8 U. S. Stat. at L., p. 122), securing to British subjects the right to grant, sell or devise the estates they held at the date of the treaty, in like manner as if they were natives, protects none but valid titles, and its provisions against the effect of the alienage of the heirs or assignees of alien grantors do not apply to mere possessory rights, without any title in fact, which by a subsequent act of congress were enlarged into freeholds, where there had been continuous occupancy and improvement.—Crane v. Reeder, 21 Mich. 24.

¶ 4. The act of the governor and judges of Michigan, adopted July 15, 1805, authorizing any foreigner to take and hold lands, does not confer upon the heirs of such foreigner the right to take such lands by inheritance, unless such right becomes vested before the repeal of the act.—Crane v. Reeder, 21 Mich. 24.

¶ 5. The ordinance of 1787 did not do away with the disability of aliens to inherit.—Crane v. Reeder, 21 Mich. 24.

¶ 6. From May 8, 1821, to the time—Jan. 1, 1828—when the statute of March 31, 1827, took effect, there was no law in force in the territory of Michigan authorizing aliens to hold or inherit lands.—Crane v. Reeder, 21 Mich. 24.

§ 3. Naturalization.

Citizenship of children following that of parents, see post § 4.

¶ 7. A British subject residing at Detroit before and at the time of the evacuation of the territory of Michigan under the provisions of Jay's treaty, and who continued to reside there afterwards, without at any time prior to June 1, 1797 (i. e., one year from the evacuation), declaring his intention to remain a British subject, became ipso facto for all purposes an American citizen.—Crane v. Reeder, 25 Mich. 303.

¶ 8. That clause of the act of congress of April 14, 1802 (2 U. S. Stat. at L., p. 155, § 4), which provides that "the children of persons duly naturalized under any of the laws of the United States, etc., being under the age of twenty-one years at the time of their parents being so naturalized, etc., shall, if dwelling in the United States, be considered as citizens of the United States," applies to the minor children of those who became citizens under Jay's treaty, a treaty being just as much a "law of the United States" as an act of congress is. The second clause of this section, providing that "the children of persons who now are, or have been, citizens of the United States, shall, though born out of the limits and jurisdiction of the United States, be considered as citizens of the United States," does not apply to those whose parents were aliens at the time of the birth of the children, nor is it restricted to the cases only of natural-born citizens and citizens who were original actors in the revolution; but it embraces also the children of naturalized citizens.—Crane v. Reeder, 25 Mich. 303.

¶ 9. Under U. S. Rev. St., § 2165, an alien's declaration of an intention to become a citizen may be made before the clerk of a court elsewhere than in his office or in open court.—Andres v. Ottawa Circuit Judge, 77 Mich. 85.

§ 4. Citizenship, expatriation and repatriation.

Place or locality of citizenship, see Domicile; Elections.

Effect on jurisdiction and venue, see Courts, V; Venue.

Constitutional rights, privileges, and immunities in general, see Constitutional Law.

¶ 10. The Candian-born offspring of fugitive slaves do not, in removing to the United States, become citizens.—People ex rel. Hedgman v. Detroit Board of Registration, 26 Mich. 51.

¶ 11. A soldier in the Continental Army, who lived in the United States at and after the time of the Declaration of Independence

and the treaty of peace between the United States and Great Britain, which was signed September 3, 1783, was, by virtue thereof, a citizen of the United States, as was his son who was born in the United States while his father was a citizen, and whose citizenship would not be affected by the after-renunciation of allegiance by the father.—Lamoreaux v. Attorney-General, 89 Mich. 146.

ALIMONY to ALTERATION.

Cross-References.

Alimony, see Divorce, X, XI.
Allegations, see generally Pleading; Equity, VII; Indictment; and see specific topics for allegations appropriate to particular issues.
Allegiance, see Aliens and Citizens.
Alleys, see generally Highways; Dedication; Easements.
Allotments, see Partition.
Allowance of Claims, see specific topics treating of estate or corporation, e. g., Assignments for Creditors; Bankruptcy; Corporations, XXIII; Estates of Decedents, VI, C; Municipal Corporations, XIV; Counties, VI; Townships; Health; Poor Persons.
Allowances—
Fees and disbursements in litigation, see Costs.
To administrators, trustees, etc., see Estates of Decedents, X, D; Trusts, X; Guardianship, V; Reference (fees); and the like.
To widow of decedent, see Estates of Decedents, V, D.
By way of alimony or for support of children, see Divorce.
Alluvion, rights of riparian owner, see Waters.
Almanacs, as evidence or subject of judicial notice, see Evidence; Indictment, VIII.
Almshouses, see Poor Persons.
Alteration—
See also references under Amendments.
Of charters, see Corporations, IV; and as to constitutional validity, see Constitutional Law.
Of highway, railway or easement, see Highways, V; Railroads, II; Street Railways; Easements.
Of notes, bills, deeds, etc., see Alteration of Instruments.
Of public records, see Records; Crimes; Indictment.
Presumption when evidence is altered, see Evidence, II; Indictment, VIII.

ALTERATION OF INSTRUMENTS.

TREATS of unsanctioned changes in the wording or written form of instruments, and the effect of such changes on the rights and obligations of the parties.

Analysis.

§ 1. In general; definition and distinctions.
§ 2. Authorship of or consent to alteration.
§ 3. ——Act of third persons.
§ 4. ——Filling in spaces left blank.
§ 5. Intent and purpose of alteration.
§ 6. Materiality and method.
§ 7. ——Changing parties or negotiability.
§ 8. ——Changing amount, time or terms.
§ 9. ——Cancellation or detachment of paper.
§ 10. Effect; defense to action.
§ 11. ——Cure by restoration, ratification or acknowledgment.
§ 12. Pleading and evidence.
§ 13. ——Explanation and rebuttal.
§ 14. Jury questions and instructions.

§ 1. In general; definition and distinctions.

The term "alteration" is often used to mean material alteration. What constitutes a "material alteration," see post §§ 6-9.
Immaterial alterations, see post § 6.

The forgery or fabrication of an instrument without any assent to its utterance or any authorized execution presents a question of the genuineness and existence of the instrument as the act of the parties

thereto. See Execution of Instruments (civil matters); Crimes, II (forgery and uttering).
Modification and merger of contract (as distinguished from alteration of the instrument without consent), see Contracts, VIII, and cross-references there found.
General presumptions against spoliator or suppresser of evidence, see Evidence, II.
Amendment of or tampering with papers in proceedings of judicial or administrative nature, see topics treating of the paper or proceeding, e. g., Pleading; Drains, II, A (alteration of petition); Elections.

§ 2. Authorship of or consent to alteration.

See also post ¶ 17.
Subsequent consent as curing alteration, see post § 11.
Presumptions and evidence, see post §§ 12, 13.
Questions for jury and instructions, see post § 14.

¶ 1. Whether an oral statement made by the maker to the holder of a promissory note, during negotiations after maturity, for an extension of time for payment, directing him to "make the note ten per cent," imported an authority actually to alter the note as to the rate of interest, quere.—Swift v. Barber, 28 Mich. 503.

¶ 2. The act of one of two joint lessees in striking out an objectionable provision at the lessor's instance after it had been signed by both invalidates it as to the other lessee unless ratified.—McPherson v. Pinch, 119 Mich. 36.

§ 3. ——Act of third persons.

See also post ¶ 28.

¶ 3. One's contract is not avoided by a material alteration made therein without his express or implied authority by his agent.—White Sewing Machine Co. v. Dakin, 86 Mich. 581.

¶ 4. A bond is not avoided by a material alteration made, without express or implied authority, by the agent of the obligee.—White Sewing Machine Co. v. Dakin, 86 Mich. 581.

§ 4. ——Filling in spaces left blank.

Materiality of written in words, see post § 8, ¶¶ 14, 16.
Provisions of Negotiable Instruments Law, see Comp. L. 1915, § 6055.

¶ 5. The indorsement of a note subsequent to the indorsement thereof in blank by the payee named therein is not a material alteration as contemplated by the Negotiable Instruments Law, Pub. Acts 1905, Act 265, sec. 127, subd. 4, How. 2nd Ed., § 2798.—Ensign v. Fogg, 177 Mich. 317.

§ 5. Intent and purpose of alteration.

Alterations by third persons and agents, see ante § 3.

¶ 6. Where a note given for a debt was incorrectly dated by mistake, and the payee, without fraudulent intent, corrected the mistake, and after such change the maker made two payments on the note, and was not deceived by the alteration, the subsequent payments removed the presumptive effect of the alteration.—Johnson v. Johnson's Estate, 66 Mich. 525.

§ 6. Materiality and method.

Filling blanks, see ante § 4.
What constitute material alterations in negotiable instruments, see Comp. L. 1915, § 6166.
Striking out indorsements on paper under Negotiable Instruments Law, see Comp. L. 1915, § 6089.

¶ 7. An alteration which does not change the effect of a written contract is immaterial, and will not preclude recovery in a suit upon the contract.—Prudden v. Nester, 103 Mich. 540.

¶ 8. The signing of an extension note by the debtor, for whose benefit the instrument was given, after it comes into the possession of the payee, is not a material alteration.—Union Banking Co. v. Martin's Estate, 113 Mich. 521.

§ 7. ——Changing parties or negotiability.

Adding indorsements, see also ante ¶ 5.

¶ 9. A note was indorsed by the payee and by another person. The maker, in good faith, but without the knowledge or consent of the indorsers, inserted the name of the second indorser as payee in the body of the note, and discounted it. Held, that the alteration released both indorsers.—Aldrich v. Smith, 37 Mich. 468.

¶ 10. The insertion of the words "or bearer" in a promissory note expressly made subject to the conditions of a mortgage that is payable only on certain contingencies is an immaterial alteration; it does not change the note's legal effect.—Goodenow v. Curtis, 33 Mich. 505.

¶ 11. The insertion in a promissory note after the note has been signed and delivered of the words "or bearer" is not a material alteration, and does not avoid an indorser's liability.—Weaver v. Bromley, 65 Mich. 212.

¶ 12. The principal maker of a note is not injured by having the name of a surety added

without his consent, and such addition does not invalidate the note.—Miller v. Finley, 26 Mich. 249; Gano v. Heath, 36 Mich. 441.

§ 8. ——Changing amount, time or terms.

¶ 13. The insertion in the formal part of a bond, the penalty and conditions of which are fixed by its terms, of a promise to pay ten per cent attorney's fees in case of suit on the bond, is an immaterial alteration, such promise being no part of the penalty and not affecting the judgment to be rendered in case of suit, or the amount of damages to be assessed.—White Sewing Machine Co. v. Dakin, 86 Mich. 581.

¶ 14. Where a promissory note is drawn upon a printed blank, the payee or subsequent holder, without the knowledge or consent of the maker, adds the written words and figures "10 per cent" after the printed words "with interest at" at the end of the instrument, this act renders the note void, and constitutes a valid defense in favor of the maker, even against a bona fide purchaser of the note. In an action brought upon such altered note the maker cannot be held liable to pay the amount of the note as originally drawn.—Holmes v. Trumper, 22 Mich. 427.

¶ 15. The addition of the word "annually" to the interest clause of a note, made payable in less than two years, is not a material alteration, and does not change the liability. It only shows that the interest is to be earned at the stipulated rate by the year, and does not require an instalment of it to be paid at the end of the year from the date of the note.—Leonard v. Phillips, 39 Mich. 182.

¶ 16. The insertion of the figure "7" in a blank space left in the interest clause in a note does not change the note's legal effect, and is not a material alteration.—First Nat. Bank v. Carson, 60 Mich. 432.

¶ 17. Where there is no evidence in an action on a promissory note that plaintiff made an alteration and was not a holder, in due course, for value before maturity, under the Negotiable Instruments Act, Pub. Act 1905, Act 265, sec. 126, How. 2nd Ed., § 2797, an alteration in the date will not defeat recovery.—Ensign v. Fogg, 177 Mich. 317.

¶ 18. In an action on a note where it is alleged that plaintiff, the payee, raised the amount thereof after its execution and changed the time of payment an instruction that no recovery can be had if either change was made is warranted.—Baird v. Salnave, 174 Mich. 409.

§ 9. ——Cancellation or detachment of paper.

¶ 19. A memorandum written under a promissory note, qualifying its obligation and delivered with it, is a part of the contract; and its destruction is an alteration that vitiates the note even in the hands of a bona fide holder.—Wait v. Pomeroy, 20 Mich. 425.

¶ 20. Where, contemporaneously with the assignment of a contract upon which the assignor claimed the sum of $5,000 was due to him, he executed to the assignee a writing to the effect that he anticipated the debt would be paid at once upon the happening of a certain event, and that in case it were not paid he could, and if called upon by the assignee, would show good cause for payment, but that he did not guarantee it, held that as the clause negativing guaranty did not relieve the assignor from any obligation to be deduced from the writing, the removal of it was an immaterial alteration.—Prudden v. Nester, 103 Mich. 540.

¶ 21. In an action on the common counts based on a school order regular and valid on its face, evidence of further printed matter attached thereto at the time of execution which made the validity of the order dependent upon a vote of the district, which printed matter had been removed before negotiation, is sufficient to show an alteration rendering the instrument void.—First Nat. Bank of Cassopolis v. Carter, 138 Mich. 421.

¶ 22. The detachment by the vendor of a portion of a conditional sale contract so as to make it a negotiable promissory note, is a material alteration which will avoid the entire contract.—Toledo Scale Co. v. Gogo, 186 Mich. 442.

§ 10. Effect; defense to action.

Alteration by third person without authority, see ante ¶¶ 3, 4.

As against bona fide holder, see also ante ¶ 19.

Release of other parties, see also ante ¶ 9.

Presumption against spoliator of evidence, see Evidence, II.

Effect on liability of secondary parties of change in or extension of terms of primary party's contract, see Guaranty; Suretyship; Indemnity and Contribution; Negotiable Instruments.

Admissibility of writings apparently altered, erased, or otherwise become questionable, see Evidence, VIII.

That appellate court need not consider whether an instrument was delivered, if it appears to have been altered after delivery, see Appeal and Error, XII.

Under Negotiable Instruments Law, see Comp. L. 1915, § 6165.

¶ 23. The writing of a word over an erasure in a deed may or may not be suspicious. Where the circuit judge, with the deed before him, has proceeded on the assumption that the erasure was not suspicious, a court of review will not say, without inspection, that

he has erred.—Munroe v. Eastman, 31 Mich. 283.

¶ 24. Where a note is fraudulently altered by the payee the maker is no longer charged even as against a bona fide holder for value. —Holmes v. Trumper, 22 Mich. 427.

¶ 25. Any material alteration in a note without the consent of the party responsible on it and affected by it will destroy it as to him.—Miller v. Finley, 26 Mich. 249.

¶ 26. The addition of an interest clause to a promissory note without the consent of the indorser releases the latter even as against a bona fide holder for value. And this applies to accommodation notes indorsed in blank.—Bradley v. Mann, 37 Mich. 1.

¶ 27. Forgery of a negotiable instrument or the indorsement thereon, except in case of ratification or estoppel, nullifies such instrument as to all parties against whom the forgery is committed; and this is true of paper which is altered in a material part. —First Nat. Bank of Durand v. Shaw, 149 Mich. 362.

¶ 28. The effect of a valid deed cannot be destroyed by an unauthorized interlineation thereof by a third person.—Young v. Young, 157 Mich. 80.

§ 11. ——Cure by restoration, ratification or acknowledgment.

¶ 29. An indorser's consent to the alteration of paper need not be in writing.—Stewart v. First Nat. Bank, 40 Mich. 348.

¶ 30. Three notes drawn to the same payees were indorsed by all of them, but, after one had been negotiated, two of the indorsers were allowed to have their names erased. This was done with the consent of all the indorsers but one, and he, on being informed of it, recognized his liability on the paper. Held, that he thereby ratified the alteration of the first note and authorized the negotiation of the other two with the same change.—Stewart v. First Nat. Bank, 40 Mich. 348.

¶ 31. The presumptive effect of alteration of a note is removed by payments by the maker who was not deceived.—Johnson v. Johnson's Estate, 66 Mich. 525.

¶ 32. Since the statement under the circumstances did not amount to a misrepresentation of fact, there is no estoppel to assert that a note was raised from $500 to $3,500, where the purchaser informed an indorser that he had taken a certain person's note so indorsed and of that amount, to which the indorser replied that he did not remember indorsing a note for that amount, but that if his name is on the back it is good, and will be paid, and asked when it would mature, which the holder told him subsequently, on which occasion the indorser stated he was glad the purchaser had it, and asked him to take other paper.—Pearson v. Hardin, 95 Mich. 360.

§ 12. Pleading and evidence.

Presumption, see also post ¶ 45.
Necessity of showing responsibility, see also ante ¶ 17.
Evidence probative of alteration, see also post ¶ 48.
Effect of paying on instrument after change, see also ante ¶ 6.
Remedy to cancel or reform instruments for invalidity, see Rescission and Cancellation; Reformation.
Presumption on appeal or error that trial judge inspected writing when passing on suspiciousness of erasure, see Appeal and Error, XII, C.

¶ 33. Where there are alterations and interlineations on a deed it is presumed they were made before execution and the party attacking the instrument has the burden of showing otherwise.—Arnold v. Brechtel, 174 Mich. 147.

¶ 34. Where there is nothing suspicious on the face of an instrument, such as a deed or note, beyond the fact that an erasure is manifest, the presumption is that the alteration was made before execution.—Connery v. Connery, 175 Mich. 544; Newland v. First Baptist Church Soc. of Bellevue, 137 Mich. 335; Ensign v. Fogg, 177 Mich. 317.

¶ 35. Alterations are suspicious, upon the face of an instrument, when they appear to be beneficial to the person claiming rights under it.—Wilson v. Hotchkiss' Estate, 81 Mich. 172.

¶ 36. An agreement indorsed upon a note and changing the rate of interest thereon, if made while the note is in the owner's possession, and stamped with an internal revenue stamp, is presumed to have been made by the owner or by his authority, even if not signed.—Baent v. Kennicutt, 57 Mich. 268.

¶ 37. Defendant in an action on a note does not have the burden of showing whether the printed words "after due" were erased before or after its execution; it is for plaintiff to show that defendant executed and delivered the note in the shape in which he had produced it and declared upon it.—Willett v. Shepard, 34 Mich. 106.

¶ 38. Where the question is whether a promissory note sued upon has been altered,

it is proper for the court sitting without a jury to subject the note to a critical examination, and to use magnifying glasses for the purpose.—Morse v. Blanchard, 117 Mich. 87.

¶ 39. Where the defense to an action on a promissory note is that the note has been altered, some of the alleged alterations being printed words standing in the note as produced, the testimony of the printer at whose office the blank was printed is relevant to show that it was originally printed as it then appeared.—Hunter v. Parsons, 22 Mich. 95.

¶ 40. In action against defendant bankers for recovery of a deposit, where the issue was whether an indorsement of a deposited certificate was for the account of a firm or was in blank and the deposit for plaintiff's individual account, plaintiff claiming that it had been altered without her consent so as to be for account of the firm; one of the defendants having testified that, when plaintiff indorsed the certificate, she told him that her husband had sent word that he wanted the money placed to the credit of the firm of which he had been a member, plaintiff called her husband, and he was asked if he had sent such word to his wife, and replied that he had not. Held, that this testimony was admissible as bearing upon the probabilities of defendant's claim that it belonged to the firm.—Eherenkrook v. Webber, 100 Mich. 314.

¶ 41. Where, upon the question whether the note in suit had been raised from $500 to $3,500 by one defendant after the other defendant had indorsed it, the indorser testified that at the time he indorsed it he also indorsed two other notes, and that each of the three was for $500, evidence that the other two notes were raised to $3,500 and $4,500 respectively was inadmissible, it being an attempt to prove one forgery by other forgeries.—Pearson v. Hardin, 95 Mich. 360.

§ 13. ——Explanation and rebuttal.

Use of microscope, see ante ¶ 38.
Instruction as to explanation, see post ¶ 54.

¶ 42. When there are circumstances and appearances rendering an alteration in a written contract suspicious the party relying upon the contract as altered is bound to explain it before he can recover.—Sheldon v. Hawes, 15 Mich. 519.

¶ 43. Alterations of negotiable paper in a material part, made by the holder in the absence and without the knowledge of the maker, ought not to be sustained except upon very clear proof that, when actually made, they had the assent of the party to be charged.—Swift v. Barber, 26 Mich. 503.

¶ 44. A plaintiff who presents a traveler's check showing a line drawn through the counter-signature, is required to explain the alteration.—Samberg v. American Exp. Co., 136 Mich. 639.

¶ 45. Where alterations in a written instrument appear upon their face to be suspicious, explanatory testimony must be given before the instrument is admissible in evidence; but if no suspicion is raised from inspection, the alteration is presumed to have been made prior to the execution of the instrument.—Wilson v. Hotchkiss' Estate, 81 Mich. 172.

¶ 46. Where, upon the question whether the note in suit had been altered by defendant maker, after defendant H. had indorsed it, there was evidence that it had been written by the maker and signed by both defendants, and an expert had testified that such note had the appearance of having been all written at one time and by the same pen, ink and hand, and that in his opinion it was so written, it was admissible to be scrutinized by the jury, and to form the basis of a verdict if found genuine.—Pearson v. Hardin, 95 Mich. 360.

§ 14. Jury questions and instructions.

See also ante ¶ 18.

¶ 47. After an instrument is admitted in evidence, the question whether alterations or erasures were made before or after its execution is for the jury.—Wilson v. Hotchkiss' Estate, 81 Mich. 172.

¶ 48. Evidence that a note when signed was payable in two years, but when produced in court appeared to be payable in four months, tends to show an alteration, and the defendant has a right to have the question submitted to the jury; it is not to be assumed that the question of alteration can always be determined by inspection.—Jourden v. Boyce, 33 Mich. 302.

¶ 49. The genuineness of a deed, a part of which seems to have been written over an erasure, is a question for the jury in the light of explanatory evidence.—Comstock v. Smith, 26 Mich. 306.

¶ 50. A directed verdict in an action upon a note, the defense being that the note had been altered after it was signed, is improper where there is evidence from which the jury might find that the note had not been altered.—Weidman v. Symes, 120 Mich. 657.

¶ 51. In action on a promissory note which had been altered after execution by the eras-

ure of the words "after maturity" in the clause providing the payment of interest, which alteration the defendant denied having authorized, testimony of the payee's wife that she was in and out of the room while the maker and payee were discussing certain notes, and that she heard their conversation, but that she could not identify the note in issue, held, not to warrant submitting a case to the jury on the theory that the maker of the note sued on told the payee to alter it or that he approved of his doing so after the fact.—Nelson v. Dutton, 51 Mich. 416.

¶ 52. Where an accommodation maker sued upon a note testifies that it was altered after he signed it, the question whether an alteration had been made was for the jury, not for the court.—Weidman v. Symes, 116 Mich. 619.

¶ 53. Plaintiff, John S. Fors, Jr., and his father, the defendant, John S. Fors, went to a scrivener to have a deed executed. The deed as to the name of the grantee, contained two interlineations, an "S" between the words "John" and "Fors," and the word "Jr." after the word "Fors." The evidence was conflicting whether the insertions were made before or after the execution of the deed. In an action of ejectment, held, that the question was for the jury.—Fors v. Fors, 159 Mich. 156.

¶ 54. A charge to the jury stating that every alteration on the face of a written instrument detracts from its credit, and concluding "that if the plaintiff, claiming under a deed that had apparently been altered, failed to explain this appearance to the satisfaction of the jury so as to remove the suspicion, they are to take this into consideration as evidence tending to show that the deed in its present form is not genuine," is erroneous as implying that, after all the facts were submitted and were insufficient to satisfy the jury that the writing was genuine, the plaintiff's failure to satisfy them would merely "tend" to show that it was so erroneous.—Comstock v. Smith, 26 Mich. 306.

¶ 55. Where, after plaintiff has shown a prima facie case against defendant in respect to a change of the date of payment in a lease, the burden of proof is shifted to defendant to show that a change was intentional, it is error for the court to refuse, when requested, to charge the jury accordingly.—Stevens v. Pendleton, 94 Mich. 405.

¶ 56. In an ejectment suit, the question was whether the scrivener who drew a certain deed made alterations in the name of the grantee after its execution. The court instructed the jury that for them to find that the scrivener made such alterations would implicate him for forgery. Held, this instruction was an expression of the opinion of the court prejudicial to the claim of the defendant, who contended that such alterations had been made subsequent to the execution.—Fors v. Fors, 159 Mich. 156.

¶ 57. On an issue as to whether an agent of the payee of a note was authorized to consent to an indorsement of receipt in full from two of the several makers, on their paying a portion of the face of the note, evidence showing such indorsement in the presence of the agent, that he thereafter took the note to his principal, that the latter brought the note back to such makers, without repudiating the authority of the agent, but to request an alteration of the form of the indorsement so as to make the note negotiable, was sufficient to authorize an instruction on the effect of such alteration made by one of such makers without the consent of the other.—Custard v. Hodges, 155 Mich. 361.

ALTERNATIVE.

Cross-References.

Alternative—

See generally topic treating of the subject-matter of the alternative or election. e. g., Election and Waiver; Contracts (options and alternative provisions); Sales; etc.

Pleading in the alternative, see Equity, VII; Pleading; Indictment; and see also as to applications couched in alternative, Attachment, IV, A; Injunctions; Mandamus; etc.

Relief, judgment or verdict and findings in alternative, see Equity, X; Judgments; Verdicts and Findings; and specific topics like Injunctions; Specific Performance; Rescission and Cancellation.

Reversal of judgment alternative to imposed conditions, see Appeal and Error, XIII, B.

Remedies, see Election and Waiver; and see topics like Assumpsit (waiver of tort); Contracts, X; Sales.

Writs, see Mandamus; Prohibition; Injunctions.

AMBASSADORS AND CONSULS.

TREATS of the status, rights and privileges of foreign ministers and the consuls of foreign states.

As to the power of consuls or consular officers to take depositions, see Comp. L. 1915, § 12494; and see Depositions.

Power to take acknowledgments of deeds, see Comp. L. 1915, § 11697; and see Acknowledgments.

Procedure in course of administration to notify consuls where foreign heirs or next of kin or legatees are concerned, see Comp. L. 1915, § 13837; and see Estates of Decedents, III, B.

AMBIGUITY to AMERICAN EXPERIENCE TABLE.

Cross-References.

Ambiguity—
- See generally topics treating of the document questioned, e. g., Contracts; Deeds; Wills.
- In statutes, see Statutes; Constitutional Law.
- In pleadings and instructions, see Pleading; Equity, VII; Indictment; Instructions.
- Statements as basis for fraud or estoppel or election, see Fraud; Estoppel; Election and Waiver.
- Saving objection for review by calling for clearer ruling, see Saving Questions for Review.
- In election ballots, see Elections.

Amendments—
- See generally topics treating of the writing or proceeding in question. It is impracticable to collect references and not helpful, but see for example Pleading; Stautes; Constitutional Law; Corporations, IV; Contracts, VIII; Indictment; Judgments; Municipal Corporations, II, V.
- Cure of errors and aider of pleadings, see Harmless Error; Pleading, XI.

American Experience Table—
- Use in estimating expectancy and damages, see Damages; Death by Wrongful Act.
- Valuation of life estates, see Life Estates. See the table in Comp. L. 1915, § 9356.

AMICUS CURIÆ.

TREATS of attorneys in their capacity of friends of the court and not as representatives of the litigant parties advising the court on their own motion or on leave so to do.

¶ 1. An attorney whom the court has barred from aiding in the prosecution may, as amicus curiæ, offer a proper suggestion; e. g., that respondent plead to the information.—People v. Gibbs, 70 Mich. 425.

AMOTION to ANGUISH.

Cross-References.

Amotion of Officers, see Corporations; Associations; Fraternal Beneficiary Associations.

Amount in Controversy—
- As giving jurisdiction, see Courts, V; Equity; Justices of the Peace.
- As controlling right to costs, see Costs.

Amusements, see generally Exhibitions and Shows; Sunday.

Anarchy and Sedition, see Crimes; Indictment.

Ancestors, see Descent; Wills; Evidence, VII, C (privity to admissions).

Ancient Documents, see Evidence, VIII, A.

Ancillary Letters, see Estates of Decedents; Guardianship; Receivers; Trusts.

Ancillary Proceedings, see Equity; and see Injunctions; Receivers; Accounting Suits; and topics treating of the principal proceeding.

Anguish, as element of damages, see Damages.

ANIMALS.

TREATS of the general law of animals and the rights, duties and liabilities incident to ownership or keeping of them, but excludes contracts relating to hiring, selling, mortgaging, or pledging animals (see Bailments, Chattel Mortgages, Sales, Pledges), crimes upon or against or relating to them (see Crimes and Punishments), and negligence or other torts in using animals or property endangering them (see Highways, Railroads, Street Railways).

Analysis.

§ 1. In general; status and ownership.
§ 2. Keeping and custody; public regulations.
§ 3. Licenses and penalties.
§ 4. Estrays and impounding.
§ 5. ——Sale of impounded estrays.
§ 6. Trespass on land by animals.
§ 7. ———Distraint and procedure thereon.
§ 8. ——Appraisal and sale of beasts.
§ 9. ——Damages and penalties for trespass.
§ 10. Rescue from distraint.
§ 11. Remedies for unlawful distraint.
§ 12. Injuries by animals, liability for.
§ 13. ——Vicious animals.
§ 14. ——Actions and pleading.
§ 15. ——Burden of proof and evidence.
§ 16. ——Evidence as to viciousness and scienter.
§ 17. ——Jury questions and instructions.
§ 18. Killing or injuring animals as tort or crime.
§ 19. Killing or injuring in defense of person or property.
§ 20. Actions for injuries to animals.
§ 21. Animal health and quarantine.
§ 22. Liability for spread of disease.
§ 23. Veterinary practice and treatment.
§ 24. Agistment and breeding contracts.
§ 25. Cruelty and other crimes respecting animals.

§ 1. In general; status and ownership.

Animals as game, see Fish and Game.

Increase of animals as accession to property, see Accession, ¶ 2.

Buyer's rights to increase of animal bred on shares, see Sales.

Mortgage on animal as including increase, see Chattel Mortgages, I. B.

¶ 1. An animal is any animate being which is not human, endowed with the power of voluntary motion.—Holcomb v. Van Zylen, 174 Mich. 274.

¶ 2. The ownership of live stock does not necessarily go to the person who owns what they feed on.—Burdick v. Michael, 82 Mich. 346.

¶ 3. Dogs have a value and are property. —Heisrodt v. Hackett, 34 Mich. 283; Ten-Hopen v. Walker, 96 Mich. 236.

§ 2. Keeping and custody; public regulations.

"Keeper" of dog within meaning of statute regulating liability for injury by such animal, see ¶¶ 57, 61, 91.

Keeper's lien upon animal for care and custody, see post § 24.

Licenses, see post § 3.

Prevention of the running at large of animals, see Comp. L. 1915, chap. 137, §§ 7285-7306.

Regulations and penalties for allowing male domestic animals to run at large, see Comp. L. 1915, §§ 7305, 7306.

¶ 4. In consequence of their liability to break through all discipline and act according to their original savage nature, and because also of their liability to madness, it has been customary always to make dogs the subject of special and peculiar legislation. —Van Horn v. People, 46 Mich. 183.

¶ 5. By the common law every person must keep his animals upon his own premises; he may use the public highway for passage, but not for pasturage, except opposite his own premises.—Robinson v. Flint & P. M. R. Co., 79 Mich. 323.

¶ 6. A resolution of the board of supervisors that Laws 1867, Act No. 185, How. St., §§ 2106-2113, making it unlawful for cattle, horses, sheep and swine to run at large upon the highways, "be made operative in the county, excepting the township of A.," was held sufficient to make it unlawful for any of these animals to run at large in the other towns of the county; but where the prohibition was not meant to reach all of these classes of animals it was held that under section 2107 a special resolution was necessary, designating particularly and prohibiting the particular class or classes of animals meant to be restrained.—Cook v. Bassett, 23 Mich. 113.

¶ 7. Laws 1867, Act No. 185, § 1 (How. St., § 2106), prohibits the running at large of cattle, etc., in public highways, and provides that the act "shall be inoperative only in those counties . . . in which it shall be so determined by the board of supervisors," and How. St., § 2113, provides that the act "shall not apply to that portion of the state lying north of the tier of townships twelve north, unless ordered by the board of supervisors"; hence in townships north of that tier the common-law rule prevails. —Robinson v. Flint & P. M. R. Co., 79 Mich. 323.

¶ 8. The term "running at large" in the statute as to cattle running at large in highways means "strolling without restraint or confinement; rambling at will," and does not apply when cows are eating in the view of their owner.—Eklund v. Toner, 121 Mich. 687.

¶ 9. The vote of a township making cattle, etc., free commoners, cannot confer upon individuals the right to graze horses, cattle, etc., on the road of a railway company in said township, the road being in law neither a public common nor an ordinary public highway.—Williams v. Michigan Cent. R. Co., 2 Mich. 259.

§ 3. Licenses and penalties.

Penalty for "going at large" upon highway as distinguished from trespass upon private property, see post ¶ 47.
Liability for injury by unlicensed dog, see post § 12.
Costs of keeping and impounding as penalty in estray proceedings, see post ¶ 22.
Assessing penal damages in distraint proceedings, see also post § 9.
Bounties for killing noxious animals, see Bounties.
Validity of dog tax law, see Constitutional Law; Taxes.
Licensing and taxing of dogs, see Comp. L. 1915, chap. 136.
Penalty for the running at large of animals, see Comp. L. 1915, chap. 137, §§ 7285-7306.
Fees for distraining and impounding, see Comp. L. 1915, chap. 243, §§ 14779-14795.

¶ 10. If any owner has complied with the provisions of the statute by having his dog properly licensed and collared, and by accident the collar is lost, he is entitled to a reasonable time to discover and make good the loss.—Heisrodt v. Hackett, 34 Mich. 283.

¶ 11. Comp. L. 1871, §§ 2066, 2067, How. St., §§ 2120, 2121, authorizing a supervisor to sue in the name of the township for the penalty imposed upon the owner of a dog for not killing it after he had been notified that it had bitten a person, does not empower a ward supervisor to bring such an action, where, under the city charter, the ward is a mere territorial division of the municipal corporation, with no treasury of its own and no capacity of suit.—Bixby v. Steketee, 44 Mich. 613.

§ 4. Estrays and impounding.

Duty to keep animals confined, see ante § 2.
What constitutes "running at large," see ante ¶ 8.
Estrays on unfenced land, see post § 6.
Applicability of impounding law to animals straying upon lands, see post § 7.
Distraint of animals trespassing on land, see post § 7.
Mode and place for confinement on distraint damage feasant, see post § 7.
Power of municipality to pass ordinances relating to estrays and impounding, see Municipal Corporations, IX.
Impounding of animals running at large, see Comp. L. 1915, chap. 137, §§ 7285-7306.
Distraining and impounding of animals, see Comp. L. 1915, chap. 243.

¶ 12. Cattle in anybody's charge are not "running at large," and, if on the highway, they are not trespassing on the premises of the adjacent owner; and so in neither case is he warranted in impounding them.—Bertwhistle v. Goodrich, 53 Mich. 457; Blanck v. Hirth, 56 Mich. 330.

¶ 13. The presence of cattle in the highway depasturing the herbage of adjacent owners is a grievance for which there may be a legal remedy; but it is not a nuisance that will warrant him in summarily impounding them on his premises.—Bertwhistle v. Goodrich, 53 Mich. 457.

¶ 14. It cannot be said as matter of law that cattle were "strolling without restraint or confinement, as wandering, roving, or rambling at will, unrestrained" within the meaning of the statute. where the corroborated testimony of the person last in charge of them was that she told her boy to turn them out, adding that she would drive them to pasture, that the boy did so and reported that she was detained momentarily and the cattle followed a road towards their pasture stopping to drink in a stream, but that they were in her sight all the time except while drinking, and were not on defendant's land, and that when they came up from drinking defendant was seen driving them off along the road.—Donley v. Fowler, 147 Mich. 288, affirming by divided court the ruling of the trial court on this point.

¶ 15. If cattle are running at large in a highway they are subject to restraint, regardless of knowledge thereof on the part of the owner or negligence upon his part. —Spiegel v. Straw, 196 Mich. 581.

¶ 16. The owner and occupant of land, in the highway opposite which animals are running at large may, under Comp. Laws 1897, § 5608, How. 2nd Ed., § 4351, distrain them. —Spiegel v. Straw, 196 Mich. 581.

¶ 16a. An owner and occupant of land having the right to distrain animals in the highway opposite his premises may do so either by his own act or that of his authorized agent.—Spiegel v. Straw, 196 Mich. 581.

¶ 17. No one but a resident freeholder of the township being authorized by Comp. L. 1857, § 1605, How. St., § 2063, to take up stray beasts, the act by any one else is a trespass which cannot afterwards be assumed and made lawful by a freeholder. Accordingly, where a minor son of a resident freeholder took up a stray beast without authority, and the father subsequently adopted the act, but stated that he should not himself have taken up the beast, it was held that the proceedings were unauthorized and the subsequent sale of the estray under the statute void.—Newsom v. Hart, 14 Mich. 233.

¶ 18. One assuming possession of an estray, the taking up of which was a trespass because the taker was not a freeholder entitled to do so, cannot justify the possession and subsequent acts, though, being a freeholder, the taking up would have been legal had he done it himself.—Newsom v. Hart, 14 Mich. 233.

¶ 19. It is immaterial whether a wife occupying land with her husband is an occupant of land within Comp. Laws 1897, § 5608. How. 2nd Ed., § 4351, so as to be authorized to personally distrain animals running at large in the highway opposite such land where she distrains such animals as an authorized agent of her husband.—Spiegel v. Straw, 196 Mich. 581.

¶ 20. Under How. St., § 8362, a written notice must be given by the person impounding beasts to the owner or person in charge of them if known and living within six miles from the place of impounding.—Jones v. Dashner, 89 Mich. 246.

§ 5. ——Sale of impounded estrays.

Sale of distrained animals, see post § 8.

¶ 21. A city ordinance prohibiting animals from running at large anywhere within the city limits is repealed by an amendatory ordinance that prohibits their running at large within such limits as the council may designate by resolutions, and provides for the repeal of all ordinances inconsistent therewith. Between the taking effect of the amendatory ordinance and the designation of the limits there is nothing to prohibit cattle from running at large anywhere in the city, and proceedings to take up and sell a horse found running at large in the city during that interval have no force to transfer title. —Lenz v. Sherrott, 26 Mich. 139.

¶ 22. Where a village charter authorizes the council to provide for the sale of estrays "for the penalty incurred, and the costs of keeping and impounding," the omission of the council to impose a penalty for the nuisance of stray beasts does not invalidate the pound ordinance; the costs here are not for enforcing the penalty, and in such a case the omission of some severable part of a legal penalty, in punishing a breach of the penal laws, cannot, generally, be a ground of complaint. Whether such costs and expenses are not properly a penalty imposed upon the owner of estrays for rendering necessary these proceedings in the abatement of a nuisance, quere.—Grover v. Huckins, 26 Mich. 476.

¶ 23. A provision in a village ordinance for the sale of estrays which the owner fails to reclaim, the purpose of the sale being to cover the costs and charges of impounding and keeping them, the surplus to belong to the owner, is not a forfeiture. For illegal seizure the owner may bring replevin.—Grover v. Huckins, 26 Mich. 476; and see Campau v. Langley, 39 Mich. 451.

¶ 24. Under a village ordinance requiring the pound-master to sell at public auction animals which have been impounded for a period of eight days and are unclaimed, and to give six days' notice of such sale, such notice cannot be given until the expiration of the eight days of impounding.—Barrett v. Rowe, 78 Mich. 648.

§ 6. Trespass on land by animals.

Right to distrain for trespass without damages, see post ¶ 33.

Impounding of estray animals, see ante § 4.

¶ 25. The act of 1847—Comp. L. 1857, § 628, as amended, How. St., § 817—gave no right or privilege to the owner of cattle to have them go upon another's unfenced lands, though it denied liability for damages by cattle on such lands.—Wood v. La Rue, 9 Mich. 158.

¶ 26. The cattle of other persons going upon another's unfenced lands are wrongfully there, and the owner of the land may drive them off by any of the ordinary means to which a prudent man would ordinarily resort.—Wood v. La Rue, 9 Mich. 158.

¶ 27. The act of 1847 had reference only to exterior fences. Where, therefore, one of two owners of adjoining lands put cattle upon his own lands, from which they entered upon the other's land—there being no partition fence—he was liable to an action therefor.—Johnson v. Wing, 3 Mich. 163.

¶ 28. Nonadjoining owners of lands are liable in all cases if their animals cross the land of another and go thence upon the adjacent lands of his neighbor, whether there is any partition fence or assignment thereof between the lands of the latter or not.—Aylesworth v. Herrington, 17 Mich. 417.

¶ 29. The authorization under 2 Comp. L. 1897, § 5606 et seq., by local authorities, of owners of cattle to allow them to run at large on highways, does not deprive a landowner of his right of action for trespass upon his unfenced land.—Collins v. Lundquist, 154 Mich. 658.

Liability of owner for injuries caused by trespassing fowls, see note, 6 N. C. C. A. 219-223.

§ 7. ——Distraint and procedure thereon.

Impounding of animals on highways, see ante § 4.

Act of agent taking up animals on highway, see ante ¶¶ 16a, 17, 19.

Necessity of claim of damages and penalty in notice, see post ¶ 46.

Collateral attack upon distraint proceedings, see post ¶¶ 49, 52, 53.

Dismissal or amendment where replevin bond is defective, see Replevin, IV.

Damages allowable to distrainer of animals trespassing, see Damages.

Distraining and replevying of beasts, see Comp. L. 1915, chap. 243.

¶ 30. The right of distress damage feasant existed at common law, and cannot, therefore, be called merely statutory and in derogation of the common-law rights of property.—Hamlin v. Mack, 33 Mich. 103.

¶ 31. Laws 1879, Act No. 248, How. St., § 3068, "to prevent animals from running at large in certain cities and villages," provides that they may be impounded if they do so "in any public street, lane, alley, park, place or highway," etc. Held, that when estrays have been caught trespassing on private property without having escaped thereto from some public place, they cannot be impounded under this act, which is distinct from the general law for distraining beasts doing damage.—Bates v. Nelson, 49 Mich. 459.

¶ 32. One has not a right to distrain cattle which, having been lawfully upon adjoining land, have escaped therefrom in consequence of his own neglect to maintain his part of division fences.—Cox v. Chester, 77 Mich. 494.

¶ 33. The mere fact that the occupant of land upon which a hog was trespassing told the wife of the owner of the animal at the time he notified her, in the absence of the husband, of its presence on his land, that the damage was nothing, has no tendency to establish that his claim of his rights under Rev. Stats. 1846, chap. 125, How. 2nd Ed., § 13744 et seq., relative to distraining of animals and payment for damage is a subterfuge and afterthought, and not made in good faith.—Spiegel v. Straw, 196 Mich. 576.

¶ 34. The statute relative to distraining and replevying beasts (How. St., § 8358) was intended to provide a summary remedy for any person injured in his land by certain enumerated beasts trespassing thereon.—Cox v. Chester, 77 Mich. 494.

¶ 35. The power to divest another of his property by a summary and ex parte proceeding—e. g., distraint—must be strictly pursued.—Newsom v. Hart, 14 Mich. 233; Hasceig v. Tripp, 20 Mich. 216.

¶ 36. Comp. L. 1897, § 10698, providing for appraisement of damages sustained in impounding stray cattle, necessarily implies that the party who impounded the cattle should be heard.—Miller v. Hoffman, 135 Mich. 319.

¶ 37. Entering cattle upon the town book and notifying a justice as required in the statute relating to estrays are unnecessary acts when cattle are taken damage feasant, and do not convert the latter proceeding into the former nor estop one from claiming that he sought the statutory remedy of distraining the cattle.—Blair v. Small, 55 Mich. 126.

¶ 38. Where one seizes an animal damage feasant and confines it immediately in his

own barn, there being no pound, he takes it out of the owner's possession and into his own custody, and this is enough to constitute a distress damage feasant.—Hamlin v. Mack, 33 Mich. 103.

¶ 39. Where there is no township pound the person taking any animal doing damage may lawfully impound it by keeping it in some suitable place in his premises.—Hamlin v. Mack, 33 Mich. 103.

¶ 40. Notice to the owner of an animal that it has been taken damage feasant and impounded is waived by the owner if he discovers the facts within the time allowed for giving notice and refuses to pay lawful damages.—Norton v. Rockey, 46 Mich. 460.

¶ 41. The owner of animals distrained damage feasant waives the written notice required by the statute by trying to get the animals, after learning all the facts, before the expiration of the time for giving such notice, and while the person distraining them is proceeding to take steps under the statute.—Parks v. Kerstetter, 113 Mich. 520.

¶ 42. In an action of replevin for sheep where the defense claimed that the sheep had been lawfully impounded, held that the fact that the defendant had sent his son, a school boy, to tell the wife of plaintiff that he had shut up the sheep, and the boy had told the son of the plaintiff of the fact, did not constitute such a notice as is implied by How. St. § 8362, to be written.—Jones v. Dashner, 89 Mich. 246.

¶ 43. One distraining a hog trespassing on property occupied by him must be deemed as a matter of law to be distraining it in good faith under the provisions of the statute, Rev. Statutes 1846, chap. 125, How. 2nd Ed., § 13744 et seq., where he finds the hog trespassing upon his premises, shuts it up, goes to the home of the owner, and finding him absent, notifies his wife, and requests her to have her husband come over as soon as he returns, and in a few hours the owner receives actual notice of the hog's detention, and, upon the owner not calling as requested, gives him a written notice of distraining of the animal and demands payment for damages for care and expense, and later causes the amount due to be determined, even though he told the owner's wife at the time of the interview that the damage was not anything.—Spiegel v. Straw, 196 Mich. 576.

§ 8. ——Appraisal and sale of beasts.

Notice of distraint, see ante § 7.

¶ 44. The nephew of a distrainer is not a "disinterested person" to whom a warrant of appraisement may issue to appraise beasts taken damage feasant; and an appraisement by him would be void. Whether a justice may issue such warrant to his step-son, quere. —Hasceig v. Tripp, 20 Mich. 216.

¶ 45. One who takes no part in proceedings to appraise his beasts taken damage feasant does not waive any objection that may exist to appraisers summoned.—Hasceig v. Tripp, 20 Mich. 216.

§ 9. ——Damages and penalties for trespass.

Admissions of no damages as affecting right to distrain, see ante ¶ 33.

¶ 46. Even if one who distrained hogs, which having been at large in the public highway trespassed upon his land, was entitled to the penalty of ten cents per head provided by Comp. L. 1897, §§ 10688, 10689 (a point not determined), he waived his claim by failing to state in his notice that he claimed that he impounded the hogs because they had been in the highway (Comp. L. 1897, § 10695).—Miller v. Hoffman, 135 Mich. 319.

¶ 47. One who distrained hogs because they trespassed upon his lands, acted upon the authority contained in Comp. L. 1897, § 10691, and was not entitled to the penalty of ten cents a head provided under sections 10688 and 10689 for distraining cattle for going at large contrary to law, or contrary to any by-law of a township.—Miller v. Hoffman, 135 Mich. 319.

§ 10. Rescue from distraint.

Rescue from distraint see Comp. L. 1915, §§ 14793-14795.

¶ 48. Positive violence or menacing words are not necessary elements to a rescue of an impounded beast. It is sufficient to take away the animal and set it at liberty contrary to law.—Hamlin v. Mack, 33 Mich. 103.

¶ 49. One who is sued for rescuing an impounded animal cannot, under Comp. L. 1871, § 6782, How. St., § 8371, call in question the statutory regularity of the distrainer's proceedings, but is remitted to his action of replevin.—Hamlin v. Mack, 33 Mich. 103.

§ 11. Remedies for unlawful distraint.

See also ante ¶ 49.
Legality of distraint, see ante § 7.
Good faith of distraint, see ante ¶ 43.
Evidence, see also ante ¶ 14.
Replevin for animals, whether the statutory replevin for beasts distrained or the general action of replevin, will be treated in Replevin.
Remedy for distraint, see Comp. L. 1915, § 14795.

¶ 50. Trover will not lie for an animal taken damage feasant and detained by the injured party—there being no pound in the township—if the owner is notified, or other-

wise ascertains the animal's whereabouts and the cause of its detention, within twenty-four hours, and refuses to pay reasonable damages.—How. St., ch. 289; Norton v. Rockey, 46 Mich. 460.

¶ 51. The special proceeding in replevin to test the validity of the restraint of a trespassing animal provided in Revised Statutes 1846, chap. 125, How. 2nd Ed., § 13744 et seq., is exclusive, and trover for property taken damage feasant does not lie.—Spiegel v. Straw, 196 Mich. 576.

¶ 52. In an action of trover for the conversion of a hog, which defendant claimed that he had restrained under the statute, held that the question of irregularities in the distraint proceedings could not be considered, as the question was whether his claim was made in good faith.—Spiegel v. Straw, 196 Mich. 576.

¶ 53. The regularity of proceedings for the distraint of an animal cannot be inquired into in an action of trover, and can be tested only in a special action of replevin under Comp. Laws 1897, § 10688 et seq., How. 2nd Ed., § 13744 et seq.—Spiegel v. Straw, 196 Mich. 581.

§ 12. Injuries by animals, liability for.

Necessity of knowledge of viciousness and proof thereof, see post §§ 13, 16.
Burden of proof, evidence, and instructions, see post §§ 15-17.
Liability for injuries done by animals at large on the highway, see Highways, XIII, B.
Liability of master to servant injured by animal, or for act of servant resulting in injury to other party by animal in custody of servant, see Master and Servant.
Liability for domestic animals killed by dog, see Comp. L. 1915, chap. 136.

¶ 54. Laws 18973, Act No. 195, permitting "any person" and requiring police officers to kill dogs not licensed and collared, did not operate so as to exempt from liability one whose dog killed another's.—Heisrodt v. Hackett, 34 Mich. 283.

Liability of owners of domestic animals for injuries to trespassers or licensees, see note, 8 N. C. C. A. 953-959.

§ 13. ——Vicious animals.

Evidence and proof, see post § 16.
Scienter by notice to agents, see Agency ¶¶ 436, 437.
Double damages, see Damages.
Constitutional power of legislature to impose double damages, see Constitutional Law, III et seq.
Taking or allowing vicious or unruly animals to be on highway as misuse of way, see Highways, XIII.
Estoppel to deny ownership of vicious dog, see Estoppel, III.

¶ 55. When it appears that a dog is vicious, and has a propensity to do mischief, and the owner or keeper has notice thereof, either express or implied, the law imposes the duty upon such owner or keeper of keeping such animal secure, from which duty a liability arises in favor of any person who without fault on his part is injured by such animal either in person or property.—Knowles v. Mulder, 74 Mich. 202.

¶ 56. Comp. L. 1897, § 5593, making the owner or keeper of a dog liable if the dog "shall assault or bite or otherwise injure any person traveling," does not indicate that it is essential to recovery that the person must be bitten by the dog, and therefore a person injured through the kick of a horse which was attacked by a dog, is entitled to recover against the keeper of the dog.—Jenkinson v. Coggins, 123 Mich. 7.

¶ 57. Under Comp. L. 1897, § 5593, the owner of a dog is not liable for damages to the person bitten where said dog is in the keeping of another person.—Wetzel v. Bolster, 169 Mich. 43.

¶ 58. One who keeps an untamed and savage bear in hotel grounds frequented by the public is chargeable with a higher duty than if the locality were more private; and evidence as to how the grounds are occupied and used is admissible in a suit to recover for injuries from plaintiff's being bitten by the bear both to show negligence and to show the public character of the place.—Marquet v. LaDuke, 96 Mich. 506.

¶ 59. Where, in an action brought to recover for injuries received from the bite of a dog, the facts concur of previous manifestations of malicious disposition by the dog, and knowledge or notice of this fact in the keeper, the general peaceable disposition of the animal from thence on becomes immaterial.—Kennett v. Engle, 105 Mich. 693.

¶ 60. The injury from the bite of a rabid dog is one of inevitable accident for which the owner is not liable unless, having reason to know of the dog's condition, he neglected to restrain or destroy him.—Elliott v. Herz, 29 Mich. 202.

¶ 61. In an action under How. St., § 2119, against the owner of a vicious dog to recover double damages for its biting a child, the declaration alleged that defendant was "the keeper" of the dog, but it appeared that the dog had been enticed away from defendant, who owned it, by plaintiff's father, and was living on his premises at the time of the

injury. Held, that plaintiff's father was the "keeper" and defendant was not liable.—Burnham v. Strother, 66 Mich. 519.

¶ 62. A keeper of a vicious dog is not relieved from liability, where a child is attacked, because of the fact that servant girls disobeyed his instructions in taking the dog into the home of the child, as the statute (Laws 1850, No. 161, § 2; Comp. L. 1897, § 5593) imposing liability, extends the common law so as to include all keepers of dogs, and dispenses with proof of previous knowledge of their vicious character, and the negligence of a third person cannot be held to relieve the keeper.—Fye v. Chapin, 121 Mich. 675. Writ of error dismissed in 179 U. S. 127, 45 L. ed., 119, 21 Sup. Ct. Rep. 71.

¶ 63. Plaintiff was bitten by a dog belonging to defendant, but which at the time was in the keeping of one Bock. Plaintiff's attorney visited defendant prior to starting a suit with a view to obtaining a settlement. Plaintiff knew at that time that defendant was the owner of the dog. Defendant stated that he did not wish Bock to have any trouble in the matter and that he assumed all the responsibility. Plaintiff in his declaration sued on the theory that defendant was the owner and keeper of the dog. Held, plaintiff could not recover against defendant on the theory that the latter was estopped to deny liability.—Wetzel v. Bolster, 169 Mich. 43.

Injury by vicious animal to person visiting owner's premises on business errand, see note, 6 N. C. C. A. 380-388.

Liability for personal injuries by animals ferae naturae, see note, 3 N. C. C. A. 92-104.

Liability for personal injury sustained from attack of dog, see note, 5 N. C. C. A. 721-734.

§ 14. ——Actions and pleading.

See also ante ¶ 61.

For injuries to animals, see post § 20.

General law of pleading and practice, see Pleading; Instructions; Trial; and the like.

Choice of remedies for injuries in general, see Election and Waiver.

Damages recoverable and measure thereof, see generally Damages.

Double damages for destruction of sheep by dogs, see Damages, VII.

Knowledge of viciousness as evidence bearing on damages where scienter is not material, see Damages, V.

Liability of township for damages for killing of sheep, and ascertainment of same, see Townships.

¶ 64. Comp. L. 1871, § 2065, How. St., § 2119, giving a right of action for certain injuries done by dogs, does not supersede common-law actions.—Monroe v. Rose, 38 Mich. 347.

¶ 65. A declaration in an action under Comp. L. 1871, § 2065, How. St., § 2119, for an injury caused by a dog must aver that it was so caused and must set it forth under the statute.—Monroe v. Rose, 38 Mich. 347.

¶ 66. In declaring under How. St., § 2119, for damages for injuries sustained from a vicious dog, plaintiff need not aver that defendant previously knew the vicious habits of his dog.—Newton v. Gordon, 72 Mich. 642.

¶ 67. Whoever keeps an animal accustomed to attack and injure mankind, with knowledge that it is so accustomed, is prima facie liable in an action on the case at the suit of any person attacked and injured, without any averment of negligence or default in the securing and taking care of it; and the place of keeping need not be alleged.—Brooks v. Taylor, 65 Mich. 208.

¶ 68. A man was traveling the public highway in a sulky, driving with one hand, and with the other leading a mare that was followed by its colt. A dog rushed out of a house by the roadside and bit the colt, which jumped towards the sulky, put one leg through a wheel and upset it, whereby the man was injured. Held, that whether, under Comp. L. 1871, § 2065, How. St., § 2119, the man could have recovered at all for his personal injury, he could not do so without distinctly averring that the injury was caused by the dog, and setting it forth as a cause of action under the statute, and without such claim in his declaration evidence of his personal injury is inadmissible.—Monroe v. Rose, 38 Mich. 347.

¶ 69. In an action for damages for personal injuries resulting from being bitten by the defendant's dog the declaration is sufficient if it alleges the vicious character of the dog by which plaintiff was bitten, its liability to bite persons and defendant's knowledge as to such disposition.—French v. Wilkinson, 93 Mich. 322.

¶ 70. In a suit for personal injuries suffered from the bite of a dog, a declaration which states that defendant kept vicious and ferocious dogs, knowing said dogs were accustomed to attack and bite mankind, sufficiently alleges that the dog in question had a propensity to bite mankind.—Slater v. Sorge, 166 Mich. 173.

¶ 71. A declaration for the value of chickens alleged to have been killed by defendant's dog need not allege that defendant negligently allowed the dog to run at large: averments that defendant was the dog's "owner or possessor," and that he well knew it to be mischievous and in the habit of killing fowls, are sufficient.—Snow v. McCracken, 107 Mich. 49.

¶ 72. A declaration in an action for injuries to a child bitten by a bear owned by defendant alleged that defendant occupied and controlled the premises where the bears were kept, and that he opened them to the general public, does not require proof that such grounds were owned by the public.—Marquet v. LaDuke, 96 Mich. 596.

¶ 73. In an action for injuries to plaintiff, a child, from being bitten by a bear kept by defendant in grounds contiguous to defendant's hotel through which ran a driveway opened to and used by the public, where the declaration alleged that there were public grounds surrounding the hotel through the public was freely allowed to pass, and that plaintiff was passing through such grounds when bitten, it was immaterial that there was no evidence to support the superfluous allegation that the bears could seize persons within the driveway.—Marquet v. LaDuke, 96 Mich. 596.

§ 15. ——Burden of proof and evidence.

¶ 74. One who keeps an untamed and savage bear in grounds frequented, with his acquiescence, by citizens, is charged with a greater degree of care than if the locality were more private; and evidence as to how the grounds are occupied and used is admissible in a suit to recover injuries received from being bitten by the bear, as bearing upon the question of defendant's negligence, and the alleged public character of the place. Marquet v. LaDuke, 96 Mich. 596.

¶ 75. In a suit for the injury of some colts by a dog, evidence to prove that plaintiff went to see the dog, and was denied the opportunity by defendant's wife, is admissible to show that plaintiff made efforts to find out whether the dog in question did the injury.—Meilke v. Schabble, 159 Mich. 163.

¶ 76. In an action for injuries to a child which was bitten by a bear alleged to have been kept by defendant upon premises occupied and controlled by him, evidence as to dealings with defendant for supplies for a hotel on such premises is admissible as tending to show his proprietorship.—Marquet v. LaDuke, 96 Mich. 596.

¶ 77. In a suit for the injury of some colts by defendant's dog, evidence to prove that no other dog in the township looked like the dog in question was admissible to establish defendant's dog as the one doing the mischief.—Meilke v. Schabble, 159 Mich. 163, 165.

¶ 78. In a suit for personal injuries from the bite of a dog owned by defendant's wife, proof that defendant is the keeper of the dog is sufficiently established by evidence that defendant comes home each week end to stay with his family.—Slater v. Sorge, 166 Mich. 173.

¶ 79. In an action for injuries to a child which was bitten by a bear owned by defendant, and alleged to have been kept on grounds frequented by the public, evidence was properly admitted to show how the grounds where the bear was kept were occupied and used, as bearing on the question of defendant's negligence and the publicity of the place.—Marquet v. LaDuke, 96 Mich. 596.

¶ 80. That a driveway used by the public passed through defendant's grounds as is alleged in the declaration in an action for injuries to a child from being bitten by a bear kept by defendant in grounds contiguous to such driveway, was sufficiently supported by evidence that a driveway having the gate at one end had been put through the grounds for the convenience of people passing through who wanted to go to a hotel upon such grounds, which driveway was frequently used by persons, especially footmen, going from one street to the other.—Marquet v. LaDuke, 96 Mich. 596.

¶ 81. In an action for damages from being bitten by a dog an instruction that there was no evidence to show that defendant kept the dog, but that on the contrary it belonged to her husband, or at all events that he was the keeper of it, would preclude any finding that the defendant was the keeper of the dog.—Robb v. Shephard, 50 Mich. 189.

§ 16. ——Evidence as to viciousness and scienter.

See also ante ¶¶ 58, 59.

Declaration by former owner as to viciousness of dog, admissibility, see Evidence, VII, C.

¶ 82. In a suit for personal injuries from the bite of a dog, it is not necessary in order to establish the vicious character of the animal to prove that it had previously bitten some person, since it is sufficient to show that the dog on previous occasions had manifested, to the knowledge of defendant, a disposition to bite mankind.—Slater v. Sorge, 166 Mich. 173.

¶ 83. If a person has a dog in his possession for a considerable length of time, during all which time the dog has been in the habit of rushing into the highway in front of the owner's residence, and barking at, chasing, worrying or attacking passing teams in a ferocious manner, it is for the jury to find whether the owner was aware of such habit, or, if not, whether he was negligent in not being so aware; and the facts may be such that they may well find that he ought to have known it, and from such facts imply notice to him; and the

length of time such habit is shown to have existed has an important bearing upon the decision of this question.—Knowles v. Mulder, 74 Mich. 202.

¶ 84. In a suit for the injury of some colts by a dog, where plaintiff must prove the scienter, evidence is admissible to prove that shortly after the injury plaintiff went to see the dog, and was denied the opportunity by defendant's servant, in defendant's hearing.—Meilke v. Schabble, 159 Mich. 163.

¶ 85. In a suit for the injury of some colts by defendant's dog, knowledge of the vicious character of the dog is brought home to defendant by evidence which shows that a son of defendant acting as manager of his farm was previously informed of the dog's vicious habits.—Meilke v. Schabble, 159 Mich. 163.

¶ 86. In an action for damages on account of the death of a servant alleged to have been caused by the kick of a vicious mule, evidence on the part of those familiar with horses and mules as to the demeanor, appearance of the eyes and their movements is admissible to show that the mule is vicious and the knowledge thereof among defendant's servants.—Robbins v. Magoon & Kimball Co., 193 Mich. 200.

¶ 87. The vicious conduct of a mule immediately after kicking and killing an employee may be shown in an action against an employer for the former's death.—Robbins v. Magoon & Kimball Co., 186 Mich. 672.

¶ 88. A witness testified to having visited defendant's store on one occasion, and that the dog, without provocation, set upon witness and chased him about the store, until defendant spoke to the dog and quieted him. Held, that it was competent for defendant, for the purpose of showing that this attack of the dog was playful, and not vicious, to show that boys were accustomed to come into the store and play with the dog.—Kennett v. Engle, 105 Mich. 693.

¶ 89. In an action before a justice against the owner of a dog for injury done by the dog to a quantity of meat, it was not improper to receive testimony as to the dog's vicious character and roving propensities as having some bearing on the probabilities.—Cheney v. Russell, 44 Mich. 620.

¶ 90. In an action for personal injuries against the owner of a dog which ran into a road and caused the plaintiff to be thrown from his buggy, testimony of the general peaceable disposition of the dog is inadmissible where the plaintiff testified concerning previous specific acts and scienter.—Willet v. Goetz, 125 Mich. 581.

§ 17. ——Jury questions and instructions.

See also ante ¶ 81.

In action for injury to the animal, see post § 20.

See also generally Instructions; Trial, VI.

¶ 91. An instruction that the defendant was the keeper of a dog which bit plaintiff is proper, where, although plaintiff claimed that her adult son owned the dog, it appeared that the son lived with plaintiff upon premises entirely controlled by her, and that the only home which the dog had was upon such premises.—Jenkinson v. Coggins, 123 Mich. 7.

¶ 92. An instruction in an action for damages resulting from cattle running at large, that "if you find as a matter of fact that . . . the defendant, drove his cattle from a field upon his farm into the highway for the purpose of having them enter another field on the opposite side of the highway, where he had a pasture, the question then for you to consider would be, whether in doing that act he exercised reasonable care in taking the cattle from one field to the other. In determining that question you will consider the number of cattle that he had in charge that morning (if you find that he was in charge of the cattle), the character of the cattle, and the time when they were driven into the road by him, the time in the morning, the extent of the travel in the cross-road, in determining the question of reasonable care on his part," was as favorable to defendant as he was entitled.—Shipley v. Colclough, 81 Mich. 624.

¶ 93. In a suit for the injury of some colts by defendant's dog, an instruction is correct which states that defendant must be held to have had notice of the vicious habits of the dog if, by reasonable care and attention, he might have discovered them.—Meilke v. Schabble, 159 Mich. 163.

§ 18. Killing or injuring animals as tort or crime.

Actions for the injury, see post § 20.

Right of owner of dog when license tag is lost, see ¶ 10.

Liability of carrier of live stock, see Carriers, III.

Liability of railroad or street railroad for injuring animal on or near track, see Railroads, VIII, F; Street Railways, IV, C.

Liability for injury to animals in use of highways, see Highways, XII, XIII.

See also other topics treating of negligence in use or keeping of particular things, or of particular occupations and relations, e. g., Master and Servant, IV; Agency, II, B (responsibility for acts of servants or agent).

Bailment of animals and liability thereunder, see Bailments.

Negligence in guarding ice workings from wandering animals, see Waters, IV, D.
Criminal liability for killing of or cruelty to animals, and other crimes relating to animals, see Crimes, II.
Liability of owner of animals for spread of contagious disease, see note, 8 N. C. C. A. 1058-1064.
Distemper contracted by dogs at dog show, see note, 2 N. C. C. A. 885.
Liability of maker or distributor of serum or vaccine for injury to animals treated therewith, see note, 14 N. C. C. A. 880-891.
Liability for negligence in permitting access to female animal by male animal, see note, 8 N. C. C. A. 943-951.

§ 19. Killing or injuring in defense of person or property.

Killing of dogs for the protection of domestic animals, see Comp. L. 1915, §§ 7269-7273.

¶ 94. The fact that a dog is a trespasser does not in itself justify one in killing him. —McChesney v. Wilson, 132 Mich. 252.

¶ 95. One is justified in protecting himself from a nuisance occasioned by dogs congregating on his lawn at night and annoying him by barking, etc.—Hubbard v. Preston, 90 Mich. 221.

¶ 96. Killing a valuable dog is not justified merely because the dog barks around one's house at night, leaves tracks on a freshly-painted porch, chases cats into trees and has been found in a hen-house, where, however, it did no damage.—Bowers v. Horen, 93 Mich. 420.

¶ 97. One upon whose uninclosed land a dog goes from the highway is not justified in killing such dog, even though he believes it is about to destroy growing plants, and though he has been subjected to similar annoyances from other dogs.—Ten Hopen v. Walker, 96 Mich. 236.

¶ 98. Where a cow, going on unfenced lands, was injured by being driven off by a dog set on by the owner of the land it was held the owner was not liable for the injury, unless there was something in the size, character or habits of the dog, or in the mode of setting him on or pursuing which would negative the idea of ordinary care and prudence.—Wood v. La Rue, 9 Mich. 158.

¶ 99. An owner of sheep has the right without incurring liability, to have a dog killed which he was informed was on his premises unaccompanied by any person, and which he had been told had killed sheep belonging to others, and which he had also, some days prior to the killing, seen chasing his own sheep.—Throne v. Mead, 122 Mich. 278.

Liability for injuries negligently inflicted upon trespassing animals, see note, 14 N. C. C. A. 107-112.

§ 20. Actions for injuries to animals.

Actions against railroads, street railways, or for injuries suffered on highways, see Railroads; Street Railways; Highways. XII, XIII.

¶ 100. Trespass is the proper action to be brought for an injury to plaintiff's cow, caused by defendant setting his dog upon her.—Wood v. La Rue, 9 Mich. 158.

¶ 101. The fact that the declaration in an action for the killing of a dog, described him as "a certain beagle hound" while the proof showed the killing of a cross between a beagle and a common hound, is not such variance as will require that the case be taken from the jury, since there is nothing to show that such dog is not properly described as a "beagle hound."—O'Neil v. Newman, 132 Mich. 489.

¶ 102. It is for the jury to determine whether one is justified in killing a dog while protecting himself from a nuisance occasioned by such and other dogs congregating on his lawn at night and annoying him by barking, etc.—Hubbard v. Preston, 90 Mich. 221.

¶ 103. Whether the killing of a useful and valuable dog is justified by the fact that he had killed some of defendant's chickens, and was in the habit of urinating through his screen door onto the carpet and was urinating through his cellar screen window at the time he was shot, is for the jury.—McChesney v. Wilson, 132 Mich. 252.

¶ 104. In an action for the killing of a dog, the defense being that the dog was a trespasser and was chasing defendant's sheep, where one of plaintiff's witnesses testified that he saw the killing and that there were no sheep in the inclosure where the dog was killed but that they were in an adjoining field and were feeding, the question is one for the jury.—O'Neil v. Newman, 132 Mich. 489.
Application of doctrine of res ipsa loquitur in action to recover for injuries from various causes, see note, 5 N. C. C. A. 46-48.

§ 21. Animal health and quarantine.

Veterinary practice, see post § 23.
Liability in tort for communication of disease, see ante § 18.
Public health, health boards, and abatement of unwholesome conditions, see Health.
Protection of domestic animals, see Comp. L. 1915, chap. 138, §§ 7307-7365.
Live Stock Sanitary Commission and State Veterinarian, see Comp. L., 1915 chap. 138, §§ 7307-7339.

Suppression of contagious diseases among bees, see Comp. L. 1915, §§ 7353-7365.

¶ 105. As to the validity and effect of that provision of Pub. L. 1885, Act No. 182, which authorizes the destruction of sound animals because of their exposure to contagious disease, quere.—Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488.

¶ 106. The state live-stock sanitary commission, by the terms of the act under which it is organized (Pub. Acts 1885, No. 182; How St., chap. 61a), has the exclusive right to determine whether animals are so diseased as to require their destruction, and to ascertain, for the purpose of compensation to the owner, the value of animals condemned, subject only to the governor's approval; and its findings will not be reviewed by the courts.—Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488.

¶ 107. Where live stock is condemned as diseased under Pub. Acts 1885, No. 182, § 9, and appraised to be killed, the value of the animals in their diseased condition is the measure of the owner's right to compensation.—Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488.

¶ 108. If professing to act under Pub. L. 1885, Act No. 182, so empowering it, the State Live-Stock Sanitary Commission condemns and kills, as diseased, animals that are sound, the state is not liable for the wrongful act, the owner's remedy, if any, being against the members of the commission.—Shipman v. State Live-Stock Sanitary Commission, 115 Mich. 488.

§ 22. Liability for spread of disease.

Liability for spread of disease among domestic animals, see Comp. L. 1915, chap. 138, §§ 7307-7365.

¶ 109. A licensee of land who puts diseased sheep upon the premises is liable for loss occasioned by the communication of the infection to animals owned by the licensor.—Eaton v. Winnie, 20 Mich. 156.

¶ 110. The sale of hogs known to be infected with a dangerous and infectious disease constituted a wrong imminently dangerous to human life, and the principle extended the liability of the seller to damages for the loss of the hogs in question which were purchased by plaintiff from the firm to whom the hogs were sold, and to damages for the loss of plaintiff's sound swine which became infected and died.—Skinn v. Reutter, 135 Mich. 57.

¶ 111. The rule that one is not responsible for consequences resulting from the wrongful act of another, had no application to an action for damages for the loss of swine, where plaintiff claimed that defendants sold certain hogs to a firm of live-stock dealers knowing that they were afflicted with a dangerous and infectious disease, without notifying such firm of the fact, and that said firm in ignorance of the fact that the hogs were infected, sold them to plaintiffs, who without negligence placed such hogs with their sound swine.—Skinn v. Reutter, 135 Mich. 57.

§ 23. Veterinary practice and treatment.

¶ 112. Under Pub. Acts 1899, No. 191, §§ 2 and 3, requiring the State Veterinary Board to issue certificates to graduates of regular veterinary colleges, the board has no discretion to determine the standing of a veterinary school organized under Comp. L. 1897, § 8143, which provides that every diploma granted by such college shall entitle the possessor to all immunities allowed by statute or usage to any such institution.—Wise v. State Veterinary Board, 138 Mich. 428.

¶ 113. One holding himself out as a veterinary surgeon undertakes that he possesses ordinary professional skill, and therefore, in an action for services rendered in such capacity, it devolves upon him to prove his qualification, at least so long as his right to practice is not regulated by statute.—Conkey v. Carpenter, 106 Mich. 1.

¶ 114. In an action for professional veterinary services, where there are no statutory regulations, the burden resting upon plaintiff of establishing his qualification to practice may be discharged by showing his graduation from some reputable college or school, whereby a presumption of competency is created, or by proving his study and experience. There is a like presumption of qualification where one has been admitted to practice under the laws of the state; but whether such a statute existing plaintiff will be presumed to have been authorized to practice thereunder or must prove the fact, quere.—Conkey v. Carpenter, 106 Mich. 1.

§ 24. Agistment and breeding contracts.

Ownership of animals, see ante ¶ 2.
Regulations of keeping and custody, see ante § 2.
Priority between chattel mortgage and agister's lien, see Chattel Mortgages, III.
Bailments for hire, see Bailments.

¶ 115. A livery-stable keeper is not an insurer of a horse left with him. Negligence must be shown before he can be held liable for an injury to the horse.—Dennis v. Huyck, 48 Mich. 620.

¶ 116. A horse, left at a livery-stable over night, got untied and ate from a convenient bag of corn. In the morning his owner did not water him, but drove him eighteen miles in the heat, and the horse became injured. Held, that the stable-keeper could be held re-

sponsible in case, only if it was found that he was guilty of negligence, and that the owner of the horse had not contributed to the injury, either in fastening the horse or in improperly driving him.—Dennis v. Huyck, 48 Mich. 620.

¶ 117. Under How. St., § 8399, providing that whenever any person shall deliver to any person any horse, etc., to be kept or cared for, such person shall have a lien thereon for the keeping and care of such animal, and may retain possession of the same until such charges are paid, it is a jury question whether there was such authority from the owner that a lien will attach, where one not the owner delivers a horse under an express agreement for its board, having had possession of the horse from the owner under a like agreement.—Elliott v. Martin, 105 Mich. 506.

¶ 118. Where an owner of a barn allowed another to keep his horses in such barn and furnished feed for them on the promise that he should be paid for it, but did not care for or feed the horses except on certain Sundays when the teamster employed to feed and care for them regularly was absent, no lien was created in favor of the owner of the barn, under section 10746, 3 Comp. L. 1897, for stable rent and the value of the feed furnished, for the reason that there was no delivery of the horses to him to be kept and cared for.—Erickson v. Lampi, 150 Mich. 92.

¶ 119. A lien claimed under section 10746, 3 Comp. L. 1897, upon a team of horses for their care and keeping takes effect only upon delivery of the team to the lien claimant, hence such lien is subject to a chattel mortgage unless it is shown that such delivery was made prior to the filing of the mortgage for record.—Erickson v. Lampi, 150 Mich. 92.

¶ 120. Plaintiff is entitled to recover as against defendant his interest in a colt the foal of a mare purchased by defendant five weeks before the colt was dropped; where the evidence shows that plaintiff's claim rested upon an executed agreement with the former owner of the mare, whereby plaintiff was to pay for the breeding of the mare and receive in return therefor a one-half interest in the colt when old enough to wean, and that defendant purchased the mare with full knowledge of such agreement.—Dorris v. Rice, 45 Mich. 216.

¶ 121. The owner of a stallion was sued for the value of a mare that was ruined by service per rectum. Held error to require plaintiff to show that such service was due to defendant's negligence; the inference would be that it was.—Peer v. Ryan, 54 Mich. 224.

Liability for negligence in serving female animal, see note, 9 N. C. C. A. 363-366.

§ 25. Cruelty and other crimes respecting animals.

See generally Crimes, II; Indictment.

ANIMUS to ANNUAL.

Cross-References.

Animus—See generally topics treating of that whereof intent is material.
Furandi, see Larceny.
Revertendi, see Domicile.
Revocandi, see Wills.
Testandi, see Wills.
Annexation—
To soil, see Fixtures; Accession.
Of papers as exhibits, see Pleading; Appeal and Error, VI, D.
Of territory, see Municipal Corporations; Townships; Schools.
Annual Income, see Annuities; Wills; Trusts.
Annual Meetings, see Corporations; Schools; Townships; Taxes.
Annual Reports, see Corporations; Insurance; Officers; and the like.
Annual Rests in Accounts, see Interest.

ANNUITIES.

TREATS of stipulated sums to be paid yearly or periodically as a personal charge and not as rent or as the income of a trust or an estate, excluding interpretation of wills creative of annuities (see Wills, VI, D).

¶ 1. An "annual annuity" so called means the same as annuity defined by How. St., § 2, subd. 1, and is not apportionable, and if the annuitant dies before the time for a payment no part of such payment can be recovered even though the annuitant was indebted, when he died, for former years.—Chase v. Darby, 110 Mich. 314.

¶ 2. Where a devisee accepts property charged with the payment of an annuity, he becomes liable for the payment of such annuity and an action may be maintained for the same.—Stringer v. Stevens' Estate, 146 Mich. 181.

¶ 3. Interest upon arrearages of annuities is allowable only where the annuity is for the support of a wife or child and a lien upon the land, and will be allowed upon the unpaid instalments made for the support of the testator's widow.—Stringer v. Stevens' Estate, 146 Mich. 181.

Cross-References.

Annulment—
- Of marriage, see Marriage; and see Divorce.
- Of judgments and decrees, see Judgments.
- Of wills and trusts, see Wills; Trusts.

Another Action Pending, see Abatement and Revival; Courts, V (priority in jurisdiction).

Answers, see Equity, VII; and specific topics like Injunctions; Specific Performance.
- By witnesses, see Examination of Witnesses.
- Return or cause shown in response to mandamus or quo warranto, see Mandamus; Quo Warranto.

Antecedent Debts—
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- Conveyances or transfers fraudulent as against, see Fraudulent Conveyances, II.
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Antecedent Facts, as evidence, see generally Evidence, III; and see specific topics for relevancy of evidence of facts prior to thing complained of.

Antecedent Statements and Admissions, as evidence against maker, see Evidence, VII.

Ante Mortem Statement, as evidence, see Indictment, VIII; Homicide, VII, B (dying declarations); Evidence, VII, D (res gestae).

Antenuptial Agreements, see generally Husband and Wife, I.
- As bar to dower, see Dower.
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- Election against testamentary provision, see Wills.
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Anticipated Breach of Duty, remedy by mandamus, see Mandamus.

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Anticipation—
- Of legacy or portion, see Estates of Decedents; Trusts.
- Of defenses, see Equity, VII; Pleading.

Anticipatory Breach, see Contracts, VII.

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Apartment Houses, see Buildings; Landlord and Tenant.

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Apparent Possession or Claim of Title—
- Notice to purchaser of land, see Notice and Record of Title.
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APPEAL AND ERROR.

TREATS of the general law of civil appellate procedure by appeal and on writ of error, except the doctrine of Harmless Error, which see, and the practice and procedure in the trial court to save the objection for review by objecting, procuring a ruling, and excepting thereto (see Saving Questions for Review), and except appeals from minor courts to the circuit court (see Justices of the Peace; Probate Courts) and statutory appeals from special proceedings and proceedings of nonjudicial officers (see Eminent Domain; Highways; Local Improvements; Drains; Schools). Review by Certiorari and Mandamus is treated in those topics and writs of error to sentences for crime are treated in Indictment and Prosecution, XVI.

[Note. In many respects the nature of the review on appeal and the principles applicable are the same in appeal as in error. Because of this both modes of review have been treated in this topic, but care has been taken to differentiate them throughout the topic by means of appropriate wording of the division lines and section lines, so that matter peculiar to either mode may easily be identified in the analytical index which follows, as well as in the body of the paragraphs.]

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XVII. Costs and allowances.

§ 577. In general; cross-references.

I. THE RIGHT AND THE REMEDY TO OBTAIN REVIEW.

§ 1. Right to review; policy of the law.

Party entitled to writ of error or appeal, see post IV.
Waiver or loss of right, see post V.
The right to assign or urge an error when the cause is before the court depends on the relation of the party to the appeal or writ of error. Generally the plaintiff in error or the appellant alone can do so. See post XI, D.
General procedure to obtain appeal or writ of error, see post VI.
Filing bond and payment of fees as condition, see post VI, C.

¶ 1. Any proceeding, however called, whereby private rights are seriously affected or wrongfully divested is reviewable in some form.—First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 58 Mich. 315.

¶ 2. The right to appeal from one court to another is not a constitutional one.—Kundinger v. City of Saginaw, 59 Mich. 335.

¶ 3. The right to an appeal is statutory, and the legislature may prescribe in what cases, and under what circumstances, and from what courts, appeals may be taken; and unless the statute expressly or by plain implication provides for an appeal, none can be taken.—Sullivan v. Haug, 82 Mich. 548.

¶ 4. The authority for an appeal from one court to another must be found either in the constitution or in a statute.—Sparrow v. Ingham Circuit Judge, 109 Mich. 272.

¶ 5. The right of appeal in civil and criminal cases is statutory.—De Long v. Muskegon County Sup'rs, 111 Mich. 568.

¶ 6. Appeals are statutory, and in the absence of statute no right to appeal exists.—Waterman v. Bailey, 111 Mich. 571.

¶ 7. The right to appeal is entirely statutory.—Van Leuven v. Ingham Circuit Judge, 166 Mich. 115.

¶ 8. The right of appeal is purely statutory, and it is within the power of the legislature to determine to what extent that right shall exist and under what restrictions.—J. F. Hartz Co. v. Lukaszcewski, 200 Mich. 230.

¶ 9. There is no right to appeal in chancery suits unless created by statute.—Guthrie v. Leelanau Circuit Judge, 197 Mich. 321.

¶ 10. Where a special and extraordinary jurisdiction not following the common law is created by statute, no appeal can be taken therefrom unless expressly provided by statute.—Lorimer v. Wayne Circuit Judge, 116 Mich. 682.

¶ 11. The right of appeal is absolute, and the case must be so disposed of below as to permit a complete disposition of it on appeal.—Hewlett v. Shaw, 9 Mich. 346.

¶ 12. The right of appeal is statutory and does not depend on the merits of the case.—Michigan Ins. Co. v. Whittemore, 12 Mich. 311.

¶ 13. The provisions of Comp. Laws 1915, § 13736, as amended by Pub. Acts 1917, No. 172, providing that writs of error upon any final judgment or determination where the judgment exceeds $500 may issue of course out of the supreme court, and in all other cases may issue in the discretion of the court, upon application, applies as to the right of review where a judgment was rendered before the amendment took effect, but appellate proceedings had not been instituted in the supreme court before it took effect, since the previous statutory right of review in such cases was but a mere privilege not amounting to a vested right beyond legislative control.—J. F. Hartz Co. v. Lukaszcewski, 200 Mich. 230.

¶ 14. A judgment of no cause of action against plaintiff in an action to recover the sum of $500 is not a case "where the judgment exceeds in amount five hundred dollars," warranting a writ of error as a matter of right on a final judgment of the trial court within Comp. Laws 1915, § 13736, as amended by Pub. Acts 1917, No. 172.—J. F. Hartz Co. v. Lukaszcewksi, 200 Mich. 230.

¶ 15. Although it is regrettable that parties should resort to expensive litigation over the trivial matter of 50 cents a head damages for impounding trespasser's 16 hogs, yet where the defendant brought his appeal to the supreme court, his claim to have the controversy decided by the appropriate rules of law could not be denied.—Miller v. Hoffman, 135 Mich. 319.

¶ 16. On the grounds of public policy litigants should be encouraged to accept as final the decisions of courts of original jurisdiction.—Hoste v. Dalton, 137 Mich. 522.

§ 2. Appeal or error as proper remedy.

Statutory source of appellate jurisdiction, see post § 9.
When case made rather than error is proper, see post § 5.
When mandamus or other extraordinary remedy or motion should be resorted to, see post § 3.
For judgments reviewable by writ of error, see also generally post III.
Probate proceedings in circuit on appeal from probate court, see post §§ 27-30.
Character of errors reviewable and practice on and scope of review, see post XII.
General provisions as to writs of error and appeals, see Jud. Act, Chap. L; Comp. L. 1915, § 13736 et seq.

¶ 17. Where a common-law form of reviewing statutory proceedings does not exist, or is not resorted to, the conditions and form of appeal depend entirely upon statute, and cannot be changed or aided by judicial action.—People's Ice Co. v. The Excelsior, 43 Mich. 336.

¶ 18. All questions in probate proceedings that are reviewable by the supreme court are removable thereto on writ of error, there being no provision for appealing such proceedings to that court, as in chancery.—In re Mower's Appeal, 48 Mich. 441.

¶ 19. The proceeding under How. St., §§ 8742-8747, to establish a claim against an assignor, is put by the statute on the footing of a common-law suit and on review the supreme court is not authorized to find or determine facts.—Forncrook Mfg. Co. v. Barnum Wire & Iron Works, 63 Mich. 195.

¶ 20. The supreme court has no jurisdiction to review proceeding to enforce a me-

chanic's lien under Comp. L. 1871, chap. 215, How. St., chap. 290, except by virtue of Laws 1873, p. 119, How. St., §§ 8409-8411, which excludes any other mode of review, or rule or course of proceeding on appeal, than is provided by law in relation to appeals in ordinary chancery cases; the finding of a jury, therefore, in such proceedings, instead of being decisive as at common law, is a mere provisional and assistant inquisition analogous to a verdict or a feigned issued in chancery, and, as the court may ignore it, points raised upon the charge to the jury, rulings, etc., will not be considered.—Willard v. Magoon, 30 Mich. 273.

§ 3. Mandamus, certiorari, motion or petition as remedy.

To review judgments based on appeal from justice, see also post § 25.

Since appeal or writ of error lies only to final decrees and judgments and such orders or decrees as have been made reviewable by statute through one of those remedies, it follows that there are numerous rulings and orders which must be reached by the compulsory process of mandamus or by motion or petition in the trial court for their correction. As to these, see generally Mandamus; New Trial; Motions and Orders; Equity, XI (revivor and supplement, etc.); Judgments, V, VI (amendments and proceedings for relief); Pleading, IV, VI.

In mandamus cases the rule that the writ will not issue if the remedy by appeal or writ of error is available and adequate has evoked numerous decisions that mandamus will not lie because in the given case there is a remedy by appeal or error. These decisions are to be found in Mandamus, I, and a similar class of cases may be found in Certiorari.

For proceedings not according to the course of common law and lacking or exceeding the jurisdiction asserted the remedy is ordinarily Certiorari or Prohibition, which see. A statutory certiorari may also be given where a common-law certiorari would not issue. See Certiorari and also specific topics, such as Drains; Justices of the Peace; etc., treating of the proceedings made reviewable by statutory certiorari.

Prohibition will issue where it appears that action may be taken for which appeal will not afford an adequate remedy. See Prohibition.

Dismissal or error because wrong party was brought in instead of deceased party, see also Abatement, ¶ 96.

¶ 21. Error does not lie to review proceedings that are not according to the course of the common law, or substantially analogous thereto.—Holbrook v. Cook, 5 Mich. 225; Cross v. People, 8 Mich. 113; Conrad v. Button, 28 Mich. 365; Cameron v. Bentley, 28 Mich. 520; Faust v. Calhoun Circuit Judge, 30 Mich. 266; Churchill v. Burt, 32 Mich. 490; Smith v. Lapeer County Superintendents of Poor, 34 Mich. 58; Fletcher v. Clark, 39 Mich. 374; In re Brinsmade's Appeal, 52 Mich. 537; Knorr v. Millard, 52 Mich. 542; Gore v. Ray, 69 Mich. 114.

¶ 22. It is not enough that the proceedings were had in a court that ordinarily and primarily exercises common-law jurisdiction.—Holbrook v. Cook, 5 Mich. 225.

¶ 23. Error lies rather than mandamus where the error is disclosed on the record, as where the grounds for dimissing an appeal are stated in the order.—Stall v. Diamond, 37 Mich. 429.

¶ 24. An erroneous judgment that a party recover his costs to be taxed, should be reviewed on error, and in no other way, whatever be the rule as to reviewing retaxation by mandamus.—Luther v. Kent Circuit Judge, 151 Mich. 71; Schmidt v. Wayne Circuit Judge, 136 Mich. 658.

¶ 25. A defeated party in the circuit court on appeal from a justice who complains of the amount of costs taxed against him must seek relief by mandamus and not writ of error.—Marr v. Cook, 147 Mich. 425.

¶ 26. An order overruling a plea in abatement should be reviewed by certiorari under Act No. 310, Pub. Acts 1905, How. St., 2nd Ed., §§ 12737, 12738, instead of by writ of error.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 184 Mich. 681.

¶ 27. An order sustaining a demurrer to a plea in abatement is not such a final order as is reviewable by writ of error. Act 310, Pub. Acts of 1905, creates the proper method of reviewing such an order.—Wanner v. Martin, 173 Mich. 503.

¶ 28. Refusal by the circuit court of leave to appeal from a justice's judgment, under How. St., § 7005, is not reviewable by the supreme court except upon mandamus and in case of abuse of discretion.—Vincent v. Bowes, 78 Mich. 315.

¶ 29. Where the circuit court in its discretion refuses to assume jurisdiction of an appeal from a justice court after the lapse of five days from the entry of the judgment, mandamus and not error is the proper method for review.—Huddleston v. Charles Amos & Co., 180 Mich. 253.

¶ 30. Where testamentary trustees failed to qualify, and the probate court appointed others in their stead, proceeding does not arise after the course of the common law, and hence certiorari and not error is the proper

remedy for review of the judgment of the circuit on appeal from the probate court.—In re Erdman's Estate, 179 Mich. 567.

¶ 31. Proceedings in the probate court for the discharge of the guardian of an incompetent person and on appeal to the circuit court, where, in both instances, issues of fact are tried by a jury, are in conformity with the rules of common law and may be reviewed by the supreme court by writ of error instead of by writ of certiorari.—In re Stroebel, 194 Mich. 634; appeal of Runge, Id.

§ 4. Writ of error coram nobis (or by trial court).

¶ 32. The distinction between the common writs of error, writs of error coram nobis, and writs of error coram vobis, explained.—Teller v. Wetherell, 6 Mich. 46.

¶ 33. Circuit courts cannot issue writs of error.—Teller v. Wetherell, 6 Mich. 46.

§ 5. Case made or writ of error and exceptions.

Character of review and questions reviewable, see post §§ 254, 276, 463.

Contents and sufficiency of case made, see post §§ 105, 196.

Dimissal for defects in case made, see post § 163.

Nature of judgment, and propriety of final judgment, remand, or modification, see post XIII.

Waiver of case made by resort to bill, see post § 8.

Case made, see Jud. Act, chap. I, § 9; Comp. L. 1915, § 12014.

¶ 34. A party has his election to rely upon his exceptions or to make and settle a case.—Richardson v. Yawkey, 9 Mich. 139.

¶ 35. The practice of resorting to "case made" is quite as appropriate as that by writ of error to review the action of a circuit judge.—Wheeler v. Wilkins, 19 Mich. 78.

¶ 36. A case may be made to review the error of permitting a plaintiff to take an inquest under Circuit Court Rule 99 when he had no right to do so, a proper affidavit of merits having been filed and served.—Wells v. Booth, 35 Mich. 424.

¶ 37. Case made will lie to bring up an order setting aside a capias ad respondendum and directing judgment for defendant.—Watson v. Watson, 47 Mich. 427.

¶ 38. Exceptions to rulings on the admission of evidence can be reviewed on case made as well as on bill of exceptions.—Soper v. Fry, 37 Mich. 236.

¶ 39. Case made does not lie to review the proceedings in taking judgment on default and an assessment of damages by the clerk.—Beeson v. Hollister, 11 Mich. 193.

§ 6. Cases and questions reservable or certifiable.

Certificates of question, see Jud. Act, Chap. I, § 9; Comp. L. 1915, § 12014.

¶ 40. The circuit court could reserve for the opinion of the supreme court questions of law only, and not questions of fact, or questions involving both law and fact.—People v. Adwards, 5 Mich. 22; Bagg v. City of Detroit, 5 Mich. 66; English v. Fairchild, 5 Mich. 141; Clark v. Dorr, 5 Mich. 143.

¶ 41. Questions of law could be reserved in equity cases.—Bagg v. City of Detroit, 5 Mich. 66.

¶ 42. The questions reserved for the opinion of the supreme court had to be purely legal ones, and were required to be presented directly and definitely.—Bagg v. City of Detroit, 5 Mich. 66; English v. Fairchild, 5 Mich. 141; Clark v. Dorr, 5 Mich. 143.

¶ 43. Where trial was had by jury, and various objections were raised as to the admissibility of evidence and to its sufficiency, and the party objecting conceded that the opposite party was entitled to judgment if the objections were not well taken, and the whole case was thereupon reserved for the opinion of the supreme court upon the objections so taken, it was held that the court had no jurisdiction.—English v. Fairchild, 5 Mich. 141; Clark v. Dorr, 5 Mich. 143.

¶ 44. The statute did not intend that questions should be reserved unless the judge below had well-founded doubts upon them, save where they were new and of public importance.—Bagg v. City of Detroit, 5 Mich. 66.

¶ 45. It was no objection to the jurisdiction of the supreme court, on questions reserved, that the same questions could afterwards come up on exceptions or appeal.—Bagg v. City of Detroit, 5 Mich. 66.

§ 7. Nature of remedy; new suit or continuation of old.

Nature of the review afforded by the several remedies, see generally post XII.

Nature of the procedure to obtain review and to preserve questions and record for review, see generally post, VI, XI.

Nature of the decision on review, see post XIII.

Trial de novo of chancery cases, see post XII, H.

¶ 46. In Michigan a writ of error is not the institution of a new suit, but is a carrying on of the original proceeding.—Baumgarth v. Firemen's Fund Ins. Co., 159 Mich. 207.

§ 8. Election and waiver of methods.

Waiver and estoppel to urge errors, see post XI, D.

Right to reserve questions that might come up otherwise, see ante ¶ 45.

¶ 47. By procuring and filing a bill of exceptions one precludes himself from having a review by case made.—Richardson v. Yawkey, 9 Mich. 139.

¶ 48. A writ of error sued out after case is settled is a waiver of the case.—Hatch v. White, 18 Mich. 194.

II. APPELLATE JURISDICTION.

§ 9. In general; statutory source.

Transfer from lower to supreme court by appeal or error, see post IX.

Jurisdiction of courts in general, see Courts, V.

Jurisdiction of supreme court generally, and supervisory control over lower courts, see Jud. Act, chap. I. § 9. Comp. L. 1915, § 12014.

¶ 49. The jurisdiction over appeals is entirely statutory.—Weed v. Lyon, W. 77; Demaray v. Little, 17 Mich. 386; Maxfield v. Freeman, 39 Mich. 64; Cady v. Centreville Knit Goods Mfg. Co., 48 Mich. 133.

§ 10. Over what courts, cases or errors.

Presumption as to jurisdiction below, see post § 361.

Review of facts and conclusions thereon in chancery and in law cases, see post XII, E.

Reserved questions, see also ante ¶ 43.

¶ 50. The Supreme Court has jurisdiction of errors of fact as well as of errors of law.—Teller v. Wetherell, 6 Mich. 46.

¶ 51. A writ of error did not lie from the Supreme to a county court in civil cases.—Hiney v. Cade, 1 Mich. 163.

¶ 52. The jurisdiction to entertain an appeal is not affected by the question whether or not the charges made turn out on hearing to need redress, or the particular redress asked for.—First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 58 Mich. 315.

§ 11. Timeliness and requisite procedure.

General procedure to take appeal or error, see post VI.

Necessity that judgment be entered, see post § 34.

Time for filing bond, see post § 81.

Payment of fees, see post § 89.

Return and filings in Supreme Court, see post VII.

Dismissal for delay in proceedings, see post X.

Time for moving dismissal where jurisdiction of appeal did not attach, see post § 145, §625, § 146, § 636.

Appellate jurisdiction as restricted to review on the record, see post XII, B, 1.

¶ 53. When an appeal is not taken within the statutory time, and there is no provision for enlarging the time, there is no jurisdiction to hear it.—Portage Lake & L. S. Ship Canal Co. v. Haas, 20 Mich. 328.

¶ 54. Where a statute provides that a bond must be given within a certain number of days after entering a claim of appeal, a compliance with the statute, within the time specified, is necessary to give the appellate court jurisdiction of the appeal.—Canfield v. The City of Erie, 21 Mich. 160.

¶ 55. The Supreme Court has no jurisdiction to consider an appeal in a cause wherein the settlement of the case was delayed, without the fault of the circuit court or its officers, until the statutory time for settlement, including extensions, had expired, even though the delay was with the appellee's acquiescence.—Waterman v. Bailey, 111 Mich. 571.

¶ 56. The right of appeal is statutory and unless taken within the time fixed by statute the appellate court does not acquire jurisdiction.—Bolton v. Cummings, 200 Mich. 234.

¶ 57. Where a chancery appeal is not taken within the time prescribed by Act 299. Pub. Acts 1909, How. 2nd Ed., § 12071, the Supreme Court is without jurisdiction, and the appeal should be dismissed.—Foster v. Foster, 176 Mich. 379.

¶ 58. The right of appeal in chancery is statutory and the Supreme Court has no jurisdiction to hear and determine appeals not taken because of appellant's fault within the time prescribed by Act 299, Pub. Acts 1909, which limits the right, nor can jurisdiction be conferred by consent of the parties.—Perkins v. Perkins, 173 Mich. 690.

§ 12. Consent to give or limit jurisdiction.

Making questions by consent, see post § 260.

Consent to ruling on demurrer for purpose of appeal, see post ¶¶ 136, 155.

Default or consent decree, see post § 37.

Consent to appeal after time, see also ante ¶ 58.

Consent to extension of time for settling case or bill, see post § 95.

Consent to hearing of particular objection, see post § 260.

Nonwaiver of jurisdictional error, see post § 225.

¶ 59. As the right to an appeal depends upon the statute, jurisdiction cannot be conferred by consent of parties, and the requirements of the statute must be complied with.—Waterman v. Bailey, 111 Mich. 571.

¶ 60. The jurisdiction of the Supreme Court on error cannot be abridged by any stipulation whereby the parties seek to limit the principle of decision and exclude legal considerations.—Watts v. Tittabawassee Boom Co., 47 Mich. 540.

III. JUDGMENTS OR DECREES ON WHICH REMEDIES LIE.

A. CHARACTER OF SUIT, ACTION OR PROCEEDING.

§ 13. In general; ex parte proceedings.

The action or proceeding must not only be such as is reviewable by writ of error or by appeal, but also it must have passed into a "final" judgment disposing of the cause in the lower court. As to this principle, see post III, B.

If the proceeding is not according to the course of common law, writ of error does not lie, and recourse must be had to certiorari, mandamus, motion, petition, etc. See ante § 3.

What are proceedings "according to the course of common law," see generally post this division §§ 16-30.

Dismissal or affirmance on hearing for want of reviewable question, see post § 480.

Interpleader proceedings, see also post ¶ 145.

Restriction of the questions reviewed by the judgment and matters involved in it or accompanying it, see post XII, B, 2.

¶ 61. An appeal in equity cannot be taken unless someone appears on the record as responsible to the adverse party for costs.—Attorney General v. Hane, 50 Mich. 447.

§ 14. "Causes" in chancery.

¶ 61a. A proceeding not litigious in character, such as one for the dissolution of a corporation, is not a "cause" in chancery which is appealable.—Cady v. Centreville Knit Goods Co., 48 Mich. 133.

¶ 62. Although not specially given by statute, there is a right of appeal from an order of sale which, in effect, ends proceedings under the statute regulating assignments for creditors.—First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 58 Mich. 315.

¶ 63. Under Comp. L. 1871, chap. 215, no appeal lies from statutory proceedings to enforce the liens of mechanics, etc., who, by contract with the owner, etc., of lands, had furnished labor or materials for constructing or repairing any building, etc., upon such lands.—Clark v. Raymond, 26 Mich. 415.

§ 15. Proceedings for removal to federal courts.

Review on appeal from judgment, see post § 288.

¶ 64. An order of the circuit court granting the prayer of a petition for the transfer of a cause pending therein to the federal court is reviewable on writ of error.—Crane v. Reeder, 28 Mich. 527.

§ 16. Attachment and garnishment proceedings.

Finality of orders, see post § 32.

Scope of questions open on error, see post § 300.

Judgments in garnishment, see Jud. Act, chap. XXVIII, § 42; Comp. L. 1915. § 13163.

¶ 65. Error does not lie on the affirmance by the circuit court of a commissioner's order dissolving an attachment.—Gray v. York, 44 Mich. 415.

¶ 66. How. St., § 8030, does not authorize an appeal from the order of a circuit judge made on the hearing of an application to dissolve an attachment, but is confined to circuit court commissioners.—Harvey v. Pealer, 63 Mich. 572.

¶ 67. A proceeding to dissolve an attachment is a special one, not according to the course of the common law, and error does not lie to review it.—Gore v. Ray, 69 Mich. 114.

¶ 68. An order collateral to a suit in garnishment, requiring plaintiff to pay back the amount received from the garnishee to the real creditors permitted to assume defense, is not a judgment and does not support a writ of error.—First Nat. Bank v. Mellen, 45 Mich. 413.

§ 17. Contempt proceedings.

Person aggrieved and entitled to appeal, see post § 36, ¶ 144.

Scope of review questions open, see post § 306.

¶ 69. An order adjudging a party guilty of contempt, and imposing a fine and costs for violating an injunction, is appealable.—People ex rel. Messler v. Simonson, 9 Mich. 492; Romeyn v. Caplis, 17 Mich. 449.

¶ 70. An order adjudging a defendant in a divorce suit guilty of contempt for nonpay-

ment of alimony, and imposing a fine, and in default ordering him to stand committed is appealable.—Haines v. Haines, 35 Mich. 138.

¶ 71. An appeal lies from an order committing a defendant for contempt in refusing to pay temporary alimony.—Ross v. Ross, 47 Mich. 185.

¶ 72. A commitment for contempt in violating an injunction is appealable.—People ex rel. Port Huron G. R. Co. v. Jones, 33 Mich. 303; People v. Simonson, 10 Mich. 335.

¶ 73. The determination of a circuit judge refusing to punish for contempt will not be reviewed on appeal.—Rasch v. Sheppard, 105 Mich. 667; People ex rel. Dean v. Ann Arbor R. Co., 137 Mich. 673, on authority of Schwab v. Coots, 44 Mich. 463.

§ 18. Taxation and retaxation of costs.

Proper form of review, appeal, error or mandamus, see ante § 3.
Review with judgment, see post § 292.
Taxation of costs as improper matter in bill of exceptions, see post § 102.
Retaxation proceedings as foreign matter in record, see post § 99, ¶ 460.

¶ 74. Writ of error is not the proper remedy to review the taxation of costs, or the action of the circuit court upon appeal from such taxation.—Abbott v. Matthews, 26 Mich. 176; Lorman v. Phoenix Ins. Co., 33 Mich. 65.

§ 19. Extraordinary actions; habeas corpus, mandamus, certiorari, etc.

Reviewableness of judgment on habeas corpus, see Habeas Corpus.

¶ 75. At the common law a judgment on habeas corpus was not reviewable by appeal or on writ of error.—People v. Fairman, 59 Mich. 568; People v. Conant, 59 Mich. 565.

¶ 76. Neither at common law nor by virtue of statute does a writ of error lie to review habeas corpus proceedings.—In re Brock, 144 Mich. 42.

¶ 77. The decision of the circuit court on habeas corpus discharging or remanding a prisoner held on a civil capias is reviewable on error.—In re Hicks, 20 Mich. 129.

¶ 78. Proceedings on habeas corpus before a circuit judge at chambers are not reviewable on error.—People ex rel, Faust v. Calhoun Circuit Judge, 30 Mich. 266.

¶ 79. Proceedings upon information filed on leave, in circuit court, to try title to office, may be taken by either party to supreme court on error.—Vrooman v. Mitchie, 69 Mich. 42.

§ 20. Statutory proceedings generally.

Decrees in assignment proceedings in chancery, see post § 53.
Bastardy proceedings, see Bastards; Certiorari.
Appealability of tax proceedings generally, see Taxes, VI, B; and see also Local Improvements.
Decree in proceedings to dissolve corporation, see Jud. Act, chap. XL, § 5; Comp. L. 1915, § 13567.

¶ 80. In proceedings which are purely statutory, and not after the course of the common law, a writ of error will not lie.—Hartz v. Wayne Circuit Judge, 164 Mich. 231.

¶ 81. Proceedings in equity for the voluntary dissolution of corporations are not adverse proceedings, and are not appealable on the footing of chancery appeals. The general statute confines appeals to "causes," and does not include special proceedings not litigious.—Cady v. Centreville Knit Goods Mfg. Co., 48 Mich. 133.

¶ 82. Statutory proceedings to compel a son to support his mother are not reviewable on error.—Smith v. Lapeer County Superintendents of Poor, 34 Mich. 58.

¶ 83. Proceedings under Laws 1872, Act No. 57, How. St., § 1253, on an appeal to the circuit court from the auditor general's assessment of specific taxes are not judicial, and cannot be reviewed on error.—Auditor General v. Pullman Palace Car Co., 34 Mich. 59.

§ 21. Proceedings based on arbitration.

Questions open to review, see post § 303.
As to judgments on arbitration, see Jud. Act, chap. XLV, §§ 16, 17, Comp. L. 1915, §§ 13661, 13662.

¶ 84. Error does not lie on a judgment upon an award rendered by arbitrators under a statutory submission, where the submission is in due form, and the award is one that could have been lawfully made.—Cooper v. Andrews, 44 Mich. 94.

§ 22. Condemnation and highway proceedings.

Appeals from awards in eminent domain proceedings, see Eminent Domain, VIII.
Appeal from official location of highways or from awards of damages therein, see Highways, II, B.

§ 23. Proceedings before boards and commissions.

Appeals from assessments of taxes and local assessments, see Taxes, VI; Local Improvements, VII.

Review of proceedings of State Railroad Commission, see Public Service.

Review of decisions under Workmen's Compensation Act, see Workmen's Compensation Law.

§ 24. Prosecutions under municipal ordinances.

Being neither an indictment for crime nor an ordinary civil action reviewableness of a prosecution for violation of a municipal ordinance is specially treated in Municipal Corporations, XVI, B.

§ 25. Judgments on proceedings begun before justices and commissioners.

Finality of the judgment, see post § 33.

Questions open on error to judgment, see post § 302.

Appeal or certiorari from a justice to the circuit court is treated in Justices of the Peace, V, VI.

¶ 85. Entry of judgment on a transcript from a justice is not reviewable on writ of error; nor is the denial of a motion to vacate such judgment. If such proceedings are reviewable at all it is by certiorari.—Townsend v. Tudor, 41 Mich. 263.

¶ 86. Error, and not certiorari, is the proper remedy for reviewing a joint judgment against a principal and his sureties upon a bond, on an appeal of the cause from a justice's court.—Evers v. Sager, 28 Mich. 47.

¶ 87. Error is the proper remedy for reviewing the determination of the circuit in wrongfully dismissing an appeal from a justice's court for want of prosecution.—Willis v. Gimbert, 27 Mich. 91.

¶ 88. Error lies on the final disposition of a case in the circuit court on motion to dismiss an appeal from a justice.—McCombs v. Johnson, 47 Mich. 592.

§ 26. ——Forcible entry and summary proceedings.

Appeal from commissioner's decision in forcible entry cases, see Forcible Entry and Detainer, II.

¶ 89. When a proceeding to recover possession of lands under the statute "of forcible entries and detainers" is appealed to the circuit court, it becomes, in that court, a proceeding according to the course of the common law; and error is the only mode of reviewing, in the supreme court, the judgment of the circuit court.—Parker v. Copland, 4 Mich. 528.

¶ 90. Error and not certiorari is the proper means of reviewing an order of the circuit court dismissing on motion, for want of jurisdiction, a writ of certiorari from that court to a circuit court commissioner for the review of proceedings under the statute to recover possession of land.—Robens v. Videto, 33 Mich. 240.

§ 27. Proceedings on appeal from probate.

The right of appeal from orders, decrees and judgments of the probate courts to the circuit courts and the procedure to take such appeals is regulated by a statutory scheme unlike that of general appeals in important particulars. It is therefore treated in Probate Courts, III. and the practice and substantive matters which are peculiar to the several proceedings are treated in specific topics, such as Estates of Decedents; Wills; Guardianship.

Error rather than appeal is remedy to review probate matters, see ante ¶ 18.

Finality of orders, see post § 33.

Questions open on review of circuit judgment, see post § 301.

Appealable probate orders and decrees, see Probate Courts, III.

¶ 91. The judgment of a circuit court upon an appeal from a decision of a probate court, where the controversy involves issues analogous to suits at common law, may be reviewed in the supreme court by writ of error.—Labar v. Nichols, 22 Mich. 200.

§ 28. ——Administration proceedings.

Finality of the circuit judgment, see post § 33.

Ancillary receivership proceedings, see post § 57, ¶ 264, § 58, ¶ 272.

Proper amount of bond, see post § 83, ¶ 378.

¶ 92. Proceedings in the circuit court on appeal from the proceedings for the appointment or removal of an administrator are not reviewable on error.—Holbrook v. Cook, 5 Mich. 225; Conrad v. Button, 28 Mich. 365; In re Brinsmade's Appeal, 52 Mich. 537; Woolley v. Crane, 86 Mich. 360.

¶ 93. The affirmance by the circuit court of the dismissal by the probate court of a creditor's petition for the removal of an administratrix, which petition was met by plea and answer, the administratrix and her bondsman being discharged under the plea as upon a full accounting, is reviewable on a writ of error.—Peckham v. Hoag, 92 Mich. 423.

¶ 94. An order not according to the course of the common law, such as one requiring an executor to furnish a new bond and to render an account, is not reviewable on writ of error.—In re Sanborn's Appeal, 107 Mich. 189.

¶ 95. Error will not lie to review an affirmance by the circuit court of an order of the probate to extend the time of a commission and pass upon a claim.—Churchill v. Burt, 32 Mich. 490.

¶ 96. An appeal from the allowance of an administrator's account, or from his final accounting, is reviewable on writ of error and exceptions.—Labar v. Nichols, 22 Mich. 200; In re Mower's Appeal, 48 Mich. 441.

¶ 97. When a creditor of an estate proceeds in the probate court to compel the administrator to pay his claim, and the case is appealed to the circuit court, where the case involves substantially the issue plene administravit, the judgment of the circuit court thereon may be reviewed on error.—Brown v. Forsche, 43 Mich. 492.

¶ 98. Error will not lie to review an affirmance of the probate court's refusal to relieve an executor from giving bond on sale of realty.—Fletcher v. Clark, 39 Mich. 374.

¶ 99. The Supreme Court has no jurisdiction to review the refusal of the circuit court to affirm a probate order to an executor to advance money from an accumulation fund to the beneficiaries under a will since such a case does not present a common-law issue.—Knorr v. Millard, 52 Mich. 542.

§ 29. ——Probation or contest of wills.

Party entitled to appeal, see post § 62.
Questions brought up, see post § 301.

¶ 100. Where an appeal has been taken to the circuit court from the decree of the probate court allowing or disallowing a will, and a trial is had, error lies to remove to the Supreme Court the adjudication of the circuit court upon the appeal; it makes no difference that a formal issue was not made up in the circuit court, since the substance of the issue is the same, whether made up in form or not.—American Baptist Missionary Union v. Peck, 9 Mich. 445.

§ 30. ——Guardianship proceedings.

¶ 101. Error will not lie to review proceedings in the circuit court upon an appeal from an order of the probate court denying a petition for the appointment of a mother as guardian of her minor children.—Cameron v. Bentley, 28 Mich. 520.

B. CHARACTER OR FINALITY OF THE JUDGMENT OR DECREE.

§ 31. In general; form and finality of decree.

In addition to having the requisite finality the decree or judgment must have been in a proceeding according to the course of the common law to be reviewable on error, and amounting to a "cause in chancery" to be appealable, or within some statute giving review. As to such matters, see ante III, A; and see also ante § 3.

Law judgments, see post §§ 32, 33.
What "orders" are deemed final, see post §§ 45-50.
Judgments on demurrers or pleas, see post §§ 38-40.
Cost decrees, see post § 41.
Decrees reserving questions, see post § 42.
Orders relating to amendments or in supplement of action, see post § 43.
Divorce and alimony decrees, see post § 54.
Foreclosure decrees and orders in course of foreclosure, see post § 55.
Injunctional orders and decrees, see post § 56.
Time for taking appeal from decree and from orders, see post § 73.
Nature of the judgment and matters involved in it as limiting review, see post XII, B, 2.
Dismissal or affirmance on hearing for want of reviewable question, see post § 480.

¶ 102. The right to appeal is determined not by the form of the order or decree, or by the particular classification thereof, but by the effect.—Perrin v. Lepper, 72 Mich. 454.

¶ 103. Appealability is not determined by the stage of the case at which the order was made, but by its effect on the rights of the parties.—Barry v. Briggs, 22 Mich. 201; Taylor v. Sweet, 40 Mich. 736.

¶ 104. An appeal in chancery lies only from a final decree or order.—Caswell v. Comstock, 6 Mich. 391; Demaray v. Little, 17 Mich. 386; Maxfield v. Freeman, 39 Mich. 64.

¶ 105. Decrees and orders, final and interlocutory, defined, and the distinction between them explained.—Wing v. Warner, 2 D. 288.

¶ 106. Decrees are final when they are the final determination of the court on the rights of the parties; interlocutory, when they are auxiliary only to the final determination.—Caswell v. Comstock, 6 Mich. 391.

¶ 107. The difference between interlocutory and final decrees is that in the former some further steps are required to enable the court to adjudicate and settle the rights of

the parties, while under a final decree the party obtains his rights without any further adjudication on the merits, either by the direct operation of the decree itself, or by means of proceedings of a ministerial character in execution of it.—Lewis v. Campau, 14 Mich. 458.

¶ 108. When the word decree is used in a statute it is to be understood to mean a final decree, unless there is something in the context showing an interlocutory as well as a final decree is intended.—Caswell v. Comstock, 6 Mich. 391.

¶ 109. An appeal lies from every decree in chancery which purports to be final, even though its illegality does not appear on its face.—Wilson v. Wilson, 73 Mich. 620.

¶ 110. To be appealable a decree need not have disposed of all the merits.—Hake v. Coach, 105 Mich. 425.

¶ 111. A decree is not final, although it declares the principles on which the court means to act in all its future doings in the cause, unless it also adjudicates upon and fixes the rights of parties so that it can be carried into effect without further inquiry as to their rights and liabilities.—Patterson v. Hopkins, 23 Mich. 541.

¶ 112. Any decree or order divesting possession or rights on a preliminary inquiry is illegal and void; and when made in equity is a final order and appealable, though an appeal is not necessary to rescind it.—Tawas & B. C. R. Co. v. Iosco Circuit Judge, 44 Mich. 479.

¶ 113. The appealability of an order is determined by its effect on the rights of the parties. An order to be final must dispose of some portion of the controversy, and must finally determine some right between the parties.—Williams v. Olson, 151 Mich. 265.

§ 32. ——Judgments at law generally.

See also ante § 31.
Judgment on demurrer or dilatory plea, see post §§ 39, 40.

¶ 114. To authorize the writ of error there must be a final judgment or determination in the inferior court; it will not lie to bring up interlocutory proceedings merely, or discretionary orders made pending the litigation.—Holbrook v. Cook, 5 Mich. 225.

¶ 115. The province of a writ of error is to bring up for review final judgments or determinations, and it is not employed to bring up interlocutory decisions or discretionary orders made pending litigation.—Brady v. Toledo, A. A. & N. M. R. Co., 73 Mich. 457.

¶ 116. An order which puts an end to a suit is a final judgment reviewable by a writ of error.—City of Flint v. Genesee Circuit Judge, 146 Mich. 439.

¶ 117. Error lies to review the final order or determination of the circuit court.—City of Flint v. Genesee Circuit Judge, 146 Mich. 439.

¶ 118. A writ of error does not lie to review interlocutory decisions.—People v. Stimer, 82 Mich. 17.

¶ 119. An order, upon a verdict of guilty on a trial for nuisance for keeping up a milldam, that the dam be removed, is a final judgment on which a writ of error lies.—Crippen v. People, 8 Mich. 117.

¶ 120. The Supreme Court has power to review, by writ of error, any final judgment of a circuit court rendered in a proceeding according to the course of the common law.—In re Hicks, 20 Mich. 129.

¶ 121. It is not necessary that a judgment should be a final determination of the rights of the parties to authorize a writ of error. It is enough if it determines the particular suit.—In re Hicks, 20 Mich. 129.

¶ 122. Error is the proper remedy to review the decision of a circuit judge dismissing a writ of replevin and quashing all proceedings with costs on motion. Such an order is held a final determination of the suit with a judgment against the plaintiff for costs.—Jewell v. Lamoreaux, 30 Mich. 155.

¶ 123. Error lies upon an order finally dismissing a common-law action of trover where the grounds of the motion to dismiss are made part of the record.—Emerson Talcott & Co. v. McCormick Harvesting Mach. Co., 51 Mich. 5.

¶ 124. An order denying plaintiff's motion for judgment on the ground that the suit has been discontinued by stipulation is final so as to be reviewable.—Carpenter v. Myers, 90 Mich. 209.

¶ 125. Where a motion by defendants on special appearance to quash an attachment has been overruled, and they take no further steps, but allow judgment to be entered against them by default, a writ of error is their proper remedy for a review of the proceedings.—Pierce v. Johnson, 93 Mich. 125.

¶ 126. Under Comp. L. 1897, § 10642, providing that any judgment or final order in garnishment may be removed to the supreme court in the same manner as other personal actions, an order quashing a writ of garnishment and releasing the garnishee from further liability, with costs to defendant, is in effect a final judgment which plaintiff can have reviewed upon writ of error, and hence mandamus will not be granted to review such order and to compel the circuit judge to vacate it.—Recor v. St. Clair Circuit Judge, 139 Mich. 156.

§ 33. ——Circuit judgments on appeal or certiorari.

Nature of the appeal as a chancery cause or common-law action open to review by appeal or error, see ante §§ 25-30.
Necessity that judgment be entered on claim against estate, see post § 34, ¶ 137.
Consent or default judgment, see also post § 37, ¶¶ 150, 151.
Denial of appeal after time as discretionary and not subject of writ, see post § 51, ¶ 226.
Scope of review, see post § 274.
Presumption as to jurisdiction of original court, see post § 361.
Amendment of assignments to challenge jurisdiction, see post ¶ 567.

¶ 127. A judgment in the circuit court upon an appeal from an administrator's accounting held sufficiently final in character to authorize a writ of error.—Hall v. Grovier, 25 Mich. 428, 438.

¶ 128. An order entered in a special appeal from justice court upon alleged jurisdictional grounds, finding that the appeal was not sustained by the returns of the justice, and directing the matter to stand for trial on its merits, was not a final order and therefore not reviewable on error.—Dodge v. Nichols, 136 Mich. 28.

¶ 129. A judgment of the circuit court on appeal from an order of the probate court denying a petition for letters de bonis non is final and subject to writ of error, where the circuit court dismissed the appeal though there was an issue of fact as to existence of unadministered assets, such an issue imparting to the appeal the nature analogous to a suit at common law.—Owen v. Ward's Estate, 125 Mich. 30.

¶ 130. An order dismissing an appeal and an order quashing a writ, are final orders reviewable by writ of error.—City of Flint v. Genesee Circuit Judge, 146 Mich. 439.

¶ 131. An order dismissing an appeal from the probate to the circuit court because no leave to appeal had been granted is a final order reviewable by a writ of error, and mandamus will be denied in such case.—City of Flint v. Genesee Circuit Judge, 146 Mich. 439.

¶ 132. An order of the circuit court allowing appeal after time from a decree of the probate court probating a will is merely interlocutory and is not appealable.—Apsey v. DeYoung, 173 Mich. 426.

§ 34. Stage of the judgment; rendition or entry.

Necessity of rendering decree permitting of appeal, see ante ¶ 11.
Judgment on demurrer, see also post § 39.
Decrees reserving questions or referring them, see post § 42.
Orders in course of the action or suit but not disposing of it entirely, see post §§ 45-50.
Consent to sustaining of demurrer without final judgment thereon, see post § 38, ¶ 155.
Appeal from demurrer to cross-bill before final judgment on bill, see post § 38, ¶ 167.
Necessity that record show entry of verdict and judgment, see post § 173.
Taking appeal or error before entry of judgment or settlement of case, see post ¶¶ 646, 647.
Dismissal for want of judgment entered, see post § 150.
Commencement of time to take appellate procedure, see post § 73.
Costs for premature appeal or error, or for unfounded appeal or error, see Costs, V.

¶ 133. When a decision is simply announced, but no decree actually drawn up or filed, there is no legal determination of the cause, and an appeal is premature.—Newbould v. Stewart, 15 Mich. 155.

¶ 134. A writ of error does not lie to review a case in which no final judgment has been entered.—Bancroft v. Board of Regents, University of Michigan, 192 Mich. 168.

¶ 135. An order sustaining a demurrer as to certain counts of a declaration, and overruling it as to others, is not reviewable by writ of error prior to the entry of final judgment.—Perry v. Church, 107 Mich. 480.

¶ 136. An agreement by counsel, without action of the court, that a demurrer to a declaration, which had been overruled, should stand overruled as to an amended declaration, presents no question for review on error, since parties cannot stipulate causes into the supreme court.—Hendrick v. Minor Lumber Co., 113 Mich. 52.

¶ 137. The rule that a judgment must be entered before a writ of error lies to it, applies as well to the adjudication of the allow-

ance of a claim filed against the estate of a deceased person at a certain sum, or a disallowance, on appeal to the circuit court, as to a common-law judgment.—Rayl v. Wayne Circuit Judge, 91 Mich. 4.

¶ 138. Where an order setting aside a decree of divorce by default against a husband was granted upon condition that the husband pay the wife solicitor's fees of a specified sum within a certain period, and a petition to set aside the order of allowance of solicitor's fees was denied, but the time for payment was extended for 30 days, and the husband failed to pay the solicitor's fees within such second period, the decree went automatically into effect so that an appeal would lie therefrom.—McDonald v. McDonald, 190 Mich. 649.

¶ 139. Where an action for false imprisonment is against three defendants jointly, and a demurrer to the declaration is sustained in favor of two of them and overruled as to the third, the case is still pending for further proceedings in the court below, and a writ or error is unavailable.—Toleikis v. Austin, 197 Mich. 333.

¶ 139a. Error will not lie to review the order of the circuit court forfeiting a bond given on an appeal of a criminal case from justice's court after a denial of a motion to quash, no further proceedings having been taken in the case to carry it into judgment on the bond.—People v. Stimer, 82 Mich. 17.

§ 35. Abated, suspended or vacated judgments.

Appealability of judgment in abatement, see post § 40.
Leaving questions in suspense or under reference, see post § 42.
Effect of order opening default on conditions which are not performed, see ante ¶ 138.
Causes of action which survive death of party, see Abatement and Revival, §§ 16, 17.
What will suspend judgment and enlarge time for error, see post § 75.
Practice in reviving to take appeal or error, see post § 80.
Treating revival as having been made, see post § 389, ¶ 1546.

¶ 140. An appeal from a decree of divorce taken by the defending wife within the statutory period, but after her husband's death, was sustained.—Shafer v. Shafer, 30 Mich. 163.

¶ 141. Appeal lies from a decree of divorce granted to a complainant after his death, with alimony to defendant, which decree was entered so as to relate back to complainant's lifetime.—Wilson v. Wilson, 78 Mich. 620.

(1 Mich. Dig. 18)

§ 36. Aggrievement or injury to appellant.

Right to have review of trivial judgments, see ante ¶ 15.
Party entitled to appeal or bring error, see post § 60.
Aggrievement or injury as giving capacity to appeal, see post §§ 61, 62.
Judgment suffered by default or confession, see post § 37.
Dismissal pending appeal on compliance with or enforcement of judgment, see post § 162.
Dismissal or affirmance on hearing for want of grievance, see post § 481.
Final judgment without remand where no substantial injury or grievance appears, see post § 504.

¶ 142. Whenever a substantial legal right is divested by an order or decree in a court of chancery, an appeal lies from such order or decree to the supreme court.—Perrin v. Lepper, 72 Mich. 454.

¶ 143. The absence of a personal liability clause in a foreclosure decree is no ground for appeal unless the decree goes further and declares that no such liability should exist.—Shelden v. Erskine, 78 Mich. 627.

¶ 144. An appeal will not lie from the order of a circuit judge, made in contempt proceedings instituted by the complainants in a judgment creditors' suit to punish the defendant for a violation of the injunction issued on filing their bill, that the defendant is not guilty of the contempt charged.—Rasch v. Sheppard, 105 Mich. 667.

¶ 145. A complainant who obtained an interpleader of two claimants to a fund cannot appeal from the decree awarding it to one of them.—Knights of Honor v. Nairn, 60 Mich. 44; Atkinson v. Flannigan, 70 Mich. 639.

¶ 146. Complainant filed a bill asking that defendant village be enjoined from interfering with complainant in the latter's carrying out of a paving contract. Defendant filed a cross-bill asking that complainant be restrained from claiming any right or bringing any suit under said contract. Complainant completed the job before his bill was heard below, where the court gave defendant the relief asked in its cross-bill. Held, complainant was entitled to have the decree in favor of defendant reviewed.—Central Bithulithic Paving Co. v. Village of Highland Park, 164 Mich. 223,

§ 37. Default or consent judgments.

Failure to oppose judgment after motion to quash attachment overruled, see ante ¶ 125.
Decree or order, opening decree, see post § 44.

Party entitled to appeal, see post § 61, ¶ 294, § 62.
Loss of right to appeal by satisfaction of or compliance with judgment or decree, see post § 66.
Sufficiency of showing that order was by consent, see post § 173.

¶ 147. A consent decree is not appealable.—Brick v. Brick, 65 Mich. 230; Owen v. Yale, 75 Mich. 256.

¶ 148. A consent decree cannot be appealed from when made in a case where a wife had filed a bill under How. St., § 6291, for maintenance, charging desertion, but not for the statutory period, and the husband's failure to suitably provide for and maintain her, but not in such a manner as to lay a foundation for a divorce under the general laws, to which bill an answer had been filed fully meeting all the allegations of the bill, and on the hearing the judge had announced that a divorce would be granted; whereupon a decree was agreed upon, granting a divorce for desertion and a permanent alimony, which was paid by the husband.—Owen v. Yale, 75 Mich. 256.

¶ 149. A consent order or decree is not appealable, even though it is a stipulation for removing the case without costs in order to settle a question of jurisdiction.—Chapin v. Perrin, 46 Mich. 130; Brick v. Brick, 65 Mich. 230.

¶ 150. Plaintiff went to work for defendant under a contract for a period from June 21, 1907, to October 1, 1907. Plaintiff was dismissed in ten days, and on July 17, 1907, recovered a verdict in a justice court. The circuit court held that she could recover for damages only up to the date of the suit in the justice court. Held, that judgment entered on this verdict was not a consent judgment, so as to be unappealable.—Webb v. Depew, 152 Mich. 698.

¶ 151. Where an order of the circuit on appeal reversing an order of the State Fire Marshal was entered by consent, the consenting parties are not in a position to take an appeal from such order.—Hart v. State Fire Marshal, 178 Mich. 609.

¶ 152. The interest of complainant, an unmarried deaf-mute fifty years of age, was derived by will, a portion of which is as follows: To him "during the term of his natural life and after his death to be divided equally between his heirs, share and share alike." Upon bill by complainant to enforce specific performance of a contract of sale of the land to his sister, the defendant, and to cut off the entail and convey a free and indefeasible estate in fee simple, a decree was made in accordance with the prayer of the bill and in accordance with the wishes and consent of defendant. Held, that under the practice of the Supreme Court that court may decline to consider the appeal.—Cameron v. Smith, 171 Mich. 333.

§ 38. Judgment or decree on demurrer.

On dilatory pleas, see post § 40.
Proper remedy for review, see ante § 3.
Necessity of entry of judgment on demurrer, see ante § 34, ¶¶ 135, 136.
Review on appeal from decree, see post § 296.
Time for appealing, how reckoned, see post § 73.
Order on demurrer as a "decree" for purpose of reckoning time to claim appeal, see post ¶ 318.
Necessity for bond on appeal, see post § 81.
Questions open on appeal from interlocutory order, see post §§ 293, 307.
Ruling on demurrer or plea as question reviewable on appeal or error to final judgment, see post §§ 295, 296.

¶ 153. An order overruling a demurrer is not final; therefore it is not appealable.—Bennett v. Nichols, 12 Mich. 22; Kirchner v. Wood, 48 Mich. 199.

¶ 154. An order allowing a general demurrer, but not in terms dismissing the bill or awarding costs, is merely interlocutory and not appealable.—Blackwood v. Van Vleet, 10 Mich. 398; Kingsbury v. Kingsbury, 20 Mich. 212.

¶ 155. An order sustaining a demurrer to the bill of complaint in a chancery suit, and granted by virtue of a stipulation entered into for the purpose of bringing the cause to the Supreme Court on appeal, without any further decree dismissing the bill or otherwise disposing of the cause finally, is not such a final order or decree as is appealable.—Perkins v. Keating, 28 Mich. 269.

¶ 156. An order overruling a special demurrer to a bill is not appealable.—Babcock v. McJury, 76 Mich. 316.

¶ 157. Pub. L. 1883, p. 47, does not allow an appeal from an order overruling a demurrer that is special as well as general.—Turck v. Soule, 55 Mich. 128.

¶ 158. Comp. L. 1897, § 549, is anomalous in permitting an appeal from an order overruling a demurrer and is limited to a general demurrer.—Ideal Clothing Co. v. Hazle, 126 Mich. 262.

¶ 159. An appeal will lie from an order overruling a demurrer which is both general and special, under Comp. L. 1897, § 549.—Ideal Clothing Co. v. Hazle, 126 Mich. 262.

¶ 160. The rule requiring a specification of cause in all demurrers does not abrogate or enlarge the statute authorizing an appeal from an order overruling a general demurrer (Comp. L. 1897, § 549).—Daschke v. Schellenberg, 124 Mich. 16.

¶ 161. As the failure to verify a bill might have been ground for a general demurrer prior to the adoption of the rule requiring a specification of cause in all demurrers, an order overruling a demurrer for that cause is appealable, under Comp. L. 1897, § 549, making the overruling of a general demurrer appealable.—Daschke v. Schellenberg, 124 Mich. 16.

¶ 162. Pub. Acts 1907, No. 340, regulating the practice on appeal in chancery cases, does not restrict or enlarge the right of appeal, but regulates the practice only, and consequently does not repeal Pub. Acts 1883, No. 58, authorizing an appeal from an order overruling a general demurrer.—Moody v. Macomber, 156 Mich. 76.

¶ 163. A demurrer alleging that complainant in a supplemental bill is not entitled to file said bill or any other bill which entitles him to the relief prayed for is not a general demurrer, and an order overruling it is not appealable.—Taylor v. Taylor, 87 Mich. 64.

¶ 164. The right given by How. St., § 6737, of appeal from an order overruling a general demurrer is not enlarged or abridged by 1897 Ch. Rule 9, permitting the reasons for a demurrer to be stated therein; and an order overruling a demurrer is not appealable if the bill, prior to the adoption of said rule, would not have been subject to a general demurrer for the defects stated in the overruled demurrer.—Greenley v. Hovey, 115 Mich. 504.

¶ 165. The special reasons in matters of substance which, under 1897 Circuit Court Ch. Rule 9 may now be stated in a general demurrer, do not make it any the less a general demurrer, and an order overruling it is appealable.—Robinson v. Kunkleman, 117 Mich. 198.

¶ 166. Where the grounds of a demurrer go only to a part of the relief asked, an order overruling same as to those grounds is not appealable.—People v. Detroit, G. H. & M. Ry. Co., 169 Mich. 72.

¶ 167. An order dismissing a cross-bill on demurrer before the final determination of the original bill is appealable.—Clutton v. Clutton, 106 Mich. 690.

¶ 168. An order overruling a general demurrer to an answer filed as a cross-bill, together with a plea, is an appealable order.—Flynn v. Holmes, 142 Mich. 378.

¶ 169. In a chancery suit where the defendants have answered and in their answer inserted the usual demurrer clause, the court cannot pass upon the legal issues without first proceeding to hear the proofs, and the practice of appealing upon the decision of the demurrer alone cannot be sanctioned even at the request of the parties, and the Supreme Court will reverse the decision on the demurrer and remand the cause for proofs upon the issues.—Gray v. Eldred, 144 Mich. 23.

¶ 170. Under Comp. L. 1897, § 549, giving the right of appeal from an order overruling a general demurrer, a demurrer to a bill for multifariousness must be considered special, and no appeal lies from an order overruling it.—Kerr v. Rupp, 144 Mich. 269.

¶ 171. A demurrer to a bill setting out in detail the grounds of multifariousness, repugnancy of allegations, duplicity, and inconsistency between the allegations and between the prayer and the allegations, is special and not general, and therefore no appeal lies from an order overruling it.—Case v. Longyear, 168 Mich. 434.

¶ 172. No appeal lies from an order overruling a demurrer for multifariousness, since such demurrer is special and not embraced by the statute.—Freeman v. Lowell Specialty Co., 174 Mich. 59.

¶ 173. As a demurrer to a bill of complaint on the ground of multifariousness is special, no appeal lies from an order overruling it.—Michigan Nat. Bank v. Hill, 181 Mich. 7.

¶ 174. A demurrer to a bill for multifariousness is special, and an order overruling it cannot be appealed from.—Graham v. Graham, 171 Mich. 307.

¶ 175. An appeal does not lie from an order overruling a special demurrer to a bill filed by the receiver of a defunct fraternal loan and insurance society for a discovery and an accounting against the trustees, officers and agents of the company.—Snover v. Boynton, 173 Mich. 539.

§ 39. ——At law.

Order sustaining demurrer, see also ante ¶ 27.

On dilatory pleas, see post § 40.

Review on error to final judgment, see post § 296.

Dismissal for want of reviewable judgment, see post § 150.

¶ 176. An order sustaining a demurrer to a declaration and directing final judgment,

unless plaintiff amends within twenty days, is not a final order so as to be reviewable on error until the time limited therein for amendment has transpired.—Clark v. Village of North Muskegon, 86 Mich. 29.

¶ 177. An order overruling a demurrer to a declaration is not reviewable until it has been followed by final judgment.—Fitzsimmons v. Milwaukee, L. S. & M. R. Co., 98 Mich. 257.

¶ 178. An order overruling a demurrer to a declaration not followed by judgment, is not a final order, and is not reviewable by writ of error.—Tompkins v. Bowen, 123 Mich. 377.

§ 40. Decrees or judgments on dilatory pleas.

Proper remedy for review, see ante § 3.
Dismissal for want of judgment on plea, see post § 150.
Nature of judgment as limiting scope of review, see post XII, B, 2.
Review on appeal from final decree or judgment, see post §§ 293, 296.
Right to proceed with trial and have review on error to final judgment, see also post ¶ 302.

¶ 179. An order overruling a plea to a bill which does not affect the merits of the entire controversy is not a final order, and therefore not appealable.—Morris v. Kuhn, 190 Mich. 419.

¶ 180. An order overruling a plea in abatement is final so as to be appealable when the plea goes to the whole case, and will dispose of it, if sustained.—Pinel v. Campsell, 190 Mich. 347.

¶ 181. Where a plea in an equitable action if good will dispose of the whole case, an order overruling such plea and requiring the defendant to answer within a given time under penalty of otherwise having the bill taken as confessed by him, is a final order and appealable after the elapse of the time for answering if the defendant elects to stand on his plea.—Hagar v. Schliess, 183 Mich. 610.

¶ 182. Where a plea is overruled with leave to answer within a limited time, it seems that taking an appeal before the expiration of that period may be treated as an election to stand by the plea, and the appeal may be sustained accordingly.—Cross v. Cross, 54 Mich. 115.

¶ 183. A writ of error will lie from an order overruling a demurrer to a plea in abatement, since such order is in effect a final determination. The proper practice, however, is to enter a judgment, quashing the writ to which the plea is interposed.—Campbell v. Hudson, 106 Mich. 523.

¶ 184. An order overruling a plea to a bill to foreclose a mortgage, setting up facts which it was claimed required the state of Michigan to be made a party, with permission to answer, was not an appealable order, even though not reviewable on appeal from final decree.—Miller v. McLaughlin, 135 Mich. 646.

¶ 185. An order overruling a plea in abatement in a chancery suit to sequestrate corporation stock and property held not appealable.—Painter v. Lebanon Land Co., 178 Mich. 47.

¶ 186. Error will lie to test the sufficiency of service after an unsatisfactory decision on a plea of abatement.—Trumbull Motor Car Co. v. Wayne Circuit Judge, 189 Mich. 554.

¶ 187. The sufficiency of service may be tested on a writ of error, if the party elects to stand upon it and not waive his rights.—Trumbull Motor Car Co. v. Wayne Circuit Judge, 189 Mich. 554.

§ 41. Cost decrees and judgments.

¶ 188. Defendants against whom a decree for costs has been taken may appeal from the decree.—McCabe v. Farnsworth, 27 Mich. 52.

¶ 189. An appeal in chancery will not lie where nothing is involved but costs on demurrer upon the dismissal of a bill without prejudice.—Jenness v. Smith, 58 Mich. 280.

¶ 190. Where a circuit judge orders a stay of proceedings until security for costs is given, the order is not a formal one and is reversible in the upper court for error.—Clark v. Bay Circuit Judge, 154 Mich. 483.

§ 42. Decrees for relief with reference or reservation.

Accounting decrees in general, see also post § 52.
Divorce decree with reference, see also post § 54, ¶¶ 238, 239.

¶ 191. A decree is not final or appealable which directs a reference to a master or other officer to do what the court, but for its power to make such reference, would itself have to do before it could decide the case.—Caswell v. Comstock, 6 Mich. 391.

¶ 192. Where a decree declares that there ought to be a specific performance, but does not fix its terms nor direct either party to do

any act, and requires further inquiry as to title and incumbrances and an accounting, all of which are necessary to determine the terms and conditions of performance, it will be held to be interlocutory and not appealable; it does not conclude the parties from further litigating their rights on a final hearing.—Patterson v. Hopkins, 23 Mich. 541.

¶ 193. A decree in a partition suit which fixes the respective rights of the parties, although it contains an order of reference to take an accounting as to rents and profits, and to ascertain whether an actual partition is practicable, or whether a sale and distribution of proceeds is necessary, is such a final order or decree as is appealable.—Damouth v. Klock, 28 Mich. 163.

¶ 194. Under a bill to recover dower, a decree declaring complainant entitled to dower is appealable though directing further inquiry as to damages for dower withheld, and to ascertain whether dower could be assigned by metes and bounds, and, if not, to compute the money value.—Brown v. Bronson, 35 Mich. 415.

§ 43. Supplementary and amendatory decrees and judgments.

Orders opening, vacating or refusing to open or vacate, see also post § 44.
Accounting decree in execution of decree, see post § 52, ¶ 228.
Decree for revision of divorce or alimony decree, see post § 54, ¶¶ 237, 239.
Finality of orders supplementary to judgment, see post §§ 45-50.
Scope of questions open on appeal, see post § 308.

¶ 195. An order denying a petition to correct a foreclosure decree is final and appealable, though made after time to appeal from such decree had lapsed and extension thereof was denied.—Tucker v. Stone, 92 Mich. 298.

¶ 196. A decree determining the legal estate of parties is final and appealable; it is too late to examine the merits of the case on an appeal from any subsequent order made for the purpose of enforcing it.—Shepherd v. Rice, 38 Mich. 556.

§ 44. Opening or vacating decrees and judgments.

See also post ¶ 203.
Setting aside or opening foreclosure sale, see post § 55, ¶¶ 245-248.
Time for appealing, how reckoned, see post § 73.

¶ 197. An order refusing to set aside a decree for irregularity is final and appealable.—Michigan Ins. Co. v. Whittemore, 12 Mich. 311.

¶ 198. An order opening a decree to a defense before any new rights have intervened is not final.—Maxfield v. Freeman, 39 Mich. 64.

¶ 199. An order setting aside a final decree, taken pro confesso in a foreclosure suit, and permitting a defendant to defend, unless the complainant should elect to assign to him the decree for a sum named in the order, is not a decree, or final order, which can be appealed from.—Prentis v. Rice, 2 D. 296.

¶ 200. A denial of a motion to set aside a default for nonappearance of defendant on condition that plaintiff remit a portion of the judgment, may be reviewed on writ of error, although an unconditional denial, being discretionary, cannot be so reviewed.—Carton v. Day, 157 Mich. 43.

§ 45. Finality of orders generally.

See also post §§ 46-50.
Orders on demurrers, see ante §§ 38, 39.

¶ 201. A final order is one that finally disposes of the whole matter of the suit; and it may be either the decree itself, or an order subsequent to the decree when something remains to be done in carrying the decree into effect before the whole subject is finally disposed of, and a further and final order is requisite for the purpose.—Wing v. Warner, 2 D. 288.

¶ 202. Final orders are adjudications upon motions or other applications, not involving a hearing upon pleadings and proofs, but upon other issues interlocutory or collateral, whereby some supposed right of a party is definitely cut off or some liability is fixed upon him.—Kingsbury v. Kingsbury 20 Mich. 212.

¶ 203. If the decision of a motion opens a case it is not generally final unless it cuts off some acquired right under a decree; if it closes the matter and precludes any further hearing or investigation it is final.—Kingsbury v. Kingsbury, 20 Mich. 212.

¶ 204. An order disposing finally of any part of the merits is appealable, notwithstanding it is made before the case is ripe for hearing and though not deciding the whole case.—Lewis v. Campau, 14 Mich. 458; Kingsbury v. Kingsbury, 20 Mich. 212.

¶ 205. The appealability of an order is not determined by the stage of the case at which it is made, but by its effect on the rights of the parties.—Barry v. Briggs, 22 Mich. 201; Taylor v. Sweet, 40 Mich. 736.

¶ 206. An order is final and appealable so far as it finally disposes of any portion

of the subject-matter in controversy.—Taylor v. Sweet, 40 Mich. 730.

¶ 207. Whenever an order of a court of chancery divests a legal right an appeal lies to determine whether the order is legal or unauthorized.—Barry v. Briggs, 22 Mich. 201.

¶ 208. Any order is final that gives all the relief prayed for by the bill.—Whitbeck v. Chittenden, 50 Mich. 426.

¶ 209. If an order finally disposes of any right it is appealable though other proceedings are yet to be taken in the case.—Maxfield v. Freeman, 39 Mich. 64.

¶ 210. Complainant filed a bill against defendant as executor, for an accounting. Defendant answered and expressed a willingness to accouut. Defendant afterwards moved to dismiss the bill on the ground of lack of jurisdiction. The motion was denied. Held, an appeal would not lie from the order denying this motion, no final decree having been made on the bill.—Brooks v. Hargrave, 162 Mich. 599.

¶ 211. A writ of error is the proper remedy to review the decision of a circuit judge dismissing a writ of replevin and quashing all proceedings with costs on a motion whereupon, improperly, the merits were disposed of. —Jewell v. Lamoreaux, 30 Mich. 155.

§ 46. ——Striking or dismissing pleadings from case.

¶ 212. An order striking a bill from the files is final and appealable.—Webster v. Hitchcock, 11 Mich. 56; McMann v. Westcott, 47 Mich. 177.

¶ 213. A decree dismissing a cross-bill is appealable.—Farmers' & Mechanics' Bank v. Bronson, 14 Mich. 361.

¶ 214. An order striking a bill from the files is a final determination of the right of complainant to pursue her remedy against the defendant who had thus moved, and is therefore a final order from which an appeal lies.—Carpenter v. Auditor General, 144 Mich. 251.

¶ 215. An order denying a motion to strike an amended bill from the files is not a final order and is not appealable.—Williams v. Olson, 151 Mich. 265.

§ 47. ——Granting or denying leave to plead or intervene.

In foreclosure suits, see also post ¶ 243.

¶ 216. An order denying leave to file a bill of review is final.—Beecher v. Marquette & Pacific Rolling Mill Co., 40 Mich. 307.

¶ 217. An order granting leave to file a bill of review, and made before any steps have been taken in execution of the decree, is not a final order from which an appeal lies. —Maxfield v. Freeman, 39 Mich. 64; Beecher v. Marquette & Pacific Rolling Mill Co., 40 Mich. 307.

¶ 218. It seems that an order permitting a party interested but not a party to the suit to file a bill in the nature of a bill of review, is not appealable.—Leggett v. City of Detroit, 137 Mich. 247.

§ 48. ——Granting or denying writs and process.

Review on error to judgment, see post § 290.

¶ 219. An order denying a writ of assistance to the purchaser in a foreclosure suit may be appealed from.—Baker v. Pierson, 5 Mich. 456.

¶ 220. An order overruling a motion to quash the service of a summons is interlocutory and not reviewable upon writ of error.—Brady v. Toledo, A. A. & N. M. R. Co., 73 Mich. 457.

§ 49. ——Discharge from capias.

¶ 221. An order dismissing a capias and discharging the defendant from arrest on condition that he file a stipulation not to bring suit for his arrest against either the plaintiff or the sheriff is an interlocutory order and not a judgment, and is therefore not removable into the Supreme Court by writ of error.—Adams v. Church, 22 Mich. 79.

§ 50. ——Granting or denying rehearing or new trial.

Review with judgment on appeal or error from it, see post § 298.

Scope of appeal from order on petition for rehearing, see post § 309.

¶ 222. An appeal lies from an order denying a rehearing of a chancery suit.—Perkins v. Perkins, 181 Mich. 166.

¶ 223. Bill of exceptions and writ of error for the sole purpose of reviewing the action of the circuit court in refusing to grant a new trial, is authorized under Comp. L. 1897 § 10504, which provides that "the party appealing the same may incorporate in the bill of exceptions a record of all proceedings had on said motion for a new trial, including the reasons given by the trial judge in refusing to grant said new trial. Exception may be taken and error assigned on the decision of the circuit judge in refusing such motion, and the same shall be reviewed by the Supreme Court."—Walker v. Newton, 13 Mich. 576.

¶ 224. Under Comp. Laws 1897, § 10492, a writ of error will not lie to review the determination of the trial judge in denying a motion for a new trial upon the merits after the affirmance of the cause in the Supreme Court since such denial is not a final determination within the meaning of said section.—Minkkinen v. Quincy Min. Co., 172 Mich. 404.

§ 51. Discretionary orders.

See also post ¶ 645.
Discretionary order coupled with conditions, see also ante ¶ 200.
Injunctional orders, see post § 56.
Divorce and alimony decrees, see post § 54.
Rules as to review of discretionary rulings involved in or leading to judgment appealed from, see post XII, D.

¶ 225. Appeal will not lie from any order or matter in the discretion of the court.—Benedict v. Thompson, 2 D. 299; Baker v. Pierson, 5 Mich. 456; Duncan v. Campau, 15 Mich. 415; Demaray v. Little, 17 Mich. 386; Boinay v. Coats, 17 Mich. 411.

¶ 226. Error does not lie to review the circuit court's denial of leave to appeal from justice's judgment sought on ground that party was prevented from appealing within statutory time by causes beyond his control.—Vincent v. Bowes, 78 Mich. 315.

§ 52. Accounting decrees.

See also ante ¶ 210.
Decrees with reference for accounting, see also ante § 42.
Parties entitled to appeal, see post §§ 61, 62.
Scope of questions open on appeal, see post § 304.

¶ 227. A decree that consists in part of a reference to a commissioner to take an account between the parties is not appealable.—Enos v. Sutherland, 9 Mich. 148.

¶ 228. An accounting ordered only in aid of the execution of the decree, and which is no part of the relief prayed for, does not prevent the decree from being final where the whole purpose of the suit has been accomplished, and where the parties are entitled to an immediate execution of the decree.—Winthrop Iron Co. v. Meeker, 109 U. S. 180, 27 L. ed. 898, 3 Sup. Ct. Rep. 111.

¶ 229. The confirmation of the report of a commissioner upon a reference to examine and state a partnership account—there having been no pre-adjudication upon the questions involved in the reference—is not a decree or final order which can be appealed from.—Kingsbury v. Kingsbury, 20 Mich. 212.

¶ 230. Appeal does not lie from an order confirming the report of a special commissioner on a reference to ascertain the amount due between parties.—Bewick v. Alpena Harbor Improvement Co., 39 Mich. 700.

¶ 231. A decree which, in a suit for a partnership accounting, places the date at which the firm dissolved at a period later than is claimed by either party, is not final as disposing of the case, but is final and appealable as settling the basis for accounting.—Candler v. Stange, 53 Mich. 479.

¶ 232. An order or decree which is in effect a final disposition of the case, and which fixes the principles of an accounting upon a bill filed therefor, is final and appealable.—Perrin v. Lepper, 72 Mich. 454.

¶ 233. Where by the commissioner's report in an accounting between partners the amount found due is subject to change by matters in process of litigation, an order confirming such report is not final or appealable.—Petrie v. Torrent, 95 Mich. 439.

¶ 234. A decree in a partnership accounting suit which fixes the time at which the accounting is to commence, the period which it is to cover, the respective rights of the parties with regard to the business of the partnership, and with regard to the business which is claimed by defendant to have been no part of the partnership, said contention being decided adversely to defendant, and which directs the commissioner after fixing the standing and rights of the parties in the various matters in dispute, to state an account upon said order as a basis, is appealable.—Hake v. Coach, 105 Mich. 425.

§ 53. Decrees in assignment proceedings.

Receivership orders, see post §§ 57-59.

¶ 235. An order appointing a receiver pendente lite, and requiring property in mortgagee's possession to be turned over to him, issued in a proceeding under How. St., § 8749o (relating to voluntary assignments, and authorizing persons having preferred claims to apply for a receiver in certain cases), is appealable.—Hall v. Wayne Circuit Judge, 111 Mich. 395.

§ 54. Divorce and alimony decrees.

Consent decree, see ante § 37, ¶ 148.
Effect of death of party, see ante § 35.

¶ 236. An order overruling a plea of nonmarriage in a divorce suit is appealable.—Cross v. Cross, 54 Mich. 115.

¶ 237. A decree upon a petition filed under Comp. L. 1857, § 3238, How. St., § 6239, providing for the revision of decrees in divorce cases, is final and appealable.—Chandler v. Chandler, 24 Mich. 176.

¶ 238. A decree granting a divorce from the bonds of matrimony is appealable although also ordering a reference on the question of temporary alimony.—Shaw v. Shaw, 9 Mich. 164.

¶ 239. An order opening for review a decree for permanent alimony in a divorce suit, and ordering a reference to a circuit court commissioner to take proofs, etc., and to report thereon, is not appealable.—Perkins v. Perkins, 10 Mich. 425.

¶ 240. An order modifying a decree for alimony is final and appealable.—Maxfield v. Freeman, 39 Mich. 64; Chandler v. Chandler, 24 Mich. 176.

¶ 241. An order allowing temporary alimony is interlocutory and not appealable.—Haines v. Haines, 35 Mich. 138; Lapham v. Lapham, 40 Mich. 527; Cooper v. Mayhew, 40 Mich. 528; Ross v. Ross, 47 Mich. 185; Froman v. Froman, 53 Mich. 581; Rose v. Rose, 53 Mich. 585.

§ 55. Foreclosure decrees and orders in foreclosure suits.

See also ante ¶ 184.
Absence of deficiency clause as grievance to appellant, see ante ¶ 143.
Receivership orders in foreclosure, see post §§ 57-59.
Order allowing or denying amendment, see also ante § 43, ¶ 195.
Proper amount of bond, see post § 83.
Scope of questions open on appeal, see post § 305.

¶ 242. An order in a foreclosure suit confirming the report of the appraisal, set-off and conveyance of the mortgaged premises, under the appraisal law of 1842, was held to be a final order, from which an appeal would lie, and the decree directing such appraisal was also appealable, it being final.—Benedict v. Thompson, 2 D. 299.

¶ 243. An order denying and dismissing a petition made before mortgage sale for leave to file an answer nunc pro tunc is final and appealable.—Scriven v. Hursh, 39 Mich. 98.

¶ 244. An order nisi confirming a foreclosure sale is appealable.—Detroit Fire & Marine Ins. Co. v. Renz, 33 Mich. 298.

¶ 245. An order denying a motion to stay a sale under a decree of foreclosure, and vacating a temporary order staying the sale until the motion could be heard and disposed of, cannot be appealed from.—Romeyn v. Hale, 1 Mich. 93.

¶ 246. An appeal will lie from an order setting aside a sale in a foreclosure suit after confirmation of report of sale, it being final as to the purchaser.—Bullard v. Green, 9 Mich. 222.

¶ 247. An order vacating a sale and ordering a new sale on new terms and conditions becomes a decree and may be appealed from.—Perkins v. Perkins, 16 Mich. 162.

¶ 248. An order opening biddings before confirmation, and directing a new sale on condition that a larger bid shall be made, is not appealable.—Demaray v. Little, 17 Mich. 386.

§ 56. Injunctional orders and decrees.

Contempt orders for violation, see ante § 17.
Review of interlocutory injunction, see post § 411.

¶ 249. A decree which grants the principal relief prayed for, and gives complainant the immediate benefit of judicial action by an injunction that in effect puts an end to defendant's business, is appealable, even though a farther decree may be necessary upon completion of an accounting.—Smith v. Walker, 57 Mich. 456.

¶ 250. An order allowing an injunction which has the effect of depriving a party of his possession of land is final and appealable.—Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 61 Mich. 9; Arnold v. Bright, 41 Mich. 207.

¶ 251. An order is final which enjoins defendant from ever using a particular device upon his manufactures, or from selling them as if made at complainant's establishment.—Smith v. Walker, 57 Mich. 456.

¶ 252. An order refusing to enjoin a replevin suit is not final or appealable.—Merchants' & Manufacturers' Nat. Bank v. Kent Circuit Judge, 43 Mich. 292.

¶ 253. An order enjoining a replevin suit for property to which plaintiff claims title is appealable.—Merchants' & Manufacturers' Nat. Bank v. Kent Circuit Judge, 43 Mich. 292.

¶ 254. An order denying a motion for the dissolution of a preliminary injunction, heard on answer to a part and demurrer to the residue of the bill, before the time for filing replication had expired, is interlocutory merely, and cannot be appealed from.—Wing v. Warner, 2 D. 288.

¶ 255. An order merely dissolving an injunction is not appealable.—Boinay v. Coates, 17 Mich. 411; Spencer v. Stearns, 28 Mich. 463.

¶ 256. An order dissolving a preliminary injunction is not a final, appealable order. —Freeman v. Mitchell, 198 Mich. 207.

¶ 257. An order on a motion for preliminary injunction, which commands the removal of a fence alleged to have been erected maliciously to darken complainant's house, and enjoining its rebuilding, is appealable. —Ladd v. Flynn, 90 Mich. 181.

¶ 258. An order dissolving a preliminary injunction and restoring defendant to her possession of land is not appealable.—Schuffert v. Grote, 83 Mich. 263.

¶ 259. An order denying a motion to dissolve a preliminary injunction is interlocutory and not appealable.—United States Heater Co. v. Iron Molders' Union of North America, 129 Mich. 354.

¶ 260. In a chancery suit to abate an alleged nuisance a decree finding there is a nuisance and ordering that within 60 days it should be abated, failing which an injunction shall issue, is appealably final in that it decides the substantial question, though it leaves open some of the questions involved in the litigation.—Schmelzer v. Bartlett Illuminating Co., 142 Mich. 133.

¶ 261. An appeal does not lie from an order modifying a preliminary injunction nor from an order denying a motion to set aside such an order.—Simmons v. Alcona County Sup'rs, 144 Mich. 591.

¶ 262. Complainant on October 1, 1910, filed a bill for specific performance of a contract for the sale of pickles, and asked for a temporary injunction forbidding defendant vendee to sell or remove said pickles. Defendant's motions to dissolve the temporary injunction entered October 3, 1910, were heard and overruled on October 17, and November 28, 1910, respectively. The injunction entered prevented defendant from disposing of the pickles until the merits of the bill for specific performance should be determined. Held, the injunction was not such a final order as would enable the defendant to take an appeal therefrom.—Harbauer-Marseau Co. v. Thwing, 165 Mich. 42.

§ 57. Receivership and bankruptcy decrees and orders.

Divestiture of title or possession as making order appealable, see post § 58.
In assignment proceedings, see also ante § 53.
Review of interlocutory receivership, see post § 411.
Party *entitled* to appeal, see post § 60, ¶ 287, ff 61, 62.

¶ 263. When the appointment of a receiver is sought merely as ancillary to other equitable relief, and does not divest legal rights, an interlocutory order making such appointment cannot be appealed from.—Duncan v. Campau, 15 Mich. 415.

¶ 264. Where a bill is filed in aid of probate proceedings for the removal of an administrator, and prays the appointment of a receiver to take charge of the assets pending such proceedings, an order making such appointment, though in terms interlocutory, is in effect final and subject to appeal.—Lewis v. Campau, 14 Mich. 458.

¶ 265. Whether, even in ordinary partnership cases and tenancies in common, there may not be cases where an appeal will lie from the appointment of a receiver, quere. —Barry v. Briggs, 22 Mich. 201.

¶ 266. An order appointing a receiver, and directing a defendant holding a chattel mortgage assigned to him by his codefendant and alleged to be fraudulent, to turn the same over to the receiver to collect, and hold the proceeds until the respective rights of the parties are determined, is not a final decree as to such mortgagee defendant.—Salling v. Johnson, 25 Mich. 489.

¶ 267. An order appointing a receiver to take possession of and collect certain partnership accounts, held appealable.—Simon v. Schloss, 48 Mich. 233.

¶ 268. An order made when a cause in chancery is ripe for final hearing on pleadings and proofs, which appoints a receiver of partnership property, is appealable, notwithstanding it does not in terms purport to be final.—Morey v. Grant, 48 Mich. 326.

¶ 269. An order denying the appointment of a receiver in a foreclosure suit is interlocutory and not appealable.—Beecher v. Marquette & Pacific Rolling Mill Co., 40 Mich. 307.

¶ 270. An order appointing a receiver under a judgment creditor's bill, is not appealable under a record showing no abuse of discretion or other excuse for appealing.—Rankin v. Rothschild, 78 Mich. 10.

§ 58. ——Divesting rights and ordering disposal.

¶ 271. An order appointing a receiver to take charge and dispose of all the property held by defendant as surviving partner of a firm is an order divesting his entire legal estate in property of which he had exclusive control as well as exclusive title. It is a decree from which appeal lies, whatever may be the stage of the cause in which it is made. —Barry v. Briggs, 22 Mich. 201.

¶ 272. An order appointing a receiver is final and appealable where it takes from an administrator the entire custody and management of the estate and transfers them to a stranger thereto.—Perrin v. Lepper, 56 Mich. 351.

¶ 273. An order appointing a receiver is appealable if it divests a party of a possession to which he is of right entitled.—Taylor v. Sweet, 40 Mich. 736; Arnold v. Bright, 41 Mich. 207.

¶ 274. An order appointing a receiver and restraining defendants' control over real estate held by them under a trust deed which the bill seeks to set aside is appealable.—Hodges v. McDuff, 69 Mich. 76.

¶ 275. An order appointing a receiver to take possession of securities claimed by a trustee, but the right to which is disputed, is interlocutory and not appealable.—Brown v. Vandermeulen, 41 Mich. 418.

¶ 276. An order appointing a receiver is appealable when it takes from a party a possession to which he is entitled of right. —Brown v. Ring, 77 Mich. 159.

¶ 277. Where the vendors of shingle logs, who had retained the title to the logs and shingles manufactured therefrom as security, etc., filed a bill to enforce their lien upon a portion of said shingles in the hands of purchasers from their vendee who claimed to be good-faith purchasers for value, and an order was made appointing a receiver to take possession of said shingles, and hold and dispose of them only under the direction of the court it is appealable.—Brown v. Ring, 77 Mich. 159.

¶ 278. On a bill for relief from a contract because of nonperformance by defendant, and for the appointment of a receiver, it was alleged that defendant agreed to care for complainant's cattle on his farm and to take the milk and butter for a period of five years at which time double the number of cattle of like age, sex, and quality were to be returned. A decree was rendered appointing a receiver to take charge of the cattle and for the sale of the cattle, and that the money be brought into court, and further providing that in case the amount realized from the sale should be less than the value of the cattle at the time of the breach a personal decree should be entered for the deficiency, held that such decree or order was not a final order which was appealable, and this court could not examine into the merits of the controversy and construe the contract and decide the respective rights of the parties.—Webber v. Randall, 86 Mich, 58, reversed 89 Mich. 531.

¶ 279. An order for the sale of assigned property by a receiver is final and appealable where it provides for an entire disposal of the trust funds and may affect the claims of creditors and others, and where also it contains special and unusual provisions as to notice of sale, and sale in large lots, and allows to some claimants but denies to others interested certain privileges of buying on credit, and allows sales without mortgage or other property security.—First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 58 Mich. 315.

¶ 280. A receiver, appointed by consent in a suit for the settlement of partnership accounts, was afterwards ordered to pay certain moneys from the partnership funds to each of the parties on application, and without reference to the state of their accounts, and to charge them with the sums so paid, to be accounted for on final settlement. Held, that as it might not be possible to recover back such moneys this order was final and appealable, and that it was improvidently made. —Taylor v. Sweet, 40 Mich. 736.

¶ 281. Orders appointing receivers whereby the possession of property is divested, are appealable.—Mardian v. Wayne Circuit Judge, 118 Mich. 353.

¶ 282. An order obtained by a trustee in bankruptcy substituted as complainant in a proceeding involving the possession of a stock of goods held by a creditor of the bankrupt, allowing the trustee to sell the goods, is a final and appealable order.—Earl v. Jacobs, 177 Mich. 163.

¶ 282a. An order made on an intervening creditors' petition in a voluntary proceeding for the dissolution of a corporation, requiring the sale of all its assets by the receiver, is a final order from which a stockholder, although he filed the original petition for dissolution,—but who has shown cause against it,—may appeal under § 10890, Comp. L. 1897, How. St., 2nd Ed., § 13598. —Abbott v. Wayne Circuit Judge, 182 Mich. 61; Field v. Wayne Circuit Judge, Id.

§ 59. ——Discharge or removal of receiver.

¶ 283. An order discharging a receiver in a chancery cause and providing for the rendering of an account by him on notice of the order, for passing his account when rendered, for canceling his bond, for the payment into court of any surplus in his hands, for the restoration of the property taken into his possession as receiver, and for the dismissal of the bill when he shall have complied with these directions, is not an appealable final order.—Colgate v. Michigan Lake Shore R. Co., 28 Mich. 288.

¶ 284. An order or decree dismissing an intervening petition for the removal of a

receiver after a hearing on the merits is a final order and not subject to review by mandamus but by appeal only.—Moran v. Wayne Circuit Judge, 125 Mich. 6.

IV. THE PARTIES APPELLANT AND RESPONDENT.

§ 60. Proper parties appellant and respondent.

Necessary grievance or injury, see post §§ 61, 62.

Necessity of joining codefendants, see also post ¶ 351.

Parties to be served with notice, see post § 70.

Effect of death of party on appealability, see ante § 35.

Severance of case or parties for error, see post §§ 77, 78.

Practice on severance of parties for separate appeal, or on abatement and revival, see post §§ 79, 80.

Necessity of appeal or error to permit assignment of error, see post XI, D.

Necessity of appealing to obtain relief by modification of decree, see post § 520.

Appeal or error by one party as inuring to others, see post § 77.

Reversal inuring to other parties, see post § 558.

Consolidation of cross writs, see post § 141.

Single or double fees on cross appeal, see post § 89, ¶ 394.

Defects in parties as ground for dismissal or amendment, see post § 152.

Affirmance for want of parties, see post § 479.

Who may notice cause for hearing, see post § 133.

Parties entitled to notice of motions, see post § 167.

Party entitled to complain of or urge errors as depending on relation to the appeal or error, see post XI, D.

Waiver or estoppel to urge error on appeal, see post XI, D.

Party entitled to appeal, see Jud. Act, Chap. L. § 18; Comp. L. 1915, § 13753.

Appeal by party or parties to partition suit, see Jud. Act, Chap. XXXI, § 68; Comp. L. 1915, § 13325.

¶ 285. A decree finally adjudicating upon the merits of the controversy is necessarily final as to both parties, and therefore either, if aggrieved, may appeal.—Kingsbury v. Kingsbury, 20 Mich. 212.

¶ 286. Proceedings upon an information filed in the circuit court by a private relator, on leave, to try the title to an office, may be taken either by relator or respondent to the Supreme Court on error.—Vrooman v. Mitchie, 29 Mich. 42.

¶ 287. In a suit in equity against a defendant who had agreed to care properly for complainant's cattle, defendant to have the proceeds thereof, and to deliver at the end of five years double the number received of like kind, a decree was made directing the appointment of a receiver to take the cattle and their progeny, to put them in condition for market, to sell them, and to bring the proceeds into court, and requiring an accounting and providing for a deficiency decreed against defendant. Held, that such decree was final as to both and could be appealed from by either party.—Webber v. Randall, 89 Mich. 531, on rehearing modifying opinion 86 Mich. 58.

¶ 287a. Where a bill is brought to enforce stockholders' liability, and one defendant files against another defendant a cross-bill, asking affirmative relief, said defendants are to be treated as adverse parties for purpose of appeal.—Winegar v. Fritz, 164 Mich. 427.

§ 61. Interest of appellant.

Nonappealability of judgment unless injurious, see ante § 36.

Necessity that interest be injured, see post § 62.

Necessity of interest to join in another's appeal, see post § 77, ¶ 355.

¶ 288. Every person desiring to appeal must have an interest in the subject-matter of the litigation.—Allen v. Soule, 191 Mich. 194.

¶ 289. A foreclosure purchaser has such an interest as entitles him to appeal from an order setting aside the sale, even though he has conveyed to another.—Lawrence v. Jarvis, 36 Mich. 281.

¶ 290. A. assigned a claim which he held against an estate to his wife, but on a proceeding against him in the nature of a creditor's bill under Comp. L. 1871, ch. 203 (How. St., § 8107) an order was made declaring the assignment void as against creditors, appointing a receiver, and restraining the transfer to A. of the money due to him from the estate, or any interference with it by A. or his wife. Held, that A. could appeal from this order, as it would not protect him from proceedings to enforce his liability on the assignment.—Reed v. Baker, 42 Mich. 272.

¶ 291. A decree in favor of judgment creditors setting aside certain conveyances as fraudulent and providing that the costs shall be satisfied and paid out of the property, is not appealable by the grantors, as they have no interest in the property, can derive no benefit from a reversal of the decree and have no pecuniary interest in the suit. Such grantors do not represent the grantees or vendees, who being non-residents and not having been served with process, have a remedy, if they chose to avail themselves of it, but the

grantors cannot be said to have an appealable interest.—Manhard Hardware Co. v. Rothschild, 121 Mich. 657.

¶ 292. In an action for the dissolution of a partnership and for an accounting where a city had been made a party, and an injunction prayed to preserve moneys in the city's hands due on a contract of the firm, and the city had filed a cross-bill through its mayor and clerk, the city has an appealable interest in the suit where the real issue tried related to the priority of rights as to money due from the city between the firm, the materialmen, and the workmen on the contract, the city's interest being its responsibility to the materialmen in case of a deficit.—Carlisle v. Spain, 147 Mich. 158.

¶ 293. A mortgagee of land and an assignee of the mortgage who disclaim any interest in the mortgage, which was owned by a third person, are not parties possessing any interest in the subject-matter of a suit so as to be entitled to appeal from a decree in favor of complainant granting the relief prayed on a bill by the purchaser of part of the land covered by the mortgage against a subsequent purchaser of the remaining part of the land, who had agreed to assume the payment of the entire mortgage, and such mortgagee and assignee, asking for a decree reversing the order of the sale of the property on foreclosure so that the land purchased by the party assuming the mortgage might be sold first.—Allen v. Soule, 191 Mich. 194.

¶ 294. Where a corporation on passing into the hands of a receiver has become a party defendant to a suit for the distribution of the remaining assets, it cannot prosecute an appeal from a decree consented to by it and the receiver through their attorney, where the corporation has no interest in the fund to be distributed.—Gorman v. Hirsh Co., 177 Mich. 382. (Ostrander and McAlvay, JJ., dissenting.)

§ 62. Grievance of appellant.

Grievance to party as essential of appealability, see ante § 36.
Cost decrees and judgments, see also ante § 41.
Necessity that grievance be to one interested, see ante § 61.
Dismissal or affirmance on hearing for want of grievance, see post § 481.

¶ 295. A party is aggrieved by a judgment or decree when it operates on his rights in property or bears directly upon his interest.—In re More's Estate, 179 Mich. 237.

¶ 296. Where one party appeals from the decision of the judge of probate to the circuit court, and in that court the decision appealed from is affirmed, the party appealing is the only one who can bring error; since he alone can be said to be aggrieved by the judgment of the circuit court.—Jackson v. Hosmer, 14 Mich. 88.

¶ 297. If one who has no right appeals from the probate of a will, and in the circuit the proponents of the will, instead of moving to dismiss his appeal, join issue with him on the merits, and the judgment affirming the will is also a personal judgment against him for costs, he may bring error.—Taff v. Hosmer, 14 Mich. 249.

¶ 298. A writ of error may be sued out in name of executor appointed on probate here of foreign will of nonresident defendant who died after entry of judgment, though it is not shown that testator had property in Michigan.—Hubbell v. Blandy, 87 Mich. 209.

¶ 299. A bank is not properly a party to an appeal from a decree in interpleader awarding the fund to one defendant where some time previous it has been decreed that the bank pay the fund into court and be discharged from all liability to either defendant from which first decree one defendant appealed and appeal was dismissed.—Detroit Sav. Bank v. Haines, 128 Mich. 38.

¶ 299a. Where a purchaser at a sale made in pursuance to a decree in a chancery suit, obtains from the lower court an order for a writ of assistance to aid him in getting possession, a claimant to title to sustain an appeal from this order under Act No. 340, Pub. Acts 1907, must show that his title was not acquired after the chancery suit was begun (which would make him subject to the writ) or else that he had a title independent from that of the parties to the litigation.—Lightner v. Prentis, 158 Mich. 13.

V. WAIVER OR LOSS OF RIGHT.

§ 63. Agreement or waiver generally.

Right to appeal and waiver or loss of right in condemnation and highways proceedings, see Eminent Domain, VIII; Highways, II, B.
On appeals from probate, see Probate Courts, III.
Waiver by action inviting judgment complained of, see post § 64.
Waiver of right to complain of error, see post §§ 225-229.

¶ 300. Where an agreement to arbitrate provided that any question which might arise relative thereto should be submitted to the circuit court "and its decision shall be final," the decision of the circuit court thereunder is not subject to review on appeal.—Hoste v. Dalton, 137 Mich. 522.

§ 64. Invited error or judgment.

The doctrine that one cannot invite error by his course or conduct on the trial and then complain of a particular error thus induced is correlative to the rule that one must raise the objections on which he would insist and must save them by obtaining a ruling and a proper exception. See generally Saving Questions for Review.

Consent to decree, see also ante ¶ 294.

¶ 301. Parties are at liberty to waive rights secured to them by rules of practice, and they may also waive objections to pleading or to evidence; they can stipulate facts or confess judgment. But if they stipulate to substitute methods of their own in place of essential rules of legal procedure, they cannot afterwards claim the right of review, —Harris v. Sweetland, 48 Mich. 110.

§ 65. Proceeding with trial to final judgment after error.

See also Saving Questions for Review.

Remarriage as barring attack of divorce decree, see also Divorce, VII.

Acceptance or use of property awarded as alimony as bar to review of award, see also Divorce, X, E.

For the rule that such questions may be reviewed on appeal or error to the final judgment, see post XII, B, 2.

¶ 302. Upon the sustaining of a plea in abatement which had the effect of precluding a plaintiff in ejectment from prosecuting his homestead claim, raised by one of the counts of the declaration, the plaintiff was not required to appeal from the order quashing such count, but was entitled to await final judgment and then obtain a review of the question by writ of error.—Upton v. Gerber, 136 Mich. 72.

§ 66. Compliance with or recognition of judgment as proper.

Right to appeal from decree on cross-bill where object of bill has been realized, see also ante ¶ 146.

Dismissal on satisfaction or compliance, see post § 162.

¶ 303. Right to appeal from an order permitting a person interested but not a party to the suit, to file a bill in the nature of a bill of review, if such right ever existed, is waived by filing an answer thereto.—Leggett v. City of Detroit, 137 Mich. 247.

¶ 304. Payment by plaintiff in error of an execution issued against him on the judgment upon which error is brought cannot be treated as voluntary, and is no objection to sustaining a writ of error to reverse such judgment.—Watson v Kane, 31 Mich. 61.

¶ 305. A settlement with one of two defendants by complainant, who has obtained a decree requiring each to pay her a specified sum, from which decree she has appealed, does not operate as an affirmance of the decree, so as to preclude her from prosecuting her appeal as against the other defendant. —Carmichael v. Lathrop, 112 Mich. 301.

¶ 306. A party to an action cannot receive a benefit under a judgment, and then appeal from it, when the effect of his appeal may be to annul the judgment, unless his right to the benefit is absolute, and cannot possibly be affected by a reversal of the judgment.—Clairview Park Improvement Co. of Grosse Pointe, Ltd. v. Detroit & L. St. C. Ry., 164 Mich. 74.

¶ 307. On bill to set aside a deed where it is admitted in the answer of the grantee defendant that the deed was intended as security and the trial court determines that the conveyance was a mortgage and did not pass the legal title, the court's determination cannot be questioned in the Supreme Court by another defendant, the appellee, who purchased the land described in such deed under a contract from such grantee defendant.—Wiles v. Shafer, 175 Mich. 704.

§ 67. Right to resist on appeal.

¶ 308. A wife's failure to appeal from a decree dismissing her bill for divorce does not bar her from contesting defendant's claim (his answer having prayed affirmative relief) to a decree voiding the marriage for fraud. —Nadra v. Nadra, 79 Mich. 591.

VI. PROCEDURE TO OBTAIN REVIEW BY APPEAL, ERROR OR CASE.

A. SAVING OBJECTIONS AND EXCEPTIONS.

§ 68. In general; cross-references.

The procedure to have a review of an action or ruling of the trial court deemed to be erroneous begins in the trial court by taking of an objection or the making of a request for a ruling, the procurement of a ruling thereon, the taking of an exception thereto when necessary to preserve the matter so ruled on, the adherence to the objection and exception so taken, and finally the embodiment of the narrative or history of the ruling in the bill of exceptions or settled case so as to be contained in the "record on error." All such matters had and done in the trial court are treated in topic Saving Questions for Review, and the making up and settlement of the case or bill of exceptions is treated post this topic, VI, D.

Requisite showing of exceptions and objections in the bill or case, see post § 101 et seq., 177 et seq.

B. APPLICATION, CLAIM AND NOTICE, AND WRIT OF ERROR.

§ 69. Application for and claim of appeal.

Right to appeal and remedy for appeal or review, see ante I.
Filing bond and payment of fees, see post VI, C.
Filing claim after bond, and vice versa, see post § 76.
Application for leave to appeal from probate to circuit, see Probate Courts, III.
Application and affidavits on appeal or certiorari from justice of the peace, see Justices of the Peace, V, VI.
Time for filing claim of appeal, see Jud. Act, Chap. L, § 19; Comp. L. 1915, § 13754.
Procedure to appeal in judgment creditors' proceedings, see Jud. Act, Chap. XXXIV, §§ 12, 13; Comp. L. 1915, §§ 13389, 13390.

¶ 309. Under former chancery practice written claim of appeal was not required. —Emerson v. Atwater, 5 Mich. 34; Warner v. Whittaker, 5 Mich. 241.

¶ 310. A claim of appeal having been filed by seven defendants, an eighth defendant, whose name had been inadvertently omitted therefrom, executed in his own behalf and on behalf of the other seven the statutory bond, to which was attached a stipulation signed by non-appealing defendants and by complainant's solicitor, accepting such bond, waiving any question as to the sufficiency of the sureties, and all further notice of entering said appeal. Held, that the claim was amendable by inserting the name of the eighth defendant.—In re Flint & P. M. R. Co.'s Application, 105 Mich. 289.

§ 70. Notice of appeal and service.

Time for service and effect of delay, see post §§ 72-75.
Dismissal for defective or lacking notice of appeal, see post § 153.
Notice of entry of judgment, see post § 74.
Notice to settle bill or case, see post § 109.
Notice for hearing in Supreme Court, see post § 131.
Notice of chancery appeals, see Sup. Ct. Rule 14.
Notice of issuance of writ, see Sup. Ct. Rule 5.
Notice of filing of case made, see Sup. Ct. Rule 17.
Parties to be served with notice of appeal, see Sup. Ct. Rule 14.
Service of notice on coparties, where several writ of error is sued out, see Sup. Ct. Rule 10.
Methods of service of notices and papers in Supreme Court, see Sup. Ct. Rules 22, 24; service by mail, see rule 23.
Direction of court as to manner of service, see Sup. Ct. Rule 26.
Service of notice on attorneys, see Sup. Ct. Rule 21.

¶ 311. Parties who have disclaimed all interest in the subject-matter of an appeal need not be served with formal notice of the appeal.—Detroit Society for Study & Prevention of Tuberculosis v. Detroit Society for Study & Prevention of Tuberculosis, 167 Mich. 97.

¶ 312. The exchange of printed briefs before a motion is made to dismiss the appeal operates as a waiver of the written notice of appeal.—Cameron v. Adams, 31 Mich. 71.

¶ 313. Failure to serve the appellee with notice of the proceedings in error is waived by a hearing of the appeal without objection, and the presence in the record of a writ of error and return accompanied by a certified transcript of the entire proceedings. —Hirsh v. Fisher, 138 Mich. 95.

§ 71. Writ of error and issuance.

Statutory right to writ of error on judgment over $500, see ante ¶¶ 13, 14.
Return day for writ, see post § 125.
Suing out writ before settlement of exceptions or afterwards, see post § 76.
Showing as to issuance after time, see post ¶ 706.
Mode of objecting to writ, see post § 144.
Discontinuance and new writ, see post § 147, ¶ 638.
Right to new writ after dismissal, see post § 169.
Filing bond and payment of fees, see post VI, C.
Necessity of separate writs for each plaintiff, see post ¶ 354.
Severance of parties for issuance of writ, see post § 79.
Issuance of writ, see Jud. Act, Chap. L, § 1; Comp. L. 1915, § 13736; Sup. St. Rule 4.
Power to issue, see Jud. Act, Chap. I, § 9; Comp. L. 1915, § 13736; Sup. Ct. St. Rule 4.
Application for writ of error to judgment non obstante, see Sup. Ct. Rule 59 (201 Mich.).
Time for return stated in writ, see Sup. Ct. Rule 4.

§ 72. Time for proceedings or service.

Timeliness jurisdictional, see ante § 11.
Before judgment entered, see also ante § 34.
What will enlarge time or furnish reason for allowance of additional time, see post § 75.
Time for preparing bill or case and settling same, see post § 94.
Delay as reason for denying extension of time for settlement of bill, see post § 97.
Time for assigning error, see post § 121.
Appealability of dismissal of divorce case before settlement of case under statute, see also Divorce, X, C.

Service of briefs, see post § 231.
Delay as ground for dismissal generally, see post §§ 155, 161.
Time for objections to writ by motion to dismiss or otherwise, see post § 145.
Time for appeal, see Jud. Act, Chap. L, § 10; Comp. L. 1915, § 13745.
Time for filing claim of appeal, see Jud. Act, Chap. L, § 19; Comp. L. 1915, § 13754.
Time for issuance of writ of error, see Jud. Act. Chap. L, § 6; Comp. L. 1915, § 13741; and suspension of time on account of infancy, insanity, imprisonment, or death and pendency of administration, see Jud. Act, Chap. L. §§ 7-9; Comp. L. 1915, §§ 13742-13744.

¶ 314. Under Laws 1891, Act No. 200, § 61, failure in a tax case to claim appeal and file the bonds for costs within twenty days after entry of the decree necessitates dismissal of the appeal.—Carney v. Baldwin, 95 Mich. 442.

¶ 315. Delay of seven days after the twenty days allowed by Sup. Ct. Rule 14, in serving notice of perfection of appeal, is not of itself sufficient to warrant a dismissal where no damage has resulted.—Tucker v. Stone, 92 Mich. 298.

¶ 316. Writs of error and of certiorari are barred—allowing for all disabilities—after five years from judgment (How. St., §§ 8686, 8687, 8689), and if sued out will be dismissed. —People v. Van Wagner, 51 Mich. 171.

¶ 317. Where a stipulation between parties specified that it should in no wise affect the rights or claims of either party, writs of error issued three years after judgment, to review alleged rights based on the stipulation, will be dismissed.—Bliss v. Caille Bros. Co., 158 Mich. 212.

¶ 318. The term "decree," as used in Pub. Acts 1907, No. 340, § 2, allowing forty days after the filing of a decree in chancery to claim an appeal, is broad enough to include an order overruling a demurrer, although such order is not a final decree.—Moody v. Macomber, 156 Mich. 76.

§ 73. ——Commencement and computation of period.

See also ante ¶ 318.
Of time for preparation and settlement of bill or case, see post § 94.
Filing claim before settlement of case, see post ¶ 350.
Time whence limitation against writ of error is to be computed (entry of judgment by clerk), see Jud. Act, Chap. L, § 10; Comp. L. 1915, § 13745.

¶ 319. If taken within forty days from the time the decree is drawn up and left with the register to be entered it is in time, though more than forty days from the time when the judge announced orally what the decree would be.—Sellers v. Botsford, 9 Mich. 490.

¶ 320. If a decree is entered in vacation the forty days commence to run only from notice of its entry.—McClung v. McClung, 39 Mich. 55.

¶ 321. When the testimony has been taken in open court the forty days within which an appeal must be taken run from the settlement of the case.—Gale v. Gould, 40 Mich. 62; Love v. Francis, 63 Mich. 181.

¶ 322. The statute limiting the time for bringing writ of error commences running from the rendition of the judgment, and is not affected by the settlement of exceptions afterwards.—Teller v. Willis, 12 Mich. 384; Borden v. Peoria Marine & Fire Ins. Co., 14 Mich. 232.

¶ 323. Where the last of the forty days in which an appeal is allowed to be taken is Sunday the appeal cannot be taken on the following Monday.—Drake v. Andrews, 2 Mich. 203.

¶ 324. Under Const., art. 6, § 5, providing that the Supreme Court shall by general rules establish, modify and amend the practice in such court * * * and simplify the same, the time for filing the record is "forty days after the filing of the appeal bond" (Sup. Ct. Rule 15) notwithstanding Pub. Acts 1879, No. 30, which amended Comp. L. 1871, § 5182, by requiring the register to transmit the record within 15 days; and accordingly the time for noticing the cause under Sup. Ct. Rule 34 begins on the expiration of the forty days.—Byrne v. Gypsum Plaster & Stucco Co., 141 Mich. 62.

¶ 325. Comp. Laws 1897, § 550, fixing the time for appeal from a decree in chancery will limit the appellant to his appeal from the order denying a rehearing where the appeal is taken on March 2nd following a decree on November 1st, and the denial of a rehearing on January 10th.—Wilkinson v. Kneeland, 125 Mich. 261.

¶ 326. An order allowing compensation to counsel for complainant and directing the trustee to pay it, made after a hearing but before final decree on the merits, is within the provision of Pub. Acts 1899, No. 243, which requires appeal within forty days of the date of the order where not based on pleading and proofs.—Hopkins v. Crossley, 138 Mich. 561.

¶ 327. An order overruling a demurrer to a bill was entered September 23rd, and thirty

days was given defendant to file an answer. He did not do so, but took an appeal November 23rd. Held, the forty days given by Act No. 340, Pub. Acts 1907, for appeal, began to run September 23rd, and not at the end of the thirty days allotted for the answer.—Bliss v. Tyler, 156 Mich. 640.

¶ 328. Judgment was entered in the trial court October 13, 1909. The court fixed sixty days as the time for making a case. November 29, 1909, motion for a new trial was overruled. Within sixty days of this date, the appellant served upon appellee his proposed case made. By agreement of the parties the time for settling such case made was extended from time to time, the last extension being to October 15, 1910. On October 13, 1910, the case was settled and appellant filed the same with the clerk at 4:15 p. m. of that day. The clerk entered the same of record the following day. Held under 3 Comp. L. 1897, § 10492, limiting the period for taking an appeal to one year, a motion to dismiss the appeal should be denied.—Hartley v. Miller, 164 Mich. 47.

¶ 329. Where an order setting aside a decree of divorce by default against a husband is granted upon condition that the husband pay the wife solicitor's fees of a specified amount within a certain period, and a petition to set aside the order is denied, but the time for payment is extended for 30 days, and the husband fails to pay the solicitor's fees within such second period, a claim of appeal filed within 40 days after the expiration of such second period is timely.—McDonald v. McDonald, 190 Mich. 649.

§ 74. ——Notice of entry of judgment.

¶ 329a. A party who, after judgment rendered against him on trial before the judge, has acted upon the judgment, and procured orders allowing time to settle a case or bill of exceptions, cannot object that he has had no written notice of the judgment, and insist upon a right to make and serve a case, under rule 81, until ten days after such written notice.—Richardson v. Yawkey, 9 Mich. 139.

¶ 330. By filing a claim of appeal and an appeal bond, and giving notice thereof to the opposite party, a party waives his right to a notice in writing of the entry of the decree.—Stockwell v. Eaton Circuit Judge, 172 Mich. 166.

§ 75. ——Extension or enlargement of time.

Settlement of exceptions as affecting time for taking out writ, see ante § 73, ¶ 322.

For settlement of bill or case, see post §§ 95-98.

For filing return in Supreme Court, see post § 129.

For assigning errors, see post § 121.

Filing bond after time or nunc pro tunc, see post § 81.

Extension of time for filing claim of appeal, see Jud. Act, Chap. L, § 20, Comp L. 1915, § 13755.

¶ 331. Under Act No. 340, Pub. Acts 1907, a party to a suit ordinarily has only forty days after the filing of a decree in chancery within which to file his claim of appeal, but the court may, upon cause shown and notice given, extend the time.—Witham v. Clinton Circuit Judge, 150 Mich. 568.

¶ 332. The court may, in its discretion, extend the time in which to perfect an appeal.—Southwick v. Wayne Circuit Judge, 173 Mich. 472.

¶ 333. An application under Chancery Rule 37h for an extension of time in which to perfect an appeal, is addressed to the sound discretion of the trial court.—Smilansky v. Wayne Circuit Judge, 186 Mich. 463.

¶ 334. Appellants from a decree in favor of the proponents of a will must, in order to secure an extension of the regular time for taking a writ of error, show a valid excuse for the delay.—In re Langley's Estate, 158 Mich. 395; Whitehead v. Sunley, Id.

¶ 335. The Supreme Court will not grant a dilatory appeal where there is no showing that the decree of the circuit court was not just or that justice requires a revision of the case.—Stockwell v. Eaton Circuit Judge, 172 Mich. 166.

¶ 336. Where the party has failed to comply with the provisions of the statute within the time prescribed the court will not allow a re-entry of the decree in order to enable him to appeal.—Weed v. Lyon, W. 77.

¶ 337. Neither the statute (3 Comp. L. 1897, § 10504) nor Circuit Court Rule 47, nor any order of the court made pursuant thereto, may operate to extend the time limited by the statute in which to take out a writ of error.—Kaiser v. Wayne Circuit Judge, 162 Mich. 247.

¶ 338. One cannot gain time for suing out a writ of error by moving to vacate judgment.—Buckley v. Sutton, 38 Mich. 1.

¶ 339. The time within which a writ of error must be sued out under How. St., § 8686, requiring all such writs to be brought within one year after the rendition of final judgment, was not extended by Pub. Acts 1893, No. 134, of which authorizes the assignment of error upon the action of the trial court in refusing a motion for a new trial. The

right to sue out the writ is not suspended pending decision of motion for new trial.—Hill v. Hill, 114 Mich. 599.

¶ 340. Under the Judicature Act, Pub. Acts 1915, No. 314, Chap. 51, § 6, providing that all writs of error upon any judgment or final determination shall issue within one year after the rendering of such judgment or final determination is made and not thereafter, except that in case a bill of exceptions has been settled and signed by the circuit judge such writ of error shall be taken out within ten days after the bill of exceptions shall have been signed, and that the time in which writs of error may be taken out may be extended not exceeding six months by the Supreme Court or by one of the Supreme Court justices in chambers when any party has been prevented from taking out the same by circumstances not under his control, upon a proper showing, where a writ of error is obtained more than ten days after the bill of exceptions is signed and it appears that the plaintiff in error was in no way responsible for the delay in suing out such writ, it will be allowed to stand the same as though an extension of time had been granted upon a proper showing.—Rasor v. Mott, 194 Mich. 311.

¶ 341. A judgment in the lower court was rendered August 21, 1908. Motion for a new trial was entered, and the consideration of it postponed from time to time so that the decision overruling it was not filed until August 16, 1909. Defendant's counsel were absent from their offices on business, and did not receive notice of the decision until August 23, 1909. Held, that under Comp. L. 1897, § 10492, providing for an extension of time for suing out a writ of error beyond the year, the defendant was entitled, under these circumstances, to such extension.—Belmer v. Boyne City Tanning Co., 158 Mich. 399.

¶ 342. Act No. 299, Pub. Acts 1909, relating to the perfecting of appeals, makes no limitation as to time when an order extending the time for taking an appeal must be entered except that the time of appeal may not be extended beyond one year. Notice of a decree dismissing the cross-bill of defendant Dettenthaler against his codefendant Sullivan was served on Sullivan October 11, 1909. No order made with proper notice to Sullivan, and extending the time of appeal, was entered within sixty days from the time of the serving of said notice. Chancery Rule 37 provides that the court shall grant no extension of time to perfect an appeal, after the expiration of sixty days, to a party who has not obtained an extension within the sixty days. This rule was adopted by the Supreme Court February 3, 1910. Held, said rule did not apply to defendant Dettenthaler's case, and an appeal perfected on an extension of time made after the expiration of the sixty days was validly taken.—Winegar v. Fritz, 164 Mich. 427.

¶ 343. The lower court in denying an extension of time for an appeal to one losing the right to it from the neglect of counsel, has not abused its discretion where the case was fully presented in the trial court by counsel, and the equities are with the successful party.—Roberge v. De Lisle, 158 Mich. 16; De Lisle v. Wayne Circuit Judge, Id.

¶ 344. An attorney was instructed by an appellant from a decision of the circuit judge to do all things necessary to perfect an appeal. The attorney failed to do his duty as a lawyer, and did not file the appeal in time, and the Supreme Court dismissed it. Thereafter the court extended the time of appeal. Held, on mandamus to compel the circuit court to vacate the order extending the time of appeal, that the facts justified the ruling, and the writ should be denied.—Bliss v. Saginaw Circuit Judge, 159 Mich. 507.

¶ 345. A decree in chancery was entered October 22, 1908. Defendant's counsel prepared notice of an appeal, but forgot to file it. He ordered immediately a transcript of the evidence to be made, and within forty days after October 22nd, met the complainant's counsel, showed him the transcript, and talked with him about an appeal. In July, 1909, defendant's counsel discovered his mistake, and immediately filed the appeal notice. These facts were set forth in an affidavit by him, and the circuit court granted an extension of time to file the appeal. Relator, the complainant in the chancery suit, brought mandamus to compel the lower court to vacate the order of extension. Held, under section 6, Act No. 340, Pub. Acts 1907, giving the trial judge power upon cause shown to extend the time for taking appeals, that his discretion was properly exercised in this case, and the writ should be denied.—Klotz v. Lenawee Circuit Judge, 159 Mich. 639.

¶ 346. Where counsel for the defendants in an equity case timely advised them of the decree and essentials to perfect the appeal, if desired, held that as to defendants themselves, no sufficient excuse was shown for failure to promptly instruct their counsel, in case an appeal was desired, to have proper steps to that end seasonably taken within the time prescribed by law.—Guthrie v. Leelenau Circuit Judge, 197 Mich. 321.

§ 76. Order and sequence of procedure.

Bill of exceptions signed after writ issued, see also post ¶ 418.

Filing bond out of order, see also post ¶ 369.

Grounds for dismissal that steps were taken out of order, see post ¶¶ 646, 647.

¶ 347. The claim of appeal may be filed as well after the giving of the appeal bond as before, if within the forty days.—Emerson v. Atwater, 5 Mich. 34.

¶ 348. A party is not obliged to wait until his exceptions are settled before suing out his writ of error. The exceptions, if sealed and filed after error brought, may be brought up like any other omitted portion of the record. —Teller v. Willis, 12 Mich. 384.

¶ 349. While claiming an appeal and filing the bond prior to the settlement of a case, by defendant, is irregular, plaintiff waives the irregularity where he knew that defendant was proceeding in good faith and with diligence to procure the testimony for settlement of the case and was obtaining orders from the court extending the time for that purpose, and took no steps to procure a dismissal until a motion for an extension of time to perfect the appeal had been made in the Supreme Court.—Sherman v. Sherman, 139 Mich. 180.

¶ 350. Section 2, Act No. 299, Pub. Acts 1909, provides for filing claim of appeal with the register in chancery forty days after the settlement of the case on appeal. Held, the statute is complied with if the claim of appeal is filed before such settlement.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 162 Mich. 703.

§ 77. Joint and separate appeals and writs.

Necessity of separate appeal or error to enable party to complain of errors, see post XI, D.

Who may complain of errors where one party separately appeals, see post §§ 219-223.

Settlement with one party as affecting right to appeal from portion of decree affecting other coparty, see ante ¶ 305.

Necessity that judgment be finally entered as to all joint parties, see ante § 34 ¶ 139.

Joint and separate bonds, see post § 86.

Consolidation of appeals for hearing, see post § 141.

Affirmance as to some and reversal as to others, see post § 486.

¶ 351. A writ of error brings up the whole case. Where judgment has been rendered in favor of two of the defendants to a joint demand and against the other, a writ of error brought against the two only will be dismissed; the defendants cannot be severed in that manner.—Mills v. Bunce, 26 Mich. 101.

¶ 352. Where a plaintiff had consented to a new trial on the stipulation by two of the three defendants in the case that the judgment therein should be final, a writ of error afterwards sued out by the three jointly was dismissed on motion. If the other defendant desired a review of the judgment, he should have sued out a sole writ in his own behalf, in accordance with Supreme Court Rule 35. —Cole v. Thayer, 25 Mich. 212.

¶ 353. An appeal by one defendant in foreclosure does not benefit another, nor does his failure to appeal prevent another from appealing.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 354. Where both parties join in the same bill of exceptions and both assign errors, one writ of error will not suffice for both appeals.—Haas v. Malto-Grapo Co., 148 Mich. 358.

¶ 355. From an order granting a writ of assistance in certain tax proceedings, one not in any way a party to those proceedings nor a party to the application for the writ of assistance, and another, the original title owner to the land, are not entitled jointly to appeal.—Haney v. Allegan Circuit Judge, 170 Mich. 685.

¶ 356. Where in a suit against a husband and wife to foreclose a mortgage, defendants, owners by entirety of the premises, file a cross-bill asking merely that the note and mortgage be canceled on the ground of fraud and delivered up, and that they be relieved of liability, the wife alone may appeal from a decree in favor of complainant.—Davis v. Wardowski, 164 Mich. 561.

§ 78. Separate appeals or error from separate judgments.

Amendment by adding name of coappellant to claim, see ante ¶ 310.

The question whether a separate appeal or writ of error should be taken to a separate order usually appears in the form of a question what will be examined and reviewed on appeal or error to the final judgment or decree, or what may be considered on appeal from an interlocutory appeal, or on an appeal from an order after the final judgment, see post XII, B, 2.

¶ 357. Appointment of receiver under creditor's bill is not reviewed on appeal from order holding defendant in contempt for not assigning to him as ordered.—Bagley v. Scudder, 66 Mich. 97.

§ 79. Practice on severance.

¶ 358. Where joint plaintiffs in ejectment claimed undivided interests, and one recovered but the other did not, and both plaintiffs and defendants then treated the cause as severed and proceeded separately, though the pleadings were not changed beyond the title, and no order for a severance was entered, de-

fendants, after removing one branch of the case to the Supreme Court, were allowed to object to the removal of the other and claim that there was nothing before the court. But such practice is reprehensibly loose.—Stewart v. Ashley, 34 Mich. 183.

¶ 359. A writ of error to bring up a judgment against joint parties should be taken out in the name of all, and if any do not wish to prosecute it, a severance may be had under Supreme Court Rule 35. But a writ taken out in the name of only one is amendable if it identifies the judgment; and if the party who was not joined afterwards files his election not to proceed, the writ will not be dismissed for the nonjoinder, but the other may be allowed to proceed separately.—Spencer v. Fish, 43 Mich. 226.

¶ 360. Where infants have been joined as plaintiffs with an adult who has not been designated as their next friend, though their natural guardian, the objection that on taking out a writ of error they should have procured the latter's appointment as next friend, or the adult should have severed in its prosecution, is too late if not made until the hearing; it should be raised by a motion to dismiss.—Sick v. Michigan Aid Ass'n, 49 Mich. 50.

§ 80. Abatement, revival and new parties.

See also Divorce, VII.

Effect of abatement on appealability of judgment or decree, see ante § 35.

Amendment by impleading new party, see also post ¶ 648.

Remanding cause for revivor, see post § 515.

Settlement of bill on death of party, see post §§ 109, 114.

Appellate judgment on abatement, see post § 492.

Trial court practice in abated cases, see Abatement and Revival.

Right of codefendant to appeal in divorce suit abated by death of spouse, see also Abatement and Revival, ¶ 73.

Changing entitling of papers after severance as to portion of parties, see also Affidavits, ¶ 26.

¶ 361. A writ of error may issue without any steps to revive the judgment, where the party prevailing has died since judgment; and, in such case, steps may be taken after the return of the writ to bring in the representatives by scire facias, or by the process provided by rule of court.—Van Valkenburg v. Rogers, 17 Mich. 322.

¶ 362. A wife and her husband were sued jointly, but he died and the suit was discontinued as to him. The case was afterwards referred and recovery was had as against the wife alone, on the referee's report. In suing out a writ of error the wife entitled the case as if her husband was still a party. Held, that the irregularity might be disregarded.—Campau v. Brown, 48 Mich. 145.

¶ 363. Revivor and a writ of error in name of executor appointed on Michigan probate of foreign will of nonresident defendant who died after judgment was sustained over objection that he left no assets in Michigan.—Hubbell v. Blandy, 87 Mich. 209.

¶ 364. The lower court directed a judgment in a personal injury suit for defendant, and plaintiff appealed. Before the settling of a bill of exceptions, defendant died. Held, before the Supreme Court would hear an appeal, plaintiff must have the proper persons substituted as defendants.—Courser v. Jackson, 159 Mich. 119.

C. BONDS AND SECURITY AND PAYMENT OF FEES.

§ 81. Necessity of bond and time for filing.

Timely filing as jurisdictional, see also ante § 11, ¶ 54.

Filing bond before claim or claim before bond, see ante § 76.

Bond as condition of extension of time for settling bill, see post ¶ 441.

Delay as ground for denying extension of time to settle bill, see post § 95, ¶ 427.

Filing bond as waiver of notice of entry of decree, see ante ¶ 330.

Bonds for stay of proceedings or for security for costs, see Security for Costs; Stay of Proceedings, II.

Exemption of state or state officer appealing, see Jud. Act, Chap. L, § 27; Comp. L. 1915, § 13762.

¶ 365. Under Comp. L. 1897, § 550, as amended by Pub. Acts 1899, No. 243, no bond is required on an appeal from an order overruling a demurrer in chancery where no stay of proceedings is sought.—Daschke v. Schellenberg, 124 Mich. 16.

¶ 366. An appeal from an order overruling a motion to vacate an order dismissing a petition to set aside a tax sale is a general chancery appeal in which appellant is not required to file a bond in order to perfect it, except in case to stay proceedings, by virtue of Pub. Acts 1899, No. 243, amending Comp. L. 1897, § 550.—Hayward v. O'Connor, 142 Mich. 230.

¶ 367. In appeals unless the bond is filed within the time prescribed no jurisdiction of the appeal is obtained.—Weed v. Lyon, W. 77; Moore v. Ellis, 18 Mich. 77.

¶ 368. If no bond is filed during the time allowed for an appeal the party cannot be allowed to file one afterwards.—Covell v. Mosely, 15 Mich. 514.

¶ 369. If the bond is filed in due time it is immaterial whether it precedes or follows the claim of appeal.—Emerson v. Atwater, 5 Mich. 34.

¶ 370. Where a defendant appeals from a decree without having filed the statutory appeal bond, and the complainant proceeds to enforce the decree, the Supreme Court may permit the defendant upon a proper showing to file an appeal bond nunc pro tunc staying the proceedings under the decree.—Pinel v. Pinel, 172 Mich. 611.

§ 82. Signatures and execution.

Number of sureties, see also post ¶ 386.
General law of the execution of instruments, see Execution of Instruments.

¶ 371. It is not necessary that the bond should be executed by all the appellants. It is sufficient if it appear to be executed by one on behalf of all.—Warner v. Whittaker, 5 Mich. 241; Love v. Francis, 63 Mich. 181.

¶ 372. An appeal bond may be good though purporting to be signed in the surety's name by his attorney.—Wood v. Wayne Circuit Judges, 48 Mich. 641.

§ 83. Amount and conditions.

Amendment as to amount, see post § 87.
Conditions variant from statutory form, see also post ¶ 2400.
What constitutes breach or fulfillment of conditions, see post § 571.
Operation of conditions in bonds given on cross-appeals, see also post ¶ 2402.
Liabilities on bond, and enforcement of same, see post XVI.
Bond for supersedeas and stay of proceedings, see Stay, II.

¶ 373. The appeal bond provided for by How. St., § 6738, is intended to secure the performance or satisfaction of any decree the Supreme Court may make, where such decree is a personal one, requiring the party to do some act or pay some amount of money not otherwise secured.—Richardson v. Richardson, 82 Mich. 305.

¶ 374. In fixing the penalty of an additional appeal bond the Supreme Court will look to the decree made by the court below for a criterion to enable it to fix such penalty.—Richardson v. Richardson, 82 Mich. 305.

¶ 375. An appeal bond in chancery does not secure the payment of the entirety of the debt out of which the decree arises, which is otherwise secured, and is not to be made for a sum large enough to do so; but should cover the decree only.—Reid v. Wayne County Judge, 132 Mich. 406.

¶ 376. The decision in Kennedy v. Nims, 52 Mich. 153, that the appeal bond from a foreclosure decree does not cover liability for the deficiency that may arise, and is not intended to add another security for the original indebtedness, is not impaired by Richardson v. Richardson, 82 Mich. 305, which distinguished that class of cases where the original obligation is not otherwise secured and may become a part of the decree as finally made on appeal.—Reid v. Wayne Circuit Judge, 132 Mich. 406.

¶ 377. The rights of defendant in an action to set aside a deed to a certain brick store and office building, are not adequately secured by complainant's bond to answer to defendant for all rents collected from such property, pending an appeal from a decree in such action putting complainant in possession of the property; but such bond should also obligate complainant to pay defendant all damages resulting from negligence in the care or management of such property.—Barron v. Myers, 145 Mich. 342.

¶ 378. A bond of executors of a will, in the penal sum of $150, conditioned to prosecute a writ of error, and to pay and satisfy such judgment as may be rendered against them, given after an order is made to pay a legacy provided for in a will, out of the estate, the judgment being for the sum of $593.30, is insufficient where it does not comply with Comp. L. 1897, § 10355 (How. St., § 7621c, as amended by Pub. Acts 1897, No. 124), as to a stay of proceedings upon execution of a bond with sufficient sureties to pay the judgment if not set aside or reversed, and when it does not comply with Comp. L. 1897, §§ 10485, 10486 (How. St., §§ 8679, 8680), providing that no writ of error shall stay or supersede execution in any civil action unless a bond shall be given to pay and satisfy the judgment that may be rendered, which bond shall be double the amount of the judgment upon which the writ of error is brought. As there is no other statute under which an appeal may be had, the circuit court has no inherent power to stay proceedings upon such terms as it thinks just, and the fact that the judgment was ordered paid out of the assets of the estate, would not change the rule that a stay of execution can only be granted in accordance with the statute.—Markham v. Kent Circuit Judge, 121 Mich. 573.

§ 84. Descriptions and recitals.

¶ 379. Mere clerical errors in a supersedeas bond, to-wit, "twn" for "two" in stating the amount of the judgment, will be disregarded where the meaning is evident.—Ten Hopen v. Taylor, 103 Mich. 178.

§ 85. Approval and acceptance.

Affidavits to impeach officer's certificate of approval, see post ¶ 708.

¶ 380. An indorsement upon the bond, signed by the proper officer, in the following words: "I approve of this bond, both in form and substance," will be held an approval both of the sureties and of the penal sum, and is sufficient.—Maynard v. Hoskins, 8 Mich. 260.

¶ 381. The officer who fixes the penalty of the appeal bond does not acquire exclusive jurisdiction to approve the sureties; but they may be approved by any officer empowered by law to act in the premises.—Emerson v. Atwater, 5 Mich. 34.

§ 86. Joint and several bonds.

¶ 382. Where one who is a party both personally and as administrator gives an appeal bond in his own behalf only, no appeal is perfected in behalf of the administrator. —Love v. Francis, 63 Mich. 181.

§ 87. Additional bonds, amendments and further security.

Penalty of additional bond, see also ante ¶ 374.

¶ 383. Appellate courts have power, as incident to their appellate character, on application, to amend the original bond prescribed by statute for appeal or to require a new one.—Coeling v. Barnard, 159 Mich. 634.

¶ 384. Under Comp. L. 1857, § 3597, the Supreme Court has no power to require an appellant to give a new or further appeal bond in addition to the one approved by the commissioners and alleged to be insufficient.—Moore v. Olin, 6 Mich. 328.

¶ 385. Laws 1877, Act No. 13, (see How. St., § 6738) giving the Supreme Court power to order an additional bond, does not apply to cases appealed prior to its passage.—Perrin v. Kellogg, 37 Mich. 316.

¶ 386. The bond should have at least two sureties; but if defective in this or any other respect, the Supreme Court, if motion to dismiss is made for this cause, may allow a new bond to be filed or allow that already given to be amended.—Beebe v. Young, 13 Mich. 221; Torrent v. Muskegon Booming Co., 21 Mich. 159.

¶ 387. Where an appeal bond is approved by one acting under color of authority, but having no right, the Supreme Court may allow an amendment.—McClintock v. Laing, 19 Mich. 300.

¶ 388. Where an appeal bond is defective it is proper to allow the filing of an amended bond, and an appeal will not be dismissed for defects in the bond where an amended bond is tendered.—Cameron v. Adams, 31 Mich. 71.

§ 88. Objections to bonds and procedure thereon.

¶ 389. Where an appeal bond is defective or insufficient the remedy is by motion in the Supreme Court for leave to amend or file a new bond, and not by mandamus against the judge who approved it.—Pulte v. Wayne Circuit Judge, 47 Mich. 646.

¶ 390. A party is not guilty of laches in not making a motion for the filing of an additional appeal bond during the term in which the transcript is filed, where there is but one motion day in that term after such filing at which the motion could be heard.—Richardson v. Richardson, 82 Mich. 305.

§ 89. Fees and payment of same.

As precedent to extension of time to settle case on appeal, see post § 98.

Payment or offer as condition of further time to file return, see post § 129, ¶ 581.

Who must provide cost of transcript for settling bill, see post ¶ 507.

Nonpayment as ground for dismissal, see post § 154.

Costs and fees and prepayment of same in general, see Costs; Courts, I (right of clerk or stenographer to fees).

Fee for appeal, see Jud. Act, Chap. XLVI, § 11; Comp. L. 1915, § 13679.

Supreme Court clerk's fees, see Sup. Ct. Rule 2.

¶ 391. In a chancery appeal, the payment of the register's fee required by Act 299, P. A. 1909 is jurisdictional.—Perkins v. Perkins, 173 Mich. 690.

¶ 392. Failure to pay the fee within 30 days upon an appeal from a chancery order appointing a receiver of defendant's property, as required by Comp. L. 1897, § 552, entitles complainant to a dismissal where he has done nothing to waive the right.—Trombly v. Klersy, 139 Mich. 311.

¶ 393. An appeal in chancery is not perfected, under Act No. 340, Pub. Acts 1907, until the register's fee is paid, and as the time for perfecting an appeal is limited to one year from the filing of the decree, and cannot be extended, an appeal is not taken and perfected if the fee is not paid until after the year has elapsed.—Lum v. Fairbanks, 155 Mich. 23.

¶ 394. Under section 2, Act No. 299, Pub. Acts 1909, but one fee to the register in chancery is required to be paid, and when so paid the opposite party may seasonably claim an appeal, and the costs including the appeal fee will be taken care of by the final decree.—Mack v. Engel, 165 Mich. 540.

¶ 395. Comp. L. 1897, §§ 551, 552, treats an appeal as perfected when the certi-

fied case is duly filed with the register of the court. Pub. Acts 1907, No. 340, governing chancery appeals subsequent to June 28, 1907, limits the time for perfecting an appeal to one year from the filing of the decree, and requires that the register's fee be paid when the settled case is filed. Held, that, whether an appeal is taken under the former statute or the latter, the register's fee must be paid within the time limited, and if not so paid, the appeal will be dismissed.—Lum v. Fairbanks, 155 Mich. 23.

¶ 396. Section 2, Act No. 299, Pub. Acts 1909, provides for the payment of five dollars to the register in chancery within forty days after the settlement of the case on appeal. Appellant did not actually pay the fee until after the time limited, but the register considered it paid, gave appellants personal credit for the same, and made no demand therefor. Held, the statutory requirement was sufficiently complied with.—Baldwin v. Escanaba Liquor Dealers' Assn., 162 Mich. 703.

¶ 397. Where the register's fee in a chancery case is not paid until four months after the transcript for appeal is filed, the appeal must be dismissed, since, under Act No. 340, Pub. Acts 1907, § 5, the payment of the fee at the time of filing the transcript with the register is mandatory.—Thompson v. McKay, 154 Mich. 228.

D. PREPARATION OF RECORD OR TRANSCRIPT, ABSTRACT, CASE OR BILL OF EXCEPTIONS.

§ 90. In general; office and propriety.

[Note. The term "record" as used in respect to appellate procedure has two distinct meanings, which are often open to confusion. The record proper is the record which the lower court keeps of its proceedings in the clerk's office and comprises those papers in the case which are essential to its history from commencement to judgment, to wit, the pleadings, process and return or appearance, the verdict or findings, and the judgment, but not the incidents of the case or trial, such as interlocutory motions, minutes, opinion, evidence or instructions. In its more extended sense the "record on appeal" includes the record proper and also the bill of exceptions, case, or the like by which the other matters and proceedings are recorded and returned to the reviewing court as the basis of its review. See Cyc. Law Dictionary, title Record.]

A record is necessary to transmit the case to the reviewing court, where it must be seasonably filed (see post VII), in order to confer appellate jurisdiction (see post IX), and it must be sufficient in contents and substance to present for review the things objected to (see post XI, A, B); and the review will not be extended beyond the things thus preserved and sufficiently presented (see post XII, B), for which purpose essential facts will not be supplied by intendment or presumption unfavorable to the decision below (see post XII, C).

Rule that none but matters in the record proper will be examined unless properly brought in by bill or case, see also post XII, B, 1.

Irreviewableness of questions dependent on matters not reducible to record, see post § 278.

Propriety of affirmance without consideration for want of proper record, see post § 478.

Retention of cause to be heard on record proper when no case or exceptions are settled, see post § 157.

Occasion for settling case in chancery, see also post ¶ 674.

Election between exceptions and case made, see also ante ¶ 34.

Proper mode of preserving record in condemnation or highway proceedings, see Eminent Domain, VIII; Highways, II, B.

¶ 398. The nature, functions and origin of the bill of exceptions considered and explained.—Shannon v. People, 5 Mich. 36.

¶ 399. The office of a bill of exceptions is to bring before the court legal propositions decided which do not appear on the record.—Smith v. Barstow, 2 D. 155.

¶ 400. The office of the bill is solely to present certain specific points raised only by exceptions.—Turner v. City of Grand Rapids, 20 Mich. 390.

¶ 401. Pub. Acts 1905, No. 129, providing that where a cause is tried upon testimony taken in open court either party may make and settle a case at such time and in such manner as is now provided by rule for the settlement of bills of exception in cases of law has no application to a case not before the court upon pleadings and proofs but upon an oral demurrer to an amended bill.—City of Detroit v. Wayne Circuit Judge, 144 Mich. 696.

¶ 402. In proceedings to bring before the Supreme Court an alleged error of the circuit judge in dismissing an appeal to the circuit court because the appeal had not been authorized, where everything essential to the determination of the matter is found in the papers on file and entries made in the cause, no bill of exceptions is necessary because those papers and entries constitute the record which will be transmitted in obedience to the order contained in the writ of error.

But if anything essential to the determination is found outside the papers filed or entries made, a bill of exceptions is necessary.—City of Flint v. Genesee Circuit Judge, 146 Mich. 439.

¶ 403. A writ of error brings up the files and journal entries in a replevin suit and no bill of exceptions is necessary where the question is as to the sufficiency of the pleadings and papers to describe the property.—Dages v. Brake, 125 Mich. 64.

¶ 404. When no case is settled on appeal the necessity or expediency of ordering a receiver to sell the assets of a corporation in a dissolution proceeding, will not be reviewed.—In re Abbott, 187 Mich. 229.

¶ 405. Since writ of error does not lie to habeas corpus a bill of exceptions is not appropriate for review and need not be approved.—People ex rel. Faust v. Calhoun Circuit Judge, 30 Mich. 266.

§ 91. Mode of preserving record; exceptions or case.

Proposals and amendments in making up bill or case, see post § 108.
Approval and settlement and certification, see post §§ 110-114.

¶ 406. Where an appeal is taken in a case where the witnesses were examined in open court, the proper course for the party desiring the testimony to be certified to the Supreme Court under the statute, is to make a case setting it forth, present it to the circuit judge, and procure his order, fixing the time and place when and where it shall be settled, and for notice to the opposite party that he may attend and propose amendments; or instead thereof, take other equivalent proceedings.—Wright v. Dudley, 8 Mich. 74.

¶ 407. The provision of Comp. L. 1897, § 10188, providing for the making and settlement of a case where the testimony is taken before a commissioner permits but does not require testimony taken before a commissioner to be settled before the court as a condition of appeal, and such testimony is still reviewable under the old law (Comp. L. 1897, § 552) without requiring it to be settled.—Hughes v. Love, 136 Mich. 169.

§ 92. ——Trials without jury and references.

¶ 408. After a trial by the court without a jury the evidence cannot be considered for the purpose of reviewing any question of law "appearing upon the trial" unless brought upon the record by bill of exceptions or case made.—Peabody v. McAvoy, 23 Mich. 526.

¶ 409. Where a cause has been referred by the circuit court to a referee who has reported, finding the facts, and the circuit judge on motion for judgment has filed a written finding of the law, such finding may be brought to the Supreme Court for review as well by writ of error with bill of exceptions as by case made.—Near v. Mitchell, 23 Mich. 382.

¶ 410. Where exceptions are taken on a trial before a referee, the bill of exceptions, when settled, performs the same offices for the purposes of a writ of error as a bill settled by the circuit judge when the case is heard in open court.—Altman v. Wheeler, 18 Mich. 240.

¶ 411. Where a case has been tried before a referee, a bill of exceptions, including the proceedings before the referee, is necessary to enable the court to review the whole proceedings.—Bevier v. Wright, 30 Mich. 484.

§ 93. ——Recitals in order or judgment.

See also post ¶ 831.

¶ 412. The want of a bill of exceptions cannot be supplied by a recital of facts in an order of the court; e. g., one denying a motion for a new trial.—Monnier v. Mizner, 17 Mich. 271.

§ 94. Time for preparation and settlement.

Timeliness as element of jurisdiction, see also ante § 11.
Suing out writ or appeal before settlement or afterwards, see ante § 76.
Filing bond before settlement of case, see ante § 76, ¶¶ 349, 350.
Proceedings to settle, see post §§ 108-116.
Extension of time, application for extension, and grounds for it, see post §§ 95-98.
Allowable time for extensions, see post § 96.
Settlement nunc pro tunc, see post § 116.
Delay or laches as reason for not compelling settlement, see post § 115.
Striking bill or case for delay, see post § 165.
Time allowable for settlement, see Jud. Act, Chap. XVIII, § 62; Comp. L. 1915, § 12634; 1916 C. C. Rule 66, § 1.

¶ 413. The statute allowing three months after trial for the making of a case will be construed to allow three months from the time the decree is made.—Wright v. Dudley, 8 Mich. 74.

¶ 414. The time for the settlement of a bill of exceptions, under C. C. Rule 85, runs from the date of the judgment.—Rayl v. Wayne Circuit Judge, 91 Mich. 4.

¶ 415. Pub. L. 1905, Act No. 129, does not limit the time for settling a chancery case for appeal to the time limited by Circuit Court Rule No. 47.—Tinker v. Piper, 149 Mich. 335.

¶ 416. Pub. Acts 1905, Act No. 129, providing for chancery appeals, does not by reference therein to C. C. Rule No. 47, limit the time for making and settling a chancery case for appeal to the time provided by said rule, but the statute expressly grants three months in which to make and file a case, and gives the circuit judge authority to extend the time without cause and without notice to a time not extending six months after the entry of the decree.—Nolan v. Garrison, 149 Mich. 56.

¶ 417. The motion for a new trial having been denied, defendant in the case has a reasonable time thereafter for the settlement of a bill of exceptions.—Pettinger v, Montmorency Circuit Judge, 164 Mich. 463.

¶ 418. A bill of exceptions returned with a writ of error appeared to have been signed after the writ was sued out. Held to be at most an irregularity which was waived by joinder in error.—Brown v. Bissell, 1 D. 273.

¶ 419. Where a circuit judge has once regularly extended the time to settle a bill of exceptions into a term subsequent to that at which the judgment was rendered, he may, at his discretion, settle the same at any time thereafter.—White v. Campbell, 25 Mich. 463.

¶ 420. A party cannot be deprived by the inaction of the judge of his right to the settlement of a bill of exceptions which he has duly presented.—People ex rel. Wright v. Superior Court Judge, 41 Mich. 726.

¶ 421. A further order of extension having been made by the circuit judge, he cannot afterwards disregard it and refuse to settle the exceptions because not presented for the purpose within the time first allowed.—People ex rel. Teller v. Littlejohn, 11 Mich. 60.

§ 95. Extension of time to prepare and settle.

Allowable time of extension, see also ante ¶ 416.
Discretion of court to extend time, see post § 97.
Power to extend, see also post ¶ 442.
Stipulation as dispensing with formal procedure for extension, see also post ¶ 433.
Waiver of notice of judgment by obtaining extension, see ante ¶ 329a.
Extension of time for settlement, see 1916 C. C. Rule 66, § 2.

¶ 422. Where proofs were taken in open court an extension of time for filing a case on appeal can be applied for after sixty days from the date of the decree, and may be granted if the time allowed does not exceed the statutory period of three months.—Tilden v. Wayne Circuit Judge, 44 Mich. 515.

¶ 423. Pub. Acts 1895, No. 168, extending the time for settling chancery cases, deals with procedure only, and therefore it applies both to pending and to future cases.—Beebe v. Birkett, 108 Mich. 234.

¶ 424. Where the trial court fixes a time for settling a bill of exceptions or making a case, the parties may by agreement extend such time.—Hartley v. Miller, 164 Mich. 47.

¶ 425. A motion for a new trial extends the time for the settlement of a bill of exceptions into the term in which the motion is determined.—Adrian Furniture Manuf. Co. v. Lenawee Circuit Judge 92 Mich. 295.

¶ 426. Where the time for settling a bill of exceptions has been regularly extended during the term at which the case is tried, the circuit judge may settle the same at any time thereafter at his discretion; and he is not deprived of this right because the term of the extension has expired.—Lenhoff v. Saginaw Circuit Judge, 82 Mich. 565.

¶ 427. Failure to file a bond as required by Comp. L. 1897, § 10355, or to show good cause by affidavit, does not deprive the court of jurisdiction to extend the time for settling a bill of exceptions.—Marshall v. Saginaw Circuit Judge, 156 Mich. 280.

¶ 428. Appellant has a right to settle a bill of exceptions at any time within twenty days after the denial of the motion for a new trial, and within that time the court below has jurisdiction upon motion and upon cause shown, to extend reasonably the time to settle a bill of exceptions.—Kaiser v. Wayne Circuit Judge, 162 Mich. 247.

¶ 429. Respondent judge granted thirty days to defendant to settle a bill of exceptions, after denying a motion for a new trial. Held, that after the expiration of said time, the respondent had the power, upon sufficient cause shown, after due notice to opposing counsel, to further extend the time for settling the said bill.—Pettinger v. Montmorency Circuit Judge, 164 Mich. 463.

§ 96. ——Application and allowance of time.

Necessity for motion and showing, see also ante ¶¶ 428, 429.
Showing under the Judicature Act, see post § 98.
Necessity for certificate of stenographer, see post § 98.
Improper application for extension as reason for not compelling settlement, see post § 115.
Striking bill or case for want of order of extension, see post § 165.
Objection to extension as waiver of notice to settle, see post § 109, ¶ 504.

¶ 430. While it would have been the better practice for respondents to have applied for extension before the statutory time had expired, a failure to do so would not justify a refusal of the application where the stenographer was dilatory.—Lake Shore & M. S. R. Co. v. Chambers, 89 Mich. 5.

¶ 431. If no order was made during the term at which trial was had, extending the time for settlement of exceptions, the circuit judge has no power to make one afterwards.—Cleveland v. Stein, 14 Mich. 334.

¶ 432. The clerk's neglect to enter an oral order extending the time to settle a bill of exceptions is not ground for striking out a bill settled in pursuance of it; and the omission may be cured by an order for extension made nunc pro tunc at the next term.—Spencer v. Fish, 43 Mich. 226.

¶ 433. When the counsel for both parties have stipulated to extend time for settling exceptions, their stipulation removes the necessity of following the rules, and the court has no right to disregard it.—People ex rel. Hunt v. Kalamazoo Circuit Judge, 39 Mich. 123.

¶ 434. Under 1897 Circuit Court Rule 47, allowing not less than 20 days after entry of judgment for settling a bill of exceptions, and providing that further time may be granted by the court, and that the court may extend such time, and further that not more than 60 days' time shall be granted except for cause and on notice, an application for extension of time after eighty days from entry of judgment have elapsed may be granted on cause shown where there has been no previous extension.—Roach v. Wayne Circuit Judge, 117 Mich. 242.

¶ 435. Under 1897 Circuit Court Rule 47, an order extending, upon an ex parte motion, more than eighty days after the entry of judgment, the time for settling a bill of exceptions, is erroneous.—Singer v. Livingston Circuit Judge, 117 Mich. 318.

¶ 436. The court has no authority to extend time for settling a bill of exceptions for more than eighty days after judgment unless the party applying therefor has complied with the requirements of Circuit Court Rule 47.—Burgess v. Wayne Circuit Judge, 171 Mich. 583.

¶ 437. Under Comp. L. 1897, § 10504, providing for the incorporation in a bill of exceptions of the record of proceedings on motion for new trial, and Circuit Court Rule 47, allowing twenty days after judgment for the settlement of a bill of exceptions, and authorizing the court to grant such further reasonable time as may be deemed proper for such settlement, the judge should, on application being made within twenty days after the denial of a motion for a new trial, fix a reasonable time for the settlement of a bill of exceptions.—Harper v. Wayne Circuit Judge, 155 Mich. 543.

¶ 438. Where a court, over twenty days after the denial of a motion for a new trial and eighty days after judgment, enters an order prolonging the time for settling a bill of exceptions without requiring appellant to show cause, the order will be vacated by mandamus.—Kaiser v. Wayne Circuit Judge, 162 Mich. 247.

¶ 439. The requirement of Circuit Court Rule 47 in regard to extending the time for settling a bill of exceptions more than eighty days after judgment can be waived only in writing, duly filed and presented as a foundation for the action of the court, or by admission or stipulation in open court, in the presence and hearing of the court, a minute of which has been made and recital of which appears in the order as the authority of the court for granting the same.—Burgess v. Wayne Circuit Judge, 171 Mich. 583.

¶ 440. Under 1897 Cir. Ct. Rule No. 47, an ex parte order extending the time for settling a bill of exceptions is void where the verdict was rendered December 31, 1898, and the order was entered on March 31, 1900, extending the time thirty days.—Hayes v. Ionia Circuit Judge, 125 Mich. 277.

¶ 441. An order giving defendant an extension of time for settlement of a case for appeal was granted upon condition that he give bond to pay complainant a specified sum monthly, it appearing that complainant was a very old man and that the complaint founded upon defendant's failure to furnish proper support and maintenance in accordance with an agreement pursuant to which all complainant's property had been conveyed to defendant.—Sherman v. Sherman, 139 Mich. 180.

§ 97. ——Grounds for extension; objections.

Under Judicature Act, see post § 98.

¶ 442. Where time has been allowed for preparing and settling exceptions and it has expired without action the circuit judge has power to make a further order for that purpose.—People ex rel. Teller v. Littlejohn, 11 Mich. 60.

¶ 443. A settlement after the statutory time is good if the appellant used due diligence to obtain one within the time and was prevented by causes beyond his control, such as the court stenographer's inability, through sickness, to finish a transcript of the testimony.—Cameron v. Calkins, 43 Mich. 191.

¶ 444. The Supreme Court will extend the time for settling a case in which the proofs were taken in open court, if the failure to settle it within the prescribed time could not have been prevented by the appellant.—Gram v. Wasey, 45 Mich. 223.

¶ 445. A motion to extend the time for settlement of a bill of exceptions is addressed to the sound discretion of the trial judge.—People v. Manistee Circuit Judge, 194 Mich. 527.

¶ 446. The discretion of the trial court in granting an extension under Chancery Rule 37h, of the time for settling a case on appeal, held not abused.—Smilansky v. Wayne Circuit Judge, 186 Mich. 463.

¶ 447. April 18, 1911, a decree was entered against relator, the complainant in a chancery suit. The record was ready for appeal by June 12, 1911. Relator's solicitor refused to serve the transcript and stenographer's minutes until paid what relator deemed to be an excessive fee. On September 15, 1911, relator adjusted his differences with his solicitor. The transcript and minutes were not served on the defendant until November 16, 1911. On January 24, 1912, the respondent circuit judge refused to sign the proposed case on appeal. On February 27, 1912, relator filed a motion to extend the time for settling the cause for review, which was denied March 20, 1912. The petition for mandamus was signed and sworn to May 29, 1912. Held, the trial court did not abuse its discretion in refusing to grant a writ compelling respondent to extend the time for settling the appeal.—Stockwell v. Eaton Circuit Judge, 172 Mich. 166.

¶ 448. A motion for an extension of time to settle a case was denied, where appellant in a chancery case had elected to transmit the testimony taken before a commissioner under Comp. L. 1897, § 552, before having the testimony settled, instead of having it settled by the court under Comp. L. 1897, § 10188.—Hughes v. Love, 136 Mich. 169.

¶ 449. A motion to extend the time to settle a bill of exceptions not made within more than six months after the time fixed therefor by stipulation, where the delay was caused by illness of counsel, held properly denied where there was ample opportunity to have such motion heard by the judge who tried the cause.—Lavigne v. Wayne Circuit Judge, 193 Mich. 416.

§ 98. ——Under the Judicature Act.

Certificate of stenographer to substantiate extension of time for preparation, see Jud. Act, Chap. XVIII, § 62; Comp. L. 1915, § 12634.

¶ 450. The provision in the Judicature Act, Pub. Acts 1915, No. 314, Chap. L, § 9, requiring the payment of an appeal fee to the register in chancery within 20 days after decree is filed is mandatory, and a condition precedent to the extension of time to settle a case for appeal, and such requirement is not affected by Circuit Court Rule 66, as such rule states that subject to the "limitations prescribed by statute" and upon such terms and conditions as may be deemed just the court may grant a further and reasonable time for settlement of a bill of exceptions or can and may extend such time when proper.—Guthrie v. Leelenau Circuit Judge, 197 Mich. 321.

¶ 451. Under the Judicature Act, Pub. Acts 1915, No. 314, chap. XVIII, § 62, relating to the extension of time for the settlement of bills of exceptions it is not necessary that a litigant seeking a second extension file a second certificate from the official stenographer, as, such information having once been conveyed to the court, it is sufficient to warrant repeated extensions by the court in the exercise of its sound discretion.—People v. Manistee Circuit Judge, 194 Mich. 527.

¶ 452. A circuit judge has no jurisdiction under Comp. Laws 1915, § 13440, and Circuit Court Rule 66 to settle a bill of exceptions where nearly one year has elapsed since a final order vacating a judgment against a defendant and no extension of time was granted within which to settle a bill of exceptions and no cause was shown by affidavit or any special motion for, or written stipulation of the parties made or filed, extending such time.—Yerkes v. Antrim Circuit Judge, 200 Mich. 443.

¶ 453. The discretion of the trial judge in settling a bill of exceptions under Comp. Laws 1915, § 13440, and Circuit Court Rule 66 may be exercised only within the limits fixed by the statute and rule.—Yerkes v. Antrim Circuit Judge, 200 Mich. 443.

¶ 454. The discretion of the circuit judge in extending the time for settlement of a bill of exceptions must be exercised only within the limits prescribed by Pub. Acts 1915, No. 314, Chap. XVIII, § 62, and Circuit Court Rule 66, the statute contemplating an extension of time where the official stenographer through pressure of business is unable to furnish a transcript within the 20-day limit, and the allowance of a motion for an extension of time more than four months after the furnishing of such transcript is improper.—Boyne City Hardware Co. v. Charlevoix Circuit Judge, 197 Mich. 374.

§ 99. Judgment roll or record proper; contents.

Motions to set aside service, see also post ¶ 1233.

Affidavits to motions, see post § 280.

Affidavit for default, see also post ¶¶ 1230, 1234.
Functions of bill of exceptions to include matters dehors record proper, see ante § 90.
Inefficacy of recitals to serve functions of bill of exceptions, see ante § 93.
Case on chancery appeal to bring evidence into record, see also ante §§ 90, 91, post § 187.
Copy of bond as part of chancery record, see post § 99.
Making up case or record from copies, see post § 106.
Proper contents of case made, see post § 105.
Sufficiency of chancery case, see also post § 187.
Condensation of chancery case or full transcript, see post § 103.
Settlement of chancery case, see post § 110 et seq.
Sufficiency of judgment entry, see post § 173.
Contents of return to Supreme Court, see post § 126.
Sufficiency of the record to show by its contents the errors complained of or to show a reviewable question, see post XI, A.
Presumption as to omitted portions of pleadings when same are abridged in the record, see post § 330.
Restriction of review to matter properly in record, see post XII, B, 1.
Restriction of review to record proper where no case is settled, see post § 272.
Questions open on consolidated record, see post § 275.
Dismissal or remission for correction of record, see post § 156.
Power to allow paper lost from record to be supplied, see post ¶ 1113.
Requisites and contents of judgment record in equity or at law for purpose of the judgment itself, see Equity, X, B; Judgments, III.
Transmission of abstract in lieu of original files, see 1916 C. C. Rule 68.
Record of judgment based on arbitration, what to contain, see Jud. Act, Chap. XLV, § 17; Comp. L. 1915, § 13662.
Return on appeal from judgment creditors' proceedings, see Jud. Act, Chap. XXXIV, § 13; Comp. L. 1915, § 13390.

¶ 455. The record returned on appeal should include full copies of all the proceedings in the case, so that the transcript shall present everything which appeared in the court below.—Wright v. Dudley, 8 Mich. 115.

¶ 456. To a chancery appeal the register must return the entire record, and may not omit anything upon his own determination that it is not material.—Brown v. Thompson, 29 Mich. 72.

¶ 457. A copy of the bond given on appeal in chancery should be sent up by the register with the record. It is not sufficient that the register certifies that an appeal bond was duly approved and filed.—Maynard v. Hoskins, 8 Mich. 81.

¶ 458. Where a demurrer is sustained, an amended bill filed, another demurrer taken and sustained, and the decree sustaining it appealed from, the original bill is part of the record and should be included in the return to the appeal.—Riopelle v. Doellner, 26 Mich. 102.

¶ 459. The record on an appeal in a mechanic's lien case should contain a copy of the testimony duly certified by the register as a true copy of the testimony filed in the cause.—Roberts v. Miller, 31 Mich. 73.

¶ 460. Questions arising on the retaxation of costs before the circuit judge are no part of the record brought to this court on error to review the judgment, and will not be considered on such review.—Cox v. Klein, 149 Mich. 162.

§ 100. ——On error to judgment on appeal from justice or probate.

Necessity that jurisdiction appear, see post § 172, ¶ 735.
Assignment of error, how specified, see post § 201.
On case made to certiorari, see post § 105.

¶ 461. The record in error upon a judgment rendered on a general appeal from a justice's judgment does not include the affidavits, or orders of the circuit court based upon them, for compelling a return, or the returns or answers of the justice in showing cause against being compelled to make return to the appeal.—People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

§ 101. Contents of bill or case; attaching papers.

Incorporation of books, papers, etc., how accomplished, see post § 104.
Inclusion of assignment of errors, see post § 122.
Inclusion of rejected evidence in consideration on trial de novo of chancery cause, see post § 474.
Clerical errors in transcribing, see post § 342.
Requisites and sufficiency of bill or case to present the errors complained of, see post XI, B.
Necessity and sufficiency of showing that material evidence is fully embodied, see post § 176 et seq.
Sufficiency of showing to present particular errors, see post § 179 et seq.
Sufficiency of evidence to review rulings dependent thereon, see post §§ 185-191.
Restriction of relew to matters properly in record and bill or case, see post XII, B, 1.
Evidence sent up but not properly in record, see also post § 282.

What questions may be heard on record, bill or case which does not fully cover entire trial, see post XII, B, 3.
Presumptions as to contents and correctness, see post §§ 345-349.
Conflict between bill and other papers, or within bill, see post § 341.
Proper contents of case made, see post § 105.
Evidence or other matter proper to be included in bill, see 1916 C. C. Rule 66, § 4.
Evidence and procedure on exclusion of evidence necessary in case on appeal, see 1916 C. C. Rule 66, § 7.
How bill or case to be made for review of law questions on trial, see Jud. Act, Chap. XVIII, § 61; Comp. L. 1915, § 12633.
Preparation and settlement of bill on reference, see Jud. Act, Chap. XVIII, §§ 72, 73; Comp. L. 1915, §§ 12644, 12645.
Attaching abstract of record to bill of exceptions, see 1916 C. C. Rule 68.

¶ 462. Enough of the facts upon which the propositions of law to be reviewed arise should be given to show their materiality.—Smith v. Barstow, 2 D. 155.

¶ 463. Properly drawn, the bill sets forth only so much of the evidence as bears upon the particular points excepted to.—Turner v. City of Grand Rapids, 20 Mich. 390.

¶ 464. A bill of exceptions should contain nothing but what is material to the points of law presented.—Continental Ins. Co. v. Horton, 28 Mich. 173.

¶ 465. A bill should exclude whatever is immaterial. It should not be made up by embodying the stenographer's minutes in full without reference to their legal bearing.—People ex rel. Harbaugh v. Wayne Circuit Judge, 32 Mich. 259; Frankenberg v. First Nat. Bank of Decatur, 33 Mich. 46; Snyder v. Willey, 33 Mich. 483; Rice v. Rice, 50 Mich. 448.

¶ 466. A bill of exceptions should contain only so much of the evidence as is necessary to present fairly the questions of law to be reviewed, and this may usually be given in narrative form.—Cole v. Ingham Circuit Judge, 77 Mich. 619.

¶ 467. A bill of exceptions should contain only so much of the evidence as may be necessary to explain the bearing of the rulings of the court upon matters of law in reference to the questions in dispute between the parties to the case and which may relate to exceptions noted at the trial.—Grand Trunk R. Co. v. Ives, 144 U. S. 408; 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

¶ 468. The bill of exceptions should not contain a full transcript of all that happened at the trial, or set forth long colloquies unnecessary to presentation of the points raised.—Jastrzembski v. Marxhausen, 120 Mich. 677.

¶ 469. Laws 1869, p. 113, How. St., §§ 6481-6484, providing for written charges to juries, made no change in the form or office of the bill of exceptions; and the charge is not a part of the record without such bill.—Geary v. People, 22 Mich. 220; Wagar v. Peak, 22 Mich. 368.

¶ 470. Arguments upon objections to testimony form no part of the record, and parties should not be put to the expense of having them written out or printed.—Welch v. Palmer, 85 Mich. 310.

§ 102. ——Matters subsequent to trial.

Affidavits on motion, see also post ¶ 1237.
Recitals in order on motion, see also post ¶ 1238.
Incorporation of proceedings on motion for new trial, see Jud. Act, Chap. XVIII, § 63; Comp. L. 1915, § 12635.

¶ 471. The office of a bill of exceptions in a civil cause is to bring upon the record the rulings and decisions of the trial court, and not to embrace rulings upon new proceedings, such as a motion for a new trial, taken after the trial is wholly ended.—Johr v. People, 26 Mich. 427.

¶ 472. The statement in the bill of exceptions of the payment by plaintiff in error of the execution issued in the judgment whereon he brings error cannot be considered as part of the bill or record.—Watson v. Kane, 31 Mich. 61.

¶ 473. A motion for a new trial forms no part of the bill of exceptions, strictly speaking.—Cuddy v. Major, 12 Mich. 368.

¶ 474. Questions relating to the taxability of costs cannot be included in the bill of exceptions.—Stebbins v. Field, 43 Mich. 333.

¶ 475. Under Comp. Laws 1897, § 10504, How. St., 2nd Ed., § 12965, exceptions to the denial of a motion for a new trial and all proceedings with reference thereto should be incorporated in the bill of exceptions.—Maynard v. Keene, 189 Mich. 97, In re Keene's Estate, Id.

¶ 476. During the period for settling a bill of exceptions, the trial court may file supplemental reasons for denying a new trial, which may be excepted to, and both the reasons and exceptions may be incorporated in the bill of exceptions.—United States Graphite Co. v. Saginaw Circuit Judge, 158 Mich. 598.

§ 103. Verbatim or condensed narrative of evidence.

See also ante ¶ 468.

Prolixity as ground for reversal without review, see post § 164.

Narrative form or full statement, see 1916 C. C. Rule 66, § 8.

¶ 477, 478. Counsel should exercise his own discretion in omitting to print the formal, and what he might deem the unimportant, parts of the record; and the court would not interfere with the exercise of such discretion, unless it clearly appeared to have been abused.—Wilson v. Wilson, 6 Mich. 272.

¶ 479. In preparing a bill of exceptions the record should be condensed, the testimony put into a narrative form, and only such testimony inserted as is necessary to present the questions involved.—Welch v. Palmer, 85 Mich. 310.

¶ 480. A bill of exceptions should not be made up by taking a transcript of the stenographer's notes and attaching thereto a heading and a conclusion.—Welch v. Palmer, 85 Mich. 310; Pease v. Munro, 83 Mich. 475.

¶ 481. The incorporation in a bill of exceptions of all of the testimony is excusable only when it is necessary to enable the court to determine whether or not the case should have been taken from the jury.—Finch v. Karste, 97 Mich. 20.

¶ 482. The practice of settling chancery cases by including all of the testimony, immaterial and otherwise, and setting it forth by questions and answers, is condemned.—Hammond v. Rathbone, 113 Mich. 499.

¶ 483. The record on appeal should not be extended by printing long colloquies needlessly or by printing repetitions of testimony elicited by the questioning of counsel going over the same ground. The testimony should be condensed and, as far as possible, put in narrative form.—Sowles v. Wilcox, 127 Mich. 196, per Grant, J.

¶ 484. The practice of printing the entire stenographer's minutes even in chancery cases is not to be commended, immaterial testimony, repetitions, and arguments of counsel should be eliminated to condense the record with the idea of aiding the court in reaching the essential facts.—Tower v. Township of Somerset, 143 Mich. 195.

¶ 485. In a record for a chancery appeal, all questions to and answers of witnesses, and all remarks by court and counsel were included. Held, the record made was too bulky; that it should have included only enough to give a proper understanding of the evidence; and that 3 Comp. L. 1897, § 10188, providing that a chancery record should be made up in a manner similar to a bill of exceptions at law, had not been complied with.—Andrews v. Lavery, 159 Mich. 26.

¶ 486. A bill of exceptions is not necessarily prolix because it introduces a large amount of testimony, where there is room for difference concerning the tendency thereof.—Whitaker v. Kilroy, 70 Mich. 635.

¶ 487. The statement of an objection to testimony taken in a chancery case, and the reason for it, in the simplest and shortest way, is sufficient, and a discussion of it before the commissioner, if deemed necessary by counsel, is not to be transcribed and made a part of the record on appeal.—Hilliker v. Coleman, 73 Mich. 170.

¶ 488. Bill of exceptions criticised for containing the entire stenographic report without condensation in narrative form.—Wright v. Elk Rapids Iron Co., 129 Mich. 543.

¶ 489. The circuit judge need not sign and settle a case in chancery where the record has been copied verbatim and not reduced to narrative form as required by Chancery Rule 37. —Southwick v. Wayne Circuit Judge, 173 Mich. 472.

§ 104. Incorporation of books, maps or exhibits.

Attachment of papers to bill or case, see ante § 101.

Incorporation of affidavits made on motion for new trial, see also post ¶ 831.

Sufficiency of showing of documentary evidence in chancery case, see post § 187.

Affidavits and documents to supplement record, see post § 249.

Dismissal for noninclusion in record, see post § 156.

Production of exhibits with the record on appeal, see post § 178.

Indexing or identification in printed record, see post § 174.

¶ 490. Papers not incorporated in the body of the bill as signed cannot be considered as forming a part of it unless by reference thereto in the bill they are clearly identified as a part of it.—Wagar v. Peak, 22 Mich. 368.

¶ 491. Books and similar exhibits need not be reproduced in the printed record of a case.—University of Michigan v. Rose, 45 Mich. 284.

¶ 492. On a bill of accounting between partners, transcripts from such parts of the books as became material should be introduced, and not the books themselves, unless

there is something in their appearance which is necessary to consider on questions of fraud or forgery or some special difficulty.—Harrison v. Dewey, 46 Mich. 173.

¶ 493. Maps or plans ought to be furnished in the record where the case is unintelligible without.—Curtis v. Norton, 58 Mich. 411.

§ 105. Contents and substance of case made.

Dismissal for defects, see post § 163.
Remission for correction, see also post ¶ 617.
Sufficiency of matter in case made to admit of review, see post § 196.
Contents and settlement of case made, see 1916 C. C. Rule 67.
Removal of case made to Supreme Court, see Jud. Act, Chap. L, § 17; Comp. L. 1915, § 13752.

¶ 494. A record of what was called a case made after judgment contained the pleadings; a mass of evidence, documentary and oral; special questions submitted by each side to the judge, who tried the case without a jury; the judge's answers thereto; and the general judgment. No regular general finding of the facts in the case appeared. This form is criticised, and the mode of finding facts held not to be regular under the statute.—Adams v. Champion, 31 Mich. 233; Armstrong v. Adams, 31 Mich. 236.

¶ 495. A case made must present a finding of facts, and should point out as clearly as a bill of exceptions the errors relied on for a reversal.—Tuxbury v. French, 39 Mich. 190.

¶ 496. Where a judgment of a circuit court affirming a judgment of a justice of the peace on certiorari is brought to the Supreme Court for review on case made after judgment, the return of the justice to the writ of certiorari is an essential part of the record, without which the Supreme Court will not take jurisdiction of the cause.—Zeller v. Harris, 23 Mich. 286.

§ 106. Making up transcript from copies.

¶ 497. The original minutes of oral testimony taken in open court in a chancery case must not be removed from the files to be used as copy in printing the record, unless by an order of the Supreme Court. But in a case where they were so removed and were destroyed by the printer, the appellants, who were not shown to have had any knowledge that they had been so used, were allowed, for the purpose of saving their rights, to file a copy of the evidence in lieu of the original.—Lamb v. Hinman, 46 Mich. 112.

§ 107. Minutes as basis for bill or case.

Impropriety of full transcript, see ante § 103.
Settlement on notes of stenographer on retirement of judge, see post ¶ 524.
Requiring copy at expense of appellant to prepare amendments, see post ¶ 507.

¶ 498. The party making the bill is under no obligation to secure a copy of the stenographer's minutes of any more of the testimony than he may deem necessary for this purpose; for which amount, when certified to by the circuit judge, he may tax as a part of his costs.—Cole v. Ingham Circuit Judge, 77 Mich. 619.

§ 108. Proposed draft and amendments.

Service of proposals and amendments, see post § 109.
Failure to propose amendments as waiving objections to case as settled, see post ¶ 634.

¶ 499. The proper course in settling a bill of exceptions is to adopt as the framework the bill tendered by the party taking the exceptions, if proper in form, with such changes and amendments as the facts warrant.—People ex rel. Harbaugh v. Wayne Circuit Judge, 32 Mich. 259.

¶ 500. It is an abuse of discretion to discard a proper bill of exceptions tendered for settlement by the party taking the exceptions, and to adopt as a substitute one submitted by the adverse party.—People ex rel. Harbaugh v. Wayne Circuit Judge, 32 Mich. 259.

¶ 501. Amendments must contain a copy of whatever additional testimony, or exhibits, or other matter the party proposing same desires to have inserted; and copies thereof must be served on the opposite party before the time noticed for the settlement of the bill of exceptions.—Cole v. Ingham Circuit Judge, 77 Mich. 619.

§ 109. Notice to settle, and service of proposals or minutes.

See also ante ¶ 501.
Defective notice as reason for not compelling settlement, see post § 115.
Service on party when assisting in cause as solicitor, see post § 651.
Dismissal for want of notice, see post § 157.
Striking bill for want of notice, see post § 165.
Service of assignments on adversary, see post § 123.
Furnishing copies of minutes and papers for making up bill or case, see 1916 C. C. Rule 66, § 3.
Service of copy of proposed bill or case, and service of amendments proposed, see 1916 C. C. Rule 66, § 9.

¶ 502. The party against whom a decision is rendered by the circuit judge in vacation is entitled to a written notice, either from the clerk or from the opposite party, before

the ten days allowed him for making a case commence to run.—People ex rel. Kinney v. Wilson, 12 Mich. 25.

¶ 503. On settling a bill of exceptions after the death of the opposing party notice should be given to the administrator or an opportunity afforded to propose amendments.—Van Valkenburg v. Rogers, 17 Mich. 322.

¶ 504. A plaintiff waives notice and showing as required by 1897 Circuit Court Rule No. 47 where the defendant moves for time to settle a bill of exceptions to the first day of the next term and the attorney for the plaintiff opposes the motion but not on the ground that no notice had been given or showing made as required by the rule.—Wilkins v. Genesee Circuit Judge, 125 Mich. 628.

¶¶ 505, 506. Under Circuit Court Rule No. 68, requiring the party desiring the settlement of a case for appeal to furnish to the adverse party such portion of the stenographer's minutes as shall have been procured, for inspection and use by such adverse party in the preparation of amendments to the proposed case, the adverse party must be given possession of the stenographer's minutes for such reasonable time as will permit the comparison of the case presented with the testimony, even though no amendments may be necessary, and such rule is not complied with by incorporating all the testimony in the proposed case and simply producing such minutes upon the date noticed for settlement of the case.—Marsh v. Kent Circuit Judge, 200 Mich. 579.

¶ 507. Under How. St., § 6534e2, relating to the stenographer of the Kent circuit, which provides that, if it shall be necessary to procure a transcript of the stenographer's notes in order to remove a case to the Supreme Court, and the trial judge shall certify to such necessity, the appellant, if he shall prevail, may tax the cost thereof, and that said transcript may be used by the opposite party in proposing amendments to the record, the trial court, upon a certificate that a transcript of the whole or of certain parts of the testimony is necessary in order to settle a bill of exceptions, may require the appellant, at his own expense, to furnish such transcript to the appellee, to enable the latter to prepare amendments to the bill.—Gillies v. Kent Circuit Judge, 106 Mich. 687.

§ 110. Approval, settlement and certification.

Framing on basis of proposals, and amendments, see ante § 108.

Compulsory duty to sign or settle, see post § 115.

Return to insert showing of settlement, see post § 118.

Sufficiency of showing that all evidence material to questions is returned, see post § 176.

Sufficiency of showing in bill that objection was made for prolixity, see post § 177, ¶ 763.

Presumption as to regularity of settlement and signing, see post § 348.

Construction of the certificate by the Supreme Court, see post § 340.

Dismissal for improper or imperfect settlement, see post § 157.

Settlement as time whence to reckon time in which to take appeal, see ante § 73.

Settlement of evidence on appeal, see Jud. Act, Chap. L, § 22, Comp. L. 1915, § 13757.

Signature of bill in Wayne county, proper judge, see Jud. Act, Chap. II, § 55; Comp. L. 1915, § 12138; generally, see Jud. Act, Chap. XVIII, § 64; Comp. L. 1915, § 12636.

¶ 508. Under Chancery Rule 37, subdivision (a) when no amendments or corrections to a proposed record are offered, the court may certify it if satisfied it is a fair and proper presentation of the proceedings.—Alderson v. Newaygo Circuit Judge, 173 Mich. 608.

¶ 509. Failure to file a supersedeas in order to obtain a stay of proceedings as provided by 3 Comp. L. 1897, § 10355, does not deprive a court of jurisdiction to settle the bill of exceptions.—Harper v. Wayne Circuit Judge, 155 Mich. 543.

¶ 510. Where no proceedings are taken for the settling of a case, but the party appellant, without notice to the opposite party, procures and files with the appeal papers a certified copy of the judge's minutes of the evidence taken on the trial, such copy cannot be treated as a case made under the statute, or considered in the Supreme Court on the hearing.—Wright v. Dudley, 8 Mich. 74.

¶ 511. The stenographer's transcript of his notes of the evidence in a chancery cause where the testimony was taken in open court, which has been merely filed in the cause, and a copy thereof sent up with the return without being authenticated by the circuit judge as a case settled as required by the statute, will not be considered on appeal as the evidence in the cause.—Moote v. Scriven, 33 Mich. 500.

¶ 512. A case made after judgment for review by the Supreme Court must show on its face that it is settled and signed by the circuit judge for that purpose.—Gard v. Stevens, 12 Mich. 9.

¶ 513. Since the statute has confined "cases made" to law questions, less strict-

ness is required in the form of certifying them than when they could also be used for the review of facts.—Wheeler v. Wilkins, 19 Mich. 78.

¶ 514. Cases made after judgment must be certified to the Supreme Court by the clerk of the court below, or the Supreme Court has no jurisdiction to hear the cause; the want of the certificate, being a jurisdictional defect, cannot be cured by the stipulations of counsel.—City of Grand Rapids v. Whittlesey, 32 Mich. 192.

¶ 515. A bill certified as containing the substance of all the evidence deemed by the circuit judge material to the assignments of error does not show that all the evidence is included; and therefore will not admit of reviewing any question dependent thereon.—Black v. Simon, 116 Mich. 382.

¶ 516. The misleading statement in a bill of exceptions that the evidence is all set forth, when it is not, is rebuked.—American Ins. Co. of Chicago v. Woodruff, 34 Mich. 6.

§ 111. ——Agreed statement or stipulations.

Stipulations in lieu of certification, see ante ¶ 514.
Stipulations as to retiring judge settling bill, see also post ¶ 521.
Stipulation that other evidence shall be considered in case at bar, see also post ¶ 1063.
Additional matter by stipulation, see post § 248.
Agreement to extend time, see ante § 95.
Agreement as waiving inclusion of assignments in bill, see post ¶ 563.
Presumption on the record as to matters admitted or conceded, see post § 350.
Exclusion from consideration on review of stipulations extraneous to record, see post § 285.
Agreed statement and settlement and approval of same, see 1916 C. C. Rule 66, § 10.

¶ 517. Without a proper authentication of what seems to have been returned and treated as the evidence in proceedings to enforce a mechanic's lien upon lands, the Supreme Court will not hear an appeal therefrom; the defect is not cured by a stipulation of the solicitors; the solemn judgments of courts will not be disturbed on records made for them by the counsel or attorneys.—Roberts v. Miller, 31 Mich. 73.

¶ 518. Parties cannot stipulate as to the judge who shall settle a bill of exceptions.—Hill v. Hill, 112 Mich. 633.

§ 112. ——Retirement or change of judge.

Stipulations as to judge who shall sign, see ante ¶ 518.
Reversal without review on failure to obtain settlement of case, see post ¶ 695.
Settlement in case of death or resignation or other disability or absence of trial judge, see 1916 C. C. Rule 66, § 12.
Signature by successor or other judge in case of death, vacancy or disability, see Jud. Act, Chap. XVIII, § 64; Comp. L. 1915, § 12636.

¶ 519. Where a judge has gone out of office after settlement of exceptions the bill must stand as part of the record.—Van Valkenburg v. Rogers, 17 Mich. 322.

¶ 520. Where a bill was settled and signed by a judge after resignation, but by consent of parties, it was not disturbed.—Tefft v. Windsor, 17 Mich. 425.

¶ 521. A judge cannot settle a bill of exceptions after going out of office, even under stipulation of counsel.—Crittenden v. Schermerhorn, 35 Mich. 370.

¶ 522. The clause in Laws 1879, p. 5 (How. St., § 7613), permitting settlement upon stenographer's minutes by the successor in office of the trial judge, is valid.—Mason v. Phelps, 48 Mich. 126.

¶ 523. Under How. St., § 7613, Comp. L. 1897, § 10249, requiring a bill of exceptions to be settled before the judge who tried the case, except in case of his death or resignation, the expiration of his term, or vacancy in office from other cause, the fact that the case was tried before a judge from another circuit, who is absent from the county, and whose attendance cannot be procured, does not authorize the settlement of the bill before the local judge, since the bill may be settled at the trial judge's home.—Hill v. Hill, 112 Mich. 633.

¶ 524. A case in chancery may properly be settled on the stenographer's notes where the trial judge goes out of office before the time for settling the case expires; and the procedure would be substantially the same as in settling a bill of exceptions at law.—Johnson v. Johnson, 49 Mich. 639.

§ 113. ——Death of stenographer.

¶ 525. A bill of exceptions which has been certified to by the trial judge will not be deemed insufficient because containing testimony which was taken by a court stenographer who died without making a transcript, and because the testimony was placed in the hands of another court stenographer, who transcribed it; but with some help from counsel for the plaintiff, especially where no mistake in the transcript is pointed out.—White Pine Lumber Co. v. Manufacturers' Lumber Co., 191 Mich. 390.

§ 114. ——Death of party to cause.

Notice to administrator to settle bill, see ante ¶ 508.

¶ 526. A bill of exceptions is not irregular because of being signed and settled after the death of the opposing party, and before there has been any revival of the judgment.—Van Valkenburg v. Rogers, 17 Mich. 322.

§ 115. Compelling settlement or action by judge.

See also ante ¶ 421.
Unduly prolix case, see also ante ¶ 489.
Compelling amendment of record, see post § 244.
Mandamus as remedy to compel settlement of case and procedure thereon, see Mandamus.
Duty to sign bill or case, see Jud. Act, Chap. XVIII, § 64; Comp. L. 1915, § 12636.

¶ 527. Where a party has done all in his power to comply with the orders for settlement of a bill of exceptions, and has furnished it in due time, mandamus lies to compel signing.—People ex rel. De Moss v. Van Buren Circuit Judge, 41 Mich. 725.

¶ 528. Although a trial judge will not be compelled by mandamus to sign a proposed bill of exceptions which he avers to be incomplete and inaccurate, he should, upon it and the amendments offered by the other party, settle such bill as he deems proper.—Pope v. Judge of Recorder's Court, 107 Mich. 25.

¶ 529. Circuit judge not compelled by mandamus to settle bill of exceptions after expiration of time provided for in 1897 C. C. Rule 27, in absence of written stipulation extending time.—Lake Shore & M. S. R. Co. v. Branch Circuit Judge, 116 Mich. 399.

¶ 530. Mandamus to compel the circuit court to settle a case on appeal will be denied where the statutory period of forty days had elapsed without the appeal being perfected.—City of Detroit v. Wayne Circuit Judge, 144 Mich. 696.

¶ 531. The circuit judge will not be compelled by mandamus to vacate an order denying an extension of time for settling a bill of exceptions, where the application for such extension did not comply with the rule which requires cause to be shown by affidavit, on special motion, after notice, and where some of the reasons given for the extension are not founded upon the record.—Northern Assur. Co. v. Houghton Circuit Judge, 169 Mich. 238.

¶ 532. It is only when the sound discretion of the trial court in granting an extension of time under Chancery Rule 37h, for settling a case on appeal has been abused, that the appellate court will interfere.—Smilansky v. Wayne Circuit Judge, 186 Mich. 463.

¶ 533. Mandamus to compel the circuit judge to sign and settle a case on appeal should be denied where one of the three defendants had not formally entered his appearance and had not pleaded or been defaulted; where notice of settlement of the bill had been legally served on only one of the other defendants; where a motion to dismiss as to the one not served was denied; and it was agreed by the court and counsel that if the motion to dismiss was denied the bill of exceptions was not properly before the court for settlement under the statute and rules; and where no bill of exceptions was ever presented to the circuit judge for settlement and signature.—McNamara v. Kent Circuit Judge, 173 Mich. 602.

¶ 534. A circuit judge will not be required by mandamus to settle and sign a bill of exceptions in the form requested by appellant, where the former is ready to sign and settle such a bill as is warranted by the facts.—Corby v. Wayne Circuit Judge, 186 Mich. 533.

§ 116. Settlement nunc pro tunc.

¶ 535. An order made July 3rd extending to September 1st the time for settling a bill of exceptions, if objectionable, was ratified by a stipulation made on the same day agreeing to settle it by agreement before July 25th, if possible, and that the judge might sign it on September 1st nunc pro tunc July 29th; and such stipulation contemplated that if it was not agreed on the judge must have time to examine the record in passing on proposed amendments, so that it was proper for him when the bill was presented on September 1st with no agreement and with numerous proposed amendments to order it prepared with the amendments as allowed and presented to him on September 5th and then to sign it as of July 29th according to the stipulation.—Culver v. Van Buren Circuit Judge, 141 Mich. 644.

§ 117. Delivery of bill and filing below.

Dismissal for delay, see post § 155.
Who may send up record and file same above, see post § 127.
Time for filing above, see post § 128.
Effect of sending up copy of bill instead of original, see post ¶ 571.
Signature and delivery of settled bill or case, see 1916 C. C. Rule 66, § 11.
Filing bill by clerk of circuit to be returned with record, see Jud. Act, Chap. XVIII, § 66; Comp. L. 1915, § 12638.

¶ 536. The provision of C. C. Rule 83, requiring a case made to be filed within

ten days after it shall be settled and signed, has reference to the filing in the lower court only.—Ackley v. Sager, 30 Mich. 264.

¶ 537. Sup. Ct. Rules 8 and 15 do not require the dismissal of an appeal for failure to file the record in the court below within 40 days after the filing and approval of a bond which stays proceedings only, since under Pub. Acts 1899, No. 243, a bond, except to stay proceedings, is not required until after settlement of the case, and where orders extending the time for settlement of the case have been regularly made it would not be proper to dismiss the appeal for failure to file the record.—Sherman v. Sherman, 139 Mich. 180.

§ 118. Return of record for additions or amendments.

Propriety of return, see post § 243.
Compelling amendment, see post § 244.
Power to permit sending up of paper lost from files, see post § 249, ¶ 1113.
Proper practice to seek amendments, see post § 242.
Leave to appellee to resettle on denying motion to dismiss, see post ¶ 670.
Remission of record to court below for further action, see post § 143.
Form and manner of bringing amendment into record, see post § 245.
Proper matter of amendment, see post § 246.
Amendment to show matters improperly shown by certificate, see also post ¶ 701.
Return of amendments to Supreme Court, see post § 250.
Notice for hearing pending amendment, see post § 131.
Amendments and additional records in general, and presentation of points thereby, see post XI, F.

¶ 538. A case made held defective because not showing that it was settled and signed by the circuit judge for review was allowed to be remitted to the court below for correction.—Gard v. Stevens, 12 Mich. 9.

¶ 539. The Supreme Court remanded the record in a case, with an order to extend the time for settling a bill of exceptions. On November 11th, an order was entered below extending the time to November 18th, while at the same time defendant served notice on plaintiff to settle the bill on November 15th. Plaintiff overlooked this notice. On November 15th defendant settled the bill, plaintiff being absent, and the record was returned to the Supreme Court November 17th. On November 18th plaintiff presented his proposed bill of exceptions, and also served a notice upon defendant with a copy of his proposed amendments. The trial court declined to consider them on the ground of lack of jurisdiction. The trial court in his certificate stated that he mistakenly supposed the amendments had been previously accepted and that matters had been called to his notice which he thought the Supreme Court should have before it in deciding the case. Held, that plaintiff's motion before the Supreme Court to remand the record for the purpose of incorporating his amendments should be granted.—Kaiser v. Detroit United Ry., 164 Mich. 56.

¶ 540. Where a case was imperfectly settled in consequence of the wilful or negligent absence of the appellees, it was remanded for settlement, subject to a charge against the appellees on final decree of all costs resulting from their neglect to raise objection until after the case as settled had been printed.—Stickle v. Haskins, 54 Mich. 130.

¶ 541. In a case involving accounts the parties made frequent references to certain partnership books which were not returned in whole or by sufficient transcript as part of the record. The references were therefore unintelligible, and as the court could not tell whether the case was presented as it had been below, it was referred back to the lower court that the parties might take proper action to present it clearly.—Lambert v. Griffith, 40 Mich. 174.

¶ 542. An appellant secured an extension of time to settle a bill of exceptions, without showing cause for such extension. The bill was settled, the writ of error issued and return thereon made, and the record printed. The upper court decided that the extension of time was improperly made, but that appellant might apply to the lower court for leave and that such leave might be granted for cause shown. On motion of appellant, held, the appellant might dismiss its writ of error, and if the lower court granted leave for an extension of time to settle a bill of exceptions, it might take out a new writ and make the record as previously printed a part of the record under the new writ.—Kaiser v. Detroit United Ry., 163 Mich. 109.

E. ASSIGNMENT OF ERRORS.

§ 119. In general; necessity of assignment.

Who may assign and complain of errors, see post XI, D.
Construction, sufficiency and scope of assignments, see post XI, C.
Joint and several assignments, see post § 217.
Dismissal for want of regular assignments, see post § 158.
Statement of points in briefs, see post § 232.

¶ 543. On a writ of error the court should be informed of the alleged errors of law, and the precise questions involved.—In re Hoffman's Estate, 183 Mich. 67.

¶ 544. The sufficiency of the counts of a declaration cannot be considered on review

if there is no assignment of error thereon.—Hitchcock v. Pratt, 51 Mich. 263.

¶ 545. Whether a defense is available under a plea of the general issue cannot be reviewed in the absence of an exception to or assignment of error based on the admission of evidence in support thereof.—Dowagiac Mfg. Co. v. Schneider, 181 Mich. 538.

¶ 546. That the verdict and judgment in an action for the breach of warranty originating in a justice's court exceeded the ad damnum clause in an amended declaration will not be considered on review where there is no assignment of error on that subject and the question was nowhere called to the trial court's attention.—Patterson v. Gore, 177 Mich. 591.

¶ 547. Rulings in excluding testimony cannot be reviewed where error is not assigned upon them.—Kehoe v. Allen, 92 Mich. 464.

¶ 548. Objection to testimony in an ejectment case by a surveyor about a former survey in which he took no part, brought out on his cross-examination and based on no assignment of error, was not considered.—Miller v. Shumway, 135 Mich. 654.

¶ 549. The Supreme Court will not review the admission of evidence over the objection and exception of appellant, where no error is assigned upon said exception.—In re McNamara's Estate, 166 Mich. 451; McNamara v. Michigan Trust Co., Id.

¶ 550. Error not assigned to instructions on the effect of evidence if believed by the jury will not be considered by the Supreme Court.—Parkey v. Galloway, 147 Mich. 693.

¶ 551. In order to have this court review an alleged erroneous instruction error must be assigned upon the instruction.—Cox v. Klein, 149 Mich. 162.

¶ 552. An allegation in the brief that the court erred in giving certain instructions will not be considered by this court where the question is not raised in the assignments of error.—Muncie Wheel & Jobbing Co. v. Finch, 150 Mich. 274.

¶ 553. To raise the question of improper argument of counsel, exception and proper assignment must be made thereon.—Devich v. Dick, 177 Mich. 178.

¶ 554. No question is open for review in trover tried without a jury, where no exceptions of law or fact were taken, and where no error was assigned on the ground that the facts found did not support the judgment.—Goulet v. Perry, 123 Mich. 264.

¶ 555. An objection to drain proceedings on the ground that the drain commissioner was an interested party will not be considered on review where it is not raised by any assignment of error.—Roberts v. Smith, 115 Mich. 5.

¶ 556. In order to satisfy C. O. Rule 84, a case made before judgment will not be reviewed where no statement of errors is filed or error assigned.—McKinnon v. Atkins, 60 Mich. 418.

§ 120. Number of assignments.

Costs for excessive assignments, see Costs, V.

¶ 557. Assignments of error ought not to be needlessly multiplied.—Fowler v. Gilbert, 38 Mich. 292; Burt v. Long, 106 Mich. 210.

¶ 558. Counsel was criticized for making 156 assignments of error based upon rulings relating to the admission of evidence which upon examination were found not only to be without error but to raise no legal questions requiring discussion.—City of Battle Creek v. Haak, 139 Mich. 514.

§ 121. Procedure to make assignments; extensions.

Dismissal for delay in filing, see post § 155.
Practice as to assignment, see Jud. Act, Chap. L, § 5; Comp. L. 1915, § 13740.

¶¶ 559, 560. The Supreme Court will always give a plaintiff in error the benefit of his exceptions, if he is not at fault in occasioning delay, by extending time for assignment of errors, or by allowing a new assignment, as may be required.—Teller v. Willis, 12 Mich. 384.

§ 122. Inclusion in, or service with bill of exceptions.

Failure to include as ground for denying further time to file return, see post § 129.
Dismissal for noninclusion, see post § 156.
Affirmance for want of inclusion, when proper, see post § 478.

¶ 561. Where one who has proposed a bill of exceptions has failed to incorporate therein his assignment of error, the Supreme Court may refuse to consider the point made by him.—Peterson v. Frey, 109 Mich. 689.

¶ 562. An objection to the exclusion of evidence presented and argued before the court below, and clearly disclosed by the

record, was passed on although the assignments of error were not embodied in the bill of exceptions.—Coon v. Dennis, 111 Mich. 450.

¶ 563. An objection that the assignments of error did not accompany the bill of exceptions is without force where defendant in error stipulated to the settlement of the bill.—Hubbard v. Garner, 115 Mich. 406.

§ 123. Service on adversary.

Service of copy of assignments, see Sup. Ct. Rule 11; 1916 C. C. Rule 66, § 5.

¶ 564. When defendant in error notices the cause for hearing he waives the right to complain of any failure to serve him with a copy of the assignment of errors.—Frost v. Lawler, 34 Mich. 235.

§ 124. Amendments and additional assignments.

Necessity of new notice for hearing after amendments see post § 131, ¶¶ 587, 588.

¶ 565. Where an objection purely technical was made to an assignment of errors at the hearing, and it was evident that the defendant in error could not have been misled, the court permitted an amendment.—Trudo v. Anderson, 10 Mich. 357.

¶ 566. The entry of a special motion for leave to amend an assignment of errors must show in what particular an amendment is desired. And a copy of the proposed amendment, with notice of the motion, should be served on the opposite party.—Parsons v. Copland, 5 Mich. 143.

¶ 567. In a case which originated before a circuit court commissioner, and was appealed to and tried in the circuit court and then removed to the Supreme Court, a motion made after four weeks in term and after the filing of joinder in error to amend the assignment of errors so as to take an objection to the jurisdiction of the commissioner which was not made before the commissioner or in the circuit court presents no equitable claim upon the discretionary power of the court and will be denied.—Parsons v. Copland, 5 Mich. 144.

¶ 568. Assignments of error may, in a proper case, be amended, on the motion of plaintiff in error, so as to include a general assignment that the findings of the court below do not support the judgment, in which case the usual motion fee will be allowed to defendant in error.—Hubbard v. Garner, 115 Mich. 406.

VII. RETURN AND FILINGS IN THE SUPREME COURT.

§ 125. Return day for writ.

Time for filing above, see post § 128.
Time for notice for hearing, full time for return, see post § 131.
Return time in chancery appeals, see Sup. Ct. Rule 15.

¶ 569. The time—not less than twenty days—in which a writ of error may be made returnable runs from and excludes the date of issue, and includes the return day, and a writ issued August 30 is properly made returnable September 19.—Doyle v. Mizner, 41 Mich. 549.

§ 126. Requisites and contents of return in general.

Return to Supreme Court of amendments of the record, see post § 250.
Dismissal for inadequacy of return, or remission for fuller return, see post § 156.
Contents of the judgment roll and of the bill or case, see ante §§ 99, 105.
Requisites and sufficiency of the case or bill of exceptions for presentation of errors assigned, see post XI, B.
Affidavit of service of notice of writ, see Sup. Ct. Rule 5.
Filing copy of notice and proof of service of same in chancery appeals, see Sup. Ct. Rule 14.
Filing proof of service of notice of filing case made, see Sup. Ct. Rule 17.
Return of order for extension with record, when time has been extended, see Sup. Ct. Rules 7, 16.

¶ 570. The court will not set aside a writ of error for want of proper return, after the lapse of several years, during the most of which time the papers have been in possession of the counsel for defendant in error, and rejoinder in error was filed while the counsel had the return in his hands.—Wattles v. Warren, 7 Mich. 309.

¶ 571. A copy of the bill of exceptions was sent up instead of the original; but, three terms having elapsed since the return to the writ, and issue in error having been joined without notice of the irregularity, and no explanation being made of the delay, the court refused to interfere to require the original to be sent up.—Evans v. Norris, 6 Mich. 69.

§ 127. Who may send up and file record.

Filing below, see ante § 117.

¶ 572. When the case is settled and filed with the clerk of the circuit court, either party, desiring action upon it, may cause it to be certified to the Supreme Court.—Robertson v. Little, 10 Mich. 371.

§ 128. Time for filing.

Filing bill below, see ante § 117.
Sufficiency of filing made before motion to dismiss, see post § 155.
Dismissal for delay in filing return, see post § 155.
Dismissal of case made for delay in filing, see post § 163.
Filing briefs, see post § 231.

¶ 573. The provision of C. C. Rule 83, requiring a case made to be filed within ten days after it shall be settled and signed, has reference to the filing in the circuit court, and has no relation to the practice in the Supreme Court.—Ackley v. Sager, 30 Mich. 264.

§ 129. Excuse for delay; extensions.

Extension of time for taking appeal, see also ante § 75.
Reasons for extension, see also ante § 75.
Failure of judge to sign and settle, see also ante ¶ 421.
Ground for extension of time to make and settle bill or case, see ante § 97.
Counter affidavits to excuse delay, see post § 166, ¶ 707.
Extension of time for return and order for extension, see Sup. Ct. Rule 7.
Extension of time for returning record in appeals, see Sup. Ct. Rule 16.

¶ 574. Where plaintiff in error has neglected to cause the return to be made in time, and applies to the Supreme Court for relief, he must explain and excuse the delay.—Lathrop v. Hicks, 2 D. 223.

¶ 575. He will not be relieved merely upon the affidavit of his attorney that in his opinion there was good and legal cause for suing out the writ of error, and that if the case should be heard on its merits the judgment below would be reversed.—Lathrop v. Hicks, 2 D, 223.

¶ 576. It is not a sufficient excuse that the clerk below promised to make out the transcript and deliver it to the attorney within the time required by the rule; that the attorney relied upon this promise, and the neglect occurred in consequence of the clerk's failure to perform it.—Lathrop v. Hicks, 2 D. 223.

¶ 577. A neglect to procure a return is not sufficiently excused by affidavits which state that the counsel expected the clerk to make it, but show no request to the clerk to do so and no interview with him on the subject.—Carne v. Hall, 7 Mich. 159.

¶ 578. Where verdict had been rendered for plaintiff for $5,000 in an action for breach of promise of marriage, and, on motion being made for a new trial, the circuit court had made an order granting it, unless plaintiff reduced the damages to $2,000, which was done: and defendant, nearly two years thereafter, brought error, but neglected to procure return to the writ in time, held, on motion to dismiss the case for want of prosecution, that, in the absence of valid excuse for delay, the case did not call for indulgence on other grounds.—Carne v. Hall, 7 Mich. 159.

¶ 579. A plaintiff in error had failed to procure a return to a writ of error in time, and made application for leave to file it and assign errors. The only special assignment was of errors occurring on the trial, and the record showed no exceptions. As the errors proposed to be assigned could not be noticed by the court, leave was refused, though the delay was sufficiently excused.—Webster v. Fisk, 9 Mich. 250.

¶ 580. If the appellant is in default in not filing the return, and, instead of complying with the rule when his attention is called to the default, resists a motion to dismiss on technical grounds, the court will not grant him further indulgence.—Ball v. Ball, 18 Mich. 380.

¶ 581. When a transcript of the record has not been filed within the proper time, permission to file it will not be granted unless a sufficient excuse is shown for the delay, and a readiness to file it when a motion to dismiss is made, or within a time satisfactory to the court; and if the register's fees for the return are not paid the appellant should show that he has offered or been ready to pay them.—Boardman v. Taylor, 16 Mich. 62.

¶ 582. Where no assignments of error were filed with the bill of exceptions, and no satisfactory reason or excuse for not doing so is offered, a motion to extend the time to make return to the writ of error will be denied and the appeal dismissed.—Hanselman v. Adrion. 139 Mich. 546.

VIII. ENTERING, DOCKETING AND CALENDARING CAUSE.

§ 130. Appearance and entry of cause.

Party entitled to send up return, see ante § 127.
Appearance of counsel as requiring service of motions on him, see post § 167.
Improper entitling of cause by reason of death of party, see ante § 362.
Motions in causes not yet docketed, necessity of notice, see post § 167.
Practice as to appearance by appellee, see Jud. Act, Chap. L, § 5; Comp. L. 1915. § 13740.
Entitling cause and names of parties, see Sup. Ct. Rule 3.

¶ 583. Where the attorneys of record in the court below are retained as counsel for defendant in error in the Supreme Court, no formal notice of appearance is required; and counsel for plaintiff in error should treat the attorneys who appeared of record for defendant in error below as his counsel above, unless otherwise actually notified.—Frost v. Lawler, 34 Mich. 235.

§ 131. Notice for hearing.

Computation of time, when notice may be given, see ante ¶ 324.
Mode of calling up motions, see post § 166.
Notice of motion, see post § 167.
Notice as waiver of service of assignments, see ante § 123.
Notice as waiving objections to appeal or writ, see post § 146.
Noticing as preventing striking from calendar, see post ¶ 594.
Want of notice as cause for reversal, see post ¶ 2124.
Notice for argument of cause, see Sup. Ct. Rule 34.

¶ 584. An appeal cannot be noticed for hearing until the full time for making return thereto has expired.—Stockton v. Garland, 14 Mich. 333; Torrent v. Muskegon Booming Co. 21 Mich. 1.

¶ 585. In computing time on notices of hearing the day on which the notice is served is to be excluded and the first day of term included. An intervening Sunday is not to be excluded.—Anderson v. Baughman, 6 Mich. 298; Corey v. Hilliker, 15 Mich. 314.

¶ 586. The fact that the bill of exceptions has been removed from the files for amendment by order of the court and that the amendments are not completed nor the bill of exceptions returned, does not prevent noticing the case for hearing.—Polhemus v. Ann Arbor Savings Bank, 27 Mich. 44.

¶ 587. A case on error may be properly noticed for hearing under Supreme Court Rule 21 on the same day that the assignment of errors is filed, and if no new issue is raised as provided by rule 13, the case will be properly on the docket; but where, after the notice, a new issue is raised by plea in bar to the writ, this new issue must also be noticed after hearing; and where it has not been, a motion to strike from the docket must prevail.—Crane v. Sumner, 31 Mich. 199.

¶ 588. Where, after a case reserved for the opinion of the Supreme Court had been noticed for hearing, an addition of specific questions was made to it by the circuit judge without the consent of one party, it was held that such party should not be required to go to a hearing of the case upon the notice previously given.—Farrand v. Collins Iron Co., 8 Mich. 136.

§ 132. ——Form and sufficiency.

¶ 589. A notice, dated, that a cause will be brought on for hearing and argument at the next term of said court, to be held at the city of Detroit, is sufficient.—Franklin v. Mansfield, 8 Mich. 99.

¶ 590. A notice, without date, that a cause "will be brought on for hearing at the next term of said court," is good in form.—Brushaber v. Stegemann, 22 Mich. 190.

§ 133. Right to notice cause; who authorized.

¶ 591. If either party to a cause desires to have it heard in the Supreme Court, he must notice it for hearing on his own behalf, and have it placed on the docket for hearing.—Willey v. Kilduff, 25 Mich. 161.

¶ 592. An appeal in chancery cannot be properly noticed for hearing by any one not the solicitor of record in the court below, and who has not been substituted as solicitor in the Supreme Court.—English v. Maxwell, 2 Mich. 462.

§ 134. Calendar, calling and striking causes.

Notice sufficient to put cause on calendar, see ante § 132.
Notice to put cause on for hearing, see ante § 131.
Reinstatement of dismissed cause, see post § 171.
Continuances, see post § 140.
Motion calendar, see post § 166.
Striking off papers in cause, or cause itself for defects in papers, see post § 165.
Motion to strike and practice thereon, see post §§ 166-168.
Placing causes on calendar for term, and order and priority of causes on calendar, see Sup. Ct. Rule 43; stipulation for arrangement and later order, see rule
Calling causes on calendar and setting for argument, see Sup. Ct. Rule 45.

¶ 593. A case may be stricken from the docket, with full costs as for a hearing, when plaintiff in error, after noticing it for trial, does not furnish opposing counsel with a copy of the printed record until late in the day preceding that of the hearing.—Mayo v. Elsey, 47 Mich. 10.

¶ 594. A cause will be stricken from the calendar if placed thereon by a notice of hearing given before the time for filing the record as fixed by rule has elapsed.—Bay v. Gypsum Plaster & Stucco Co., 141 Mich. 62.

IX. TRANSFER OF JURISDICTION AND EFFECT THEREOF.

§ 135. Effect of removal in general.

Consequences of trial de novo in equity, see post XII, H.
Effect on conclusiveness of judgments or decrees, see Former Adjudication, II.
Effect on jurisdiction over alimony, see Divorce, X, C, E.

Pendency of action until disposed of, see Actions, § 6; Abatement, § 10.
Pendency as ground for abating later action, see Abatement, § 10 et seq.
Pending appeal to United States Supreme Court from district court, as ground for abating state suit, see Abatement, ¶ 50.

¶ 595. After an appeal has been taken, the lower court has no further jurisdiction except in case of remand for further proceedings.—City of Grand Rapids v. Coit, 51 Mich. 109.

¶ 596. A case removed to a court of record for review becomes subject to its rules of practice; and the party removing it cannot take advantage of delays necessarily incident to the operation of those rules to contest, on that ground, the jurisdiction to proceed.—People v. Blake, 54 Mich. 239.

¶ 597. The effect of filing a claim for appeal and the statutory bond is to transfer the cause to the Supreme Court, after which that court alone has jurisdiction of a motion to dismiss the appeal.—Lake Shore & M. S. R. Co. v. Chambers, 89 Mich. 5.

¶ 598. Appeal suspends decree and precludes its use in evidence in another suit.—Day v. De Jonge, 66 Mich. 550.

¶ 599. Where bill for injunction against the collection of a paving assessment, upon which a preliminary injunction has been granted, was dismissed on the hearing in the court below, an appeal from that decree by complainants does not revive the injunction, and the city authorities are not liable as for contempt for proceeding, during the pendency of such appeal, to enforce the collection of said assessment.—Breevoort v. City of Detroit, 24 Mich. 322.

¶ 600. Where a general decree in a divorce action gives the complainant a note in liquidation of temporary alimony, and defendant declines to produce it and files a claim of appeal, the trial court, until the jurisdiction of the Supreme Court on appeal attaches by the making of a return and the filing and approval of a bond, has jurisdiction to make a further order requiring the defendant to forthwith surrender such note.—Snay v. Snay, 192 Mich. 210.

¶ 601. Where a judgment against the plaintiff in attachment is appealed from it does not dissolve the attachment, but the lien of the writ continues until the final disposition of the case against him.—Treat v. Dunham, 74 Mich. 114.

§ 136. ——Suspension or stay of proceedings.
Power of lower court to enrol decree pending appeal, see post § 143, ¶ 616.
Effect of appeal or error to stay proceedings, bonds for stay or supersedeas, and applications for stay, see generally Stay of Proceedings, II.
Effect of appeal to stay proceedings, see Jud. Act, Chap. L, § 21; Comp. L. 1915, § 13756.

§ 137. Commencement and cessation of jurisdiction above.
See also ante § 135.
Return and filings in Supreme Court, see ante VII.
Jurisdiction to allow suit money on appeal from divorce decree, see also Divorce, X, C.
Power to amend or add to record, see post XI, F.
Power to supply lost files after appeal taken, see post ¶ 1113.
Cessation of power of Supreme Court to correct or relieve from its own judgment, see post § 533.
Cessation of time for application for rehearing, see post § 546.
When appeal deemed perfected, see Jud. Act, Chap. L, § 24; Comp. L. 1915, § 13759.

¶ 602. A bill of exceptions was signed November 9, 1910, and a writ of error taken out by defendant. A motion for a new trial was made by defendant February 1, 1911. Held, the trial judge properly ruled that he had no jurisdiction to dispose of the motion.—Minkkinen v. Quincy Min. Co., 169 Mich. 279.

¶ 603. After a judgment of a circuit court in an action of ejectment has been brought to the Supreme Court on writ of error, and reversed, and a new trial ordered, and before a remittitur has issued to the court below, the Supreme Court has no jurisdiction—the case not being in the court—to grant an order staying waste upon the lands in question.—Crane v. Reeder, 23 Mich. 92.

¶ 604. Jurisdiction of a case brought by writ of error to the Supreme Court, and there affirmed, is restored to the trial court upon the filing of a remittitur from the Supreme Court.—Reynolds v. Newaygo Circuit Judge, 109 Mich. 403.

§ 138. Jurisdiction to grant stay or supersedeas.

¶ 605. An appellant on writ of error failed to obtain in the lower court a stay of execution of a judgment for costs entered against him. Held, that after the writ had been returned, the Supreme Court is the only court having jurisdiction to order a stay of execution.—Coeling v. Barnard, 159 Mich. 634.

¶ 606. No power rests in the circuit court to stay proceedings for the purpose of moving for a new trial or settling a bill of exceptions, upon any verdict or judgment, beyond twenty days, unless the bond required

by statute is given, and such bond stands as a supersedeas bond when a writ of error is taken out (Comp. L. 1897, §§ 10355, 10358; How. St., §§ 7621c, 7621f).—Markham v. Kent Circuit Judge, 121 Mich. 573.

¶ 607. Under the provision of C. C. Rule 47 (h) that on cause shown and on special motion and on proper terms, the court may order the recall of an execution issued after the expiration of ten days from the settlement of a bill of exceptions, without a writ of error having issued, such motion must be made in the court which issued the execution, and therefore a motion made in the Supreme Court was dismissed without prejudice to the right to its renewal below.—Ismond v. Scougale, 119 Mich. 501.

X. MOTIONS, DISMISSALS AND INTERLOCUTORY MATTERS PENDING REVIEW.

§ 139. Practice and powers in general.

Jurisdiction dependent on transfer of jurisdiction from lower court, see ante § 135.
Amendments of or relief from appellate judgment, see post XIII, E.
General powers of the court, see Courts.
Adaption of common-law practice in all matters not otherwise provided for on writ of error, see Jud. Act, Chap. L, § 5; Comp. L. 1915, § 13740.
Power of Supreme Court to issue writs essential to exercise of its jurisdiction, see Jud. Act, Chap. I, § 9; Comp. L. 1915, § 12014.
Stipulations between counsel, and filing same, see Sup. Ct. Rule 33.
Suggestions of death and revivor, see Sup. Ct. Rule 53.

¶ 608. The constitution in granting to the Supreme Court the power to issue writs of error, and to hear and determine the same, impliedly gives all the common-law means of executing that power. If necessary, a venire may be issued for a jury to try in this court the issue joined on assignment of error of fact, or the issue may be sent to the proper circuit court for trial.—Teller v. Wetherell, 6 Mich. 46.

§ 140. Continuance of cause.

¶ 609. Where the appellant had not passed up the printed record twenty-four hours before the case was called for hearing, and his counsel were unwilling to have the case put to the foot of the docket, to be submitted on briefs, and defendants were ready to go to a hearing, the case was continued, and defendants were allowed as costs on the continuance a counsel fee as upon hearing.—Griswold v. Fuller, Chaney's Digest, p. 735, par. 6; Clark v. Sable, 44 Mich. 1.

§ 141. Consolidation of appeals or writs.

Of law and chancery causes, see also post ¶ 1118.
Time to object to improper consolidation or hearing, see post § 145, ¶ 629.
Questions open on consolidated record, see post § 275.
Severance of judgment or parties for separate review, see ante § 79.

¶ 610. A chancery appeal and a separate proceeding in an action at law brought up by writ of error, cannot be consolidated and heard together.—Stevens v. Stevens, 181 Mich. 449.

¶ 611. Where both parties take a writ of error from a judgment of the circuit court in settling the account of an administrator, the cases should be consolidated and heard together in the Supreme Court.—In re Saier's Estate (Appeal of Zimmer), 158 Mich. 170.

§ 142. Interlocutory injunctions, receivers, contempt, etc.

Which court may stay proceedings pending perfection of error, see ante § 138.
Loss of jurisdiction on remand and pending filing of remittitur below, see ante § 137.
Recalling execution, see ante § 138, ¶ 607.

¶ 612. The Supreme Court has no jurisdiction to enjoin a defendant from interfering with the operation of a railway pending condemnation proceedings, not having original equity jurisdiction, and an application for an injunction to this effect should be made to a court of original and competent jurisdiction.—Grand Rapids, G. H. & M. Ry. Co. v. Stevens, 143 Mich. 646.

¶ 613. A remainderman purchased a mortgage against the estate, obtained a decree requiring the life tenant to pay the over due interest and on a sheriff's sale, under the decree, of the life estate, bid in the estate and instituted proceedings to obtain possession. The life tenant having filed an appeal from the decree petitioned the Supreme Court for an injunction to restrain the possessory proceedings, alleging her property. Held, that as no appeal bond was filed as provided by Act No. 290, Public Acts 1909 as amended by Act No. 160, Public Act 1911, the proceedings under the decree were not stayed, and the injunction would be denied.—Pinel v. Pinel, 172 Mich. 611.

¶ 614. On adjudging that an act was in contempt of a decree of injunction pending on appeal, the extent of the punishment and the question of a reference was left to be determined on settlement of the decree by the Supreme Court.—Wilkinson v. Dunkle & Williams Co., 141 Mich. 409.

§ 143. Remission of record for further action below.

Power of Supreme Court respecting amendments, see post XI, F.
Application to amend record or bring up additional matter, see post § 242.
Return of record for additions or amendments, see ante § 118.
Compelling settlement of bill or case by trial judge, see ante § 115.
Making additions and amendments to record, see post XI, F.
Additional assignments and amendments of assignments, see ante § 124.

¶ 615. Where one of the parties caused a case to be filed in the Supreme Court which he claimed was a case settled after judgment, but it did not conclusively or necessarily show on its face that it was so intended; and the circuit judge who tried the suit and signed the document certified to the Supreme Court that, in so signing it, he did not suppose he was settling a case under the statute, and that the one signed did not set forth the whole facts as they existed, held, that the papers should be remitted to the circuit court for such action as that court should deem proper under the circumstances.—Farrand v. Bentley, 6 Mich. 281.

¶ 616. Under Pub. Acts, 1899, No. 243, permitting appeals in chancery without bond and allowing the appellee to proceed to enforce his decree unless a bond for stay be given, an enrollment of the decree in the minutes of the court is authorized, although an appeal has been taken, where no bond is filed, and on motion of the appellee the suit papers will be returned to the circuit court for enrollment.—Harmon v. Metcalfe, 134 Mich. 643.

¶ 617. If the case made shows on its face that all the evidence is not embraced, the court above will refuse to hear it, but will remand it for correction.—Lee v. Lake, 13 Mich. 220.

¶ 618. On a motion to dismiss a writ of error, it appeared that no bill of exceptions had been settled and no motion had been made for an extension of time within which the writ might be returned, although the return day of the writ had expired, but appellant desired to have the case remanded to hear certain motions. Held, that the writ should be dismissed for want of diligence or of good faith.—In re Thorington's Estate (Appeal of Starkweather), 157 Mich. 513.

§ 144. Mode of objecting to appeal or writ.

Practice on motions, see post § 166-168.

¶ 619. A motion to dismiss is the proper form of objection to a writ of error supposed to be barred by lapse of time. The plaintiff in error may show himself, by affidavit, to come within the exceptions of the statute; and if that fact is disputed the court may resort to such measures as may be found most suitable to have the question settled.—Teller v. Willis, 12 Mich. 268.

¶ 620. The right to sue out a writ of error should be contested upon a motion to dismiss the writ, supported by proper showing.—Hagar v. Coup, 50 Mich. 54.

¶ 621. An objection that a writ of error is not issued within the time allowed by 3 Comp. L. 1897, § 10492, is available without a plea of the statute of limitations.—Bliss v. Caille Bros. Co., 157 Mich. 258.

§ 145. Time for objections.

Right of court to refuse dismissal because not promptly moved, see post ¶ 636.

¶ 622. Motions to dismiss must be made at the earliest opportunity.—Warner v. Whittaker, 5 Mich. 241; Stewart v. Dixon, 6 Mich. 391; O'Flynn v. Eagle, 7 Mich. 306.

¶ 623. Motions based upon the irregular action of the opposite party must be made at the earliest opportunity, and will not be entertained after the lapse of a term unless some very satisfactory reason is shown for the delay.—O'Flynn v. Eagle, 7 Mich. 306.

¶ 624. Where plaintiff in error failed to give notice of suing out the writ of error, but served assignment of errors, a motion to dismiss made a year and a half afterward, for want of notice of suing out the writ, was held too late.—Smith v. Mitchell, 9 Mich. 261.

¶ 625. Delay in moving to dismiss will not prejudice the appellee if the appeal was not taken in time, so that the court has not acquired jurisdiction.—Moore v. Ellis, 18 Mich. 77.

¶ 626. All objections to a record as it stands at the beginning of the term should be made then, and not by separate motions, made on different motion days, to dismiss the writ and strike out the bill of exceptions.—Spencer v. Fish, 43 Mich. 226.

¶ 627. After judgment in the Supreme Court it is too late to move to dismiss a writ of error for informalities and irregularities.—Powers v. Irish, 23 Mich. 429.

¶ 628. The objection that judgment had not been entered when the writ of error was sued out comes too late when two full terms have intervened before the hearing without

motion to dismiss.—McCahill v. Detroit City R. Co., 96 Mich. 156.

¶ 629. An objection made in the Supreme Court that two cases, a mandamus proceeding and a writ of error, were combined in one record, comes too late where the record gave timely notice that the cases were to be considered together, the attention of the trial court was not called to the matter by motion or otherwise, and the original files show that stipulations for continuances of the cases entitled as combined had been entered into, signed by attorneys for party objecting.—Craig v. Ingham Circuit Judge, 171 Mich. 33; Same v. Porter, Id.

§ 146. Waiver or bar of objections.

Dismissal of nugatory proceedings on motion of party at fault, see also post ¶ 691.
Opposition to dismissal as ground for denying further time to file return, see ante § 129, ¶ 580.
Waiver of failure to suggest death of co-party, see also Abatement, ¶ 82.

¶ 630. A notice of hearing given by an appellee is a waiver of irregularities in taking the appeal.—Durfee v. McClurg, 5 Mich. 532.

¶ 631. Where a cause was noticed for hearing in the Supreme Court by both parties, and then continued, and afterwards an objection was made, for the first time, that the exceptions had been irregularly settled, held, that the objection was waived.—Mason v. Phelps, 48 Mich. 126.

¶ 632. Counsel for appellee does not waive failure of the appellant to pay, within the time required, the register's fee for filing the settled case, by urging counsel for appellant to expedite the hearing of the case, if it appears that he did not know of such failure, and was not chargeable with notice. —Lum v. Fairbanks, 155 Mich. 23.

¶ 633. Counsel for appellee, who has accepted copies of the record and of the brief for appellant, and who expected the case to be heard at the next term of court, is not in a position to take advantage, on motion to dismiss the appeal, of the failure to serve notice of perfecting the appeal.—Lum v. Fairbanks, 155 Mich. 23.

¶ 634. Where under Act No. 209, Pub. Acts 1909, as amended by Act No. 160, Pub. Acts 1911, and under Chancery Rule 37, governing chancery appeals, an appellee does not object to the correctness and sufficiency of a case proposed for settlement by offering amendments thereto, he cannot object before the Supreme Court to an appeal so taken on the ground that the case proposed for appeal was not properly settled.—Hamilton v. Wilcox, 167 Mich. 551.

¶ 635. An attempt to procure a voluntary dismissal of a writ of error made after learning of a motion to dismiss by the other party, does not affect the right of the latter to a dismissal.—Bliss v. Caille Bros. Co., 157 Mich. 258.

¶ 636. After the statutory time for suing out a writ of error has expired, the failure of a party to move promptly to dismiss a writ so sued out cannot give the Supreme Court power to refuse to dismiss such writ. —Riley v. Detroit United Ry., 163 Mich. 327.

§ 147. Voluntary dismissal or discontinuance.

Right of other party to urge involuntary dismissal, see ante ¶ 635.
Dismissal in chancery or at law on trial or pending trial, see Discontinuance, etc.; Equity, X.

¶ 637. The plaintiff in error will be allowed to dismiss his writ of error on motion on payment of costs.—Birch v. Brown, 5 Mich. 31.

¶ 638. On motion of appellant the writ may be voluntarily dismissed where the bill was settled after time without a regular extension, and leave be sought to settle a new bill on which to bring a new writ.—Kaiser v. Detroit United Ry., 163 Mich. 109.

¶ 639. Where a relator sues out a writ of error, and notifies the respondent of the time and place of settling a bill of exceptions, and when objection is made there attempts to withdraw his writ of error, he cannot do so without giving the respondent opportunity to recover costs.—Ullman v. Sardell, 158 Mich. 396.

§ 148. Dismissal on motion of court.

¶ 640. The Supreme Court should, on its own motion, dismiss a case which the record discloses it has no jurisdiction to hear and determine, because a writ of error was sued out more than one year after the entry of judgment, and no motion for extension of time to take out the writ was made, and no extension of time was granted by the Supreme Court or any of its justices.—Hamilton v. Cummings, 200 Mich. 234.

§ 149. Grounds to dismiss or affirm without review.

Repeal of statute under which review sought, see also post ¶ 690.
Time for objections and waiver or bar of them, see ante §§ 145, 146.
Avoidance of review of merits on motion to dismiss, see post § 168.

Dismissal, affirmance or reversal at hearing without consideration for defects in procedure or parties, see post §§ 476-479.
Grounds for dismissing case made, see post ¶ 163.

¶ 641. An appeal in chancery can be dismissed for want of jurisdiction only.—First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 58 Mich. 315.

¶ 150. ——Want of jurisdiction or appealable judgment.

See also ante ¶ 641.
On motion of court, see ante § 148.
Time for objection, see ante §§ 145, 146.

¶ 642. Where an examination of the printed and manuscript record discloses that no judgment has been returned there is nothing for the Supreme Court to consider, and a writ of error will be dismissed with costs.—Delaney v. Michigan Elm Hoop & Lumber Co., 144 Mich. 351.

¶ 643. Since an order sustaining a demurrer to a plea in abatement is not such a final order as is reviewable by writ of error, the writ will be dismissed with costs of printing the brief, and an attorney's fee of fifteen dollars to the appellee.—Wanner v. Martin, 173 Mich. 508.

¶ 644. Where a plea in abatement is filed and later, upon motion, is stricken from the files, and no final judgment is entered, a writ of error must be dismissed.—Backus v. Trumbull Motor Car Co., 194 Mich. 199.

¶ 645. An appeal will not be dismissed on the ground that the order appealed from was a matter of discretion in the court below.—Michigan Ins. Co. v. Whittemore, 12 Mich. 311.

¶ 151. ——Premature appeal or writ.

Want of judgment, see also ante § 150.
Time for objection, see ante § 145, ¶ 628.

¶ 646. Where a divorce case is heard in open court it is not necessarily ground for the dismissal of the appeal that it was taken before the case was settled. Where no harm results from such a course it raises a mere question of regularity and the appeal will stand nunc pro tunc.—Simons v. Simons, 7 Mich. 645.

¶ 647. Where the prevailing party neglected to enter his judgment until after the return day of a writ of error which had been taken out, but to which return had not been made, a motion to dismiss a second writ sued out after judgment was entered was denied.—Hinckley v. Washtenaw Probate Judge, 45 Mich. 343.

§ 152. ——Defects in parties.

Want of co-party defendants, see also ante § 77.
Dismissal of one party on motion as removing necessary party and requiring dismissal on hearing, see post § 479.

¶ 648. A bill in equity can be so amended on the hearing as to implead as a party complainant one whose interests were identical with those of the other complainants, and who was out of the jurisdiction when the bill was filed, but has since formally approved of the proceedings by a filed writing. And the mere omission to implead such person is not ground for dismissing the bill on appeal.—Edinger v. Heiser, 62 Mich. 598.

§ 153. ——Defects in notice or service.

Time for objections and waiver of them, see ante §§ 145, 146.

¶ 649. An appeal will not be dismissed for appellant's failure to serve notice thereof on codefendants, as required by Supreme Court Rule 14, if the failure is sufficiently excused.—Garratt v. Litchfield, 10 Mich. 451.

¶ 650. Failure to serve the notice of appeal required by Sup. Ct. Rule 14 is not ground for dismissing the appeal; the court cannot deprive itself of statutory jurisdiction.—Shook v. Proctor, 26 Mich. 283; Simpson v. Mansfield, C. & L. M. R. Co., 38 Mich. 626.

¶ 651. An appeal in chancery, where the evidence has been taken in open court, will not be dismissed on the ground that the notices of appeal and of settling a case upon the evidence were served upon the appellee in person instead of his solicitor of record, where he is himself a solicitor of the court and has taken part in the management and trial of the cause, and made no objection to the service at the time.—McCurdy v. Bowman, 27 Mich. 214.

§ 154. ——Nonpayment of fees or want of sufficient bond.

Nonpayment of fees, see also ante § 89.
Amendment of bond to prevent dismissal, see ante § 87.
Waiver of objection, see ante § 146, ¶ 632.
Power to amend bond or to require new one, see ante § 87.
For informality in bond, etc., see Jud. Act, Chap. XVI, § 9; Comp. L. 1915, § 12486.

¶ 652. The provision of How. St., § 6740, in relation to chancery appeals, that, if the appellant shall neglect to pay the registers' fees for making the return for 30 days after the appeal has been perfected, he shall be deemed to have waived his appeal, is mandatory, and upon such failure the appeal

will be dismissed, in the absence of a waiver by the appellee of his statutory right.—Bennett v. Hickey, 110 Mich. 628.

¶ 653. The right of the appellee to insist upon the dismissal of the appeal for nonpayment of return fees is held to have been waived by a failure of his counsel to assert his intention of relying upon such right when he was told by counsel for appellant, in response to the suggestion that the return had not been made within the time prescribed by statute, that counsel intended to have the return made at once, and that the appellee should not be inconvenienced by the delay.—Bennett v. Hickey, 110 Mich. 628.

§ 155. ——Delay in filings or proceedings.

Computation of period for bringing proceeding, see ante § 73.
Delay in claiming appeal and filing bond, see also ante § 72.
Dismissal of writ barred by limitations, see ante § 72, ¶ 316.
Dismissal for delay beyond time for appeal, see also ante ¶ 57.
Allowing writ to stand as if proper extension had been regularly procured, see also ante ¶ 340.
Dismissal of writ without remand as penalty for laches, see also ante ¶ 618.
Delay in cases made, see post § 163.
Informality in proceedings, see Jud. Act, Chap. XVI, § 9; Comp. L. 1915, § 12486.
Dismissal for delay beyond return time to return record, see Sup. Ct. Rule 8.

¶ 654. Unless there has been gross neglect an appeal will not be dismissed for the failure of the register to cause return to be made within the time provided by the statute, if it is actually filed before the motion to dismiss is made.—Garratt v. Litchfield, 10 Mich. 451; Covell v. Mosely, 15 Mich. 514.

¶ 655. The writ will not be dismissed for delay in filing the return if it is actually filed before motion made.—Woodmansie v. Hollon, 16 Mich. 379.

¶ 656. Where the return of a transcript in an appeal in chancery is made before the motion to dismiss is called up, the motion will be denied. But the appellant giving no adequate excuse for the delay in filing the same, costs will be awarded to the appellee.—Babcock v. Twist, 16 Mich. 282.

¶ 657. An appeal will not be dismissed for delay in filing the transcript, where the order of the extension of the official stenographer's notes was given immediately after the decree and where appellant used reasonable diligence at every stage, and the delay was owing to the default of such officer of the court.—City of Kalamazoo v. Kalamazoo Heat, L. & P. Co., 122 Mich. 489.

¶ 658. Where a claim of appeal was filed under Pub. Acts 1899, No. 248, and the time to settle the case was extended for almost one year, an appeal will not be dismissed because a second claim of appeal was not filed within 40 days from the settlement of the case where no harm has resulted therefrom.—Patterson v. Hynes, 148 Mich. 581.

¶ 659. Where the record shows that the return to a writ of error was not filed for ten days after the return day, but also shows that the motion to dismiss was not made until ten days after the return was filed, the Supreme Court will not dismiss the writ.—Riley v. Detroit United Ry., 163 Mich. 327.

¶ 660. A final sale under a foreclosure was made in August, 1910, and the purchase price paid. On appeal by defendants a record was presented to the Supreme Court in October, 1911, and immediately thereafter the same was remanded, being found defective. Seven months elapsed without the perfected record being returned. Meanwhile the purchaser was unable to obtain either possession or a return of the purchase price, the defendants occupying the premises without the payment of rent or taxes. Held, the appeal should be dismissed for failure to prosecute the same.—Vogt v. Cottier, 170 Mich. 124.

¶ 661. A motion to dismiss a writ of error because an assignment of error was not filed in time was denied where the assignment was in fact filed, and the delay was satisfactorily accounted for.—Scribner v. Gay, 5 Mich. 511.

¶ 662. A writ of error will not be dismissed for delay in filing the return if it is filed before the motion to dismiss is heard.—Hill v. Hill, 112 Mich. 633.

§ 156. ——Deficiencies or omissions in bill or case.

¶ 663. The court will not dismiss an appeal for a failure of the register to make a full return; but a further return will be ordered.—Maynard v. Hoskins, 8 Mich. 81.

¶ 664. An appeal will not be dismissed on the ground of an imperfection in the record. The proper remedy should be sought by motion to amend the return.—Verplank v. Hall, 21 Mich. 469, rehearing denied 22 Mich. 8

¶ 665. Error to review a judgment against a garnishee defendant will not be dismissed because certain exhibits referred to by the garnishee defendant in his oral testimony were not contained in the record of the evidence.—King v. Harrigan, 142 Mich. 47

¶ 666. An appeal from a decree pursuant to testimony taken before a commissioner will not be dismissed for failure to transmit books and exhibits; the remedy being to have them transmitted.—Hughes v. Love, 136 Mich. 169.

¶ 667. It seems that the Supreme Court will remand the record for correction (inclusion of assignments of error in the bill of exceptions) rather than refuse to entertain the appeal.—Coon v. Dennis, 111 Mich. 450.

¶ 668. A writ of error will be dismissed on motion where no assignment of errors accompanied the bill of exceptions when it was settled, as required by 1897 C. C. Rule 47, par. (e), and none was served until some days afterwards.—Roush v. Darmstaetter, 113 Mich. 535.

§ 157. ——Failure to settle and sign bill or case properly.

Ground for voluntary dismissal, see ante § 147, ¶ 638.

Time for settlement or preparation, see ante § 94.

Time for objections and waiver of them, see ante § 146, ¶ 631.

¶ 669. The writ of error will be dismissed where the record does not show that the bill of exceptions was signed and settled by the circuit judge.—Davison v. Valin, 142 Mich. 83.

¶ 670. In a cause where the testimony was taken in open court, and no case was settled within the statutory time, the court below, at the request of the appealing defendants, certified up a transcript of the stenographer's minutes as the whole evidence in the cause, but the certificate failed to state that a case had been settled. The appellee's motion to dismiss the appeal for want of settlement was denied, but leave was granted him, if not satisfied with the proofs as returned, to have the case resettled.—McBride v. Rea, 33 Mich. 347.

¶ 671. Appeal will not be dismissed because the return has been made to the wrong clerk's office; the statute requiring return to be made to the nearest office being directory merely.—Beebe v. Young, 13 Mich. 221.

¶ 672. Dismissal of an appeal on the ground that appellees had had no notice of the settlement of the case was denied where it appeared that it was settled in good faith and that they knew of the proceedings and might have appeared.—Stickle v. Haskins, 54 Mich. 130.

¶ 673. For failure to have a stipulated bill authenticated by the trial court and shown on the record, the writ of error will be dismissed if the fact is brought to the Supreme Court's attention before argument.—Lynch v. Craney, 95 Mich. 199.

¶ 674. Where a case is not heard on testimony taken in open court there is nothing to settle, and a motion to dismiss such a case on the ground that it has not been settled will be denied.—Pardo v. Bittorf, 47 Mich. 644.

¶ 675. An appeal from a decree for a sale for delinquent taxes cannot be dismissed for appellant's failure to cause a case to be made and settled, when the case is one that will stand for hearing without the testimony.—Carney v. Baldwin, 95 Mich. 442.

¶ 676. Where errors are assigned without exceptions under Supreme Court Rule 11 a writ of error will not be dismissed because no bill of exceptions was settled, and signed, no case was made and settled, and the record was not signed and certified by the circuit judge, and no notice of settlement of a bill of exceptions or case made was ever served, and the record filed is not complete and does not contain all the evidence in the case.—King v. Harrigan, 142 Mich. 477.

§ 158. ——Irregularities in assignment of errors.

¶ 677. Uncertainty and informality in the assignment of errors are no ground for quashing the assignment or for dismissing the writ.—Teller v. Wetherell, 6 Mich. 46.

§ 159. ——Failure to print or serve papers.

Failure to print testimony taken on appeal, see also post § 161.

Dismissal for failure to serve and file copies of printed record in time, see Sup. Ct. Rule 38.

¶ 678. A neglect to comply with Sup. Ct. Rule 32, requiring records and briefs to be printed, will, if no satisfactory excuse be offered, be sufficient ground to decline to hear the cause and to affirm the judgment of the court below.—Sanborn v. Robinson, 22 Mich. 92.

¶ 679. A writ of error will not be dismissed for failure to print and serve the record where neither party has ever noticed the case for hearing.—Leland v. Township of Blair, 97 Mich. 612.

§ 160. ——Default in Supreme Court.

¶ 680. The failure of a party to appear to argue a case was not, by itself, a sufficient default to deprive him of his right of appeal.—Stevens v. Townsend, 1 D. 77.

¶ 681. Where the appellant defaults at the hearing the decree below will be af-

firmed on motion.—Jackson Iron Co. v. Farrand, 5 Mich. 249.

¶ 682. Where the plaintiff in error makes default at the hearing in the Supreme Court, the judgment below will be affirmed on motion.—Scott v. Scott, 5 Mich. 249.

¶ 683. A record was filed and also a brief for defendant appellees, but complainant did not appear in person or by counsel, nor did he file a brief. The decree was affirmed without examining the case.—Woodward v. Chester, 42 Mich. 461.

¶ 684. A motion to dismiss a writ of error for want of prosecution, based upon (former) Supreme Court Rule 59, will be denied where it appears that neither party has ever noticed the case for hearing.—Leland v. Blair Twp., 97 Mich. 612.

§ 161. ——Delay or irregularity in taking proofs on appeal.

Failure to send up documents as stipulated, see also post ¶ 697.

¶ 685. Depositions on appeal were taken by an appellant and these were turned over by the court stenographer to the appellant, instead of being returned into court. Appellant's purpose in doing this was to shorten the record by agreement with appellee to strike out immaterial portions, and appellee joined in these negotiations. After loss of considerable time the parties failed to reach an agreement. Appellant then proceeded with reasonable diligence to have the record printed and prepare it for filing. Held, in view of these circumstances, the Supreme Court would not on appellee's motion dismiss the appeal for appellant's failure to have the record printed and served within the time prescribed by Rule 57.—Detroit Lumber Co. v. The Petrel, 163 Mich. 245.

§ 162. ——Satisfaction or extinguishment of controversy.

Dismissal of appeal where divorce was for limited term which has elapsed, see also Divorce, VII.

¶ 686. Plaintiff in an ejectment suit over two strips of land, secured a judgment as to a corner of one of the strips against defendant railway. It then took out a writ of error, and also caused to be issued a writ of possession and of execution which were kept in its possession. Under threats of employing these writs, plaintiff induced defendant to pay the costs of the suit and partly remove its tracks from the said corner. Held, that plaintiff having taken advantage of the judgment, a motion in the Supreme Court to dismiss its appeal should be granted.—Clairview Park Improvement Co. of Grosse Pointe, Ltd. v. Detroit & L. St. C. Ry., 164 Mich. 74.

¶ 687. A writ of error to review an order committing a person accused of crime to the asylum for the dangerous and criminal insane, was dismissed as useless where, while it was pending, such person was discharged from the asylum and the prosecution against him nolle prossed.—People v. Maguire, 115 Mich. 65.

§ 163. Dismissal of case made.

¶ 688. The Supreme Court cannot dismiss a case made after judgment which has never been transmitted to and filed in that court.—Robertson v. Little, 10 Mich. 371.

¶ 689. A case made, submitted without exceptions, is dismissed with costs.—Wilkinson v. Earl, 39 Mich. 626.

¶ 690. A case settled for review on the facts after repeal of the statute authorizing such review was dismissed.—Heimbach v. Weinberg, 18 Mich. 48.

¶ 691. Where a party notices a cause for hearing in the Supreme Court as on case made, and the paper filed as a case made has never been settled and signed by the judge as such, the party who has given notice of hearing will not be precluded from moving to dismiss on that ground.—Farrand v. Bentley, 6 Mich. 281.

¶ 692. The time for bringing up a case made is so far analogous to that limited by statute for bringing writs of error that a case which has been returned and filed in the Supreme Court will not be dismissed merely on the ground of delay where the delay is less than two years.—Ackley v. Sager, 30 Mich. 264.

¶ 693. If the party who has caused the case to be made neglects for more than two years to cause it to be certified to the Supreme Court, that court will dismiss the case—at least unless the delay is sufficiently accounted for.—Van Blarcom v. The Aetna Insurance Co., 6 Mich. 299.

¶ 694. Neglect to serve a statement of errors relied on in taking up a case made was overlooked by the court where the omission had not been complained of.—Perkins v. Nugent, 45 Mich. 156.

§ 164. Reversal without review.

¶ 695. Where, after hearing a chancery case in which the testimony was taken in open court, the judge resigned, without settling within the time allowed a case to bring up the testimony on appeal, and the appeal was taken without the testimony, a motion for a reversal of the decree below was granted without costs, and the cause remanded for a new hearing.—Tucker v. Tucker, 26 Mich. 443.

¶ 696. The facts that the record is much larger than it need have been, and much of the testimony might have been omitted as being of little value, do not necessarily amount to a cause for reversal.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 697. By stipulation of the parties made in the bill of exceptions, plaintiff agreed to file certain tally books with the clerk of the Supreme Court. Plaintiff having failed to so file them, defendant entered a motion before said court to require him to file them, asking for an order reversing the judgment in plaintiff's favor upon his failure so to do. It appeared that said books had been accidentally lost without the fault of either party. Held, the motion should be denied, with the option in the defendant to treat the same as an application to remit the record to the trial court for the purpose of enabling either party to apply to said court for such an amendment to the bill of exceptions as might throw further light upon contents of said books.—Sullivan v. Godkin, 167 Mich. 663.

§ 165. Striking off cause or papers therein.

Motion and practice thereon, see post §§ 166-168.
Setting aside writ for want of return, see also ante ¶ 570.
Striking cause improperly on calendar, see ante § 134.

¶ 698. The Supreme Court cannot strike out a bill of exceptions on proof that it was settled without notice to defendant in error.—Scribner v. Gay, 5 Mich. 511.

¶ 699. A bill of exceptions will not be stricken out for delay in settling it, when the party presenting it was not responsible for the delay.—Detroit v. Blackeby, 20 Mich. 219.

¶ 700. Where, after the expiration of a term at which the cause was tried, a time was fixed by consent for settling a bill of exceptions, and the parties appeared at the time appointed and the bill was settled and came into the Supreme Court appended to the record, it was held that it would not be stricken out because there had been no order made during the trial term for extending the time for settling the exceptions.—Atlas Min. Co. v. Johnston, 22 Mich. 78.

¶ 701. Where, upon a petition for a writ of assistance as a purchaser from the state under a tax sale, the respondent filed an answer to the evidence, which he asked to have treated as a cross-bill, and included in the answer a prayer for relief, and made the auditor general a party, a motion to strike from the files a certificate obtained by respondent from the circuit judge will not be granted, where the certificate, as construed by respondent's counsel, was intended to affirm facts only as they are stated by the affidavit made by petitioner, and where the Supreme Court would in any event, before finally dismissing the proceeding, permit an amended return, to show the facts as stated in the affidavits.—McFarlane v. Simpson, 153 Mich. 193.

¶ 702. The bill of exceptions in one of two consolidated causes on appeal contained no assignments of error, and the many references therein to the record were left blank. In the other case the record contained no index and the bill of exceptions was not printed. The briefs contained numerous references inserted in ink to the record in the other cause. The records in both cases were uncertain and confusing. Held, the cases should be stricken from the docket.—In re Balluss' Estate, 168 Mich. 132; Jipson v. Balluss, Id.

§ 166. Motions and showing.

For leave to amend assignments, see also ante § 124, ¶ 566.
Combining and splitting motions objecting to writ and record, see post § 145, ¶ 626.
Showing of excuse for delay in filing return, see ante § 129.
Motion for amendment of bond, see also ante § 88.
Motions for rehearing, and notice of motion, see post § 547.
Motion of court, see ante § 148.
Renewing motions, see post § 170.
Who may notice for hearing, see ante § 133.
Motion practice in Supreme Court, form of papers, and statement of grounds and objects, see Sup. Ct. Rules 27-32.
Motion calendar, docket, and days, see Sup. Ct. Rule 29.

¶ 703. A motion not called up on the day for which it was noticed cannot be taken up on any subsequent day in term, except by consent, unless it has been ordered to stand over to such subsequent day.—Ireland v. Spalding, 11 Mich. 455.

¶ 704. Where a chancery case is on appeal awaiting a hearing, a motion to remand the same to the circuit court for the purpose of introducing further testimony will be heard at the same time the appeal is considered.—Barthel v. Crippen, 154 Mich. 499.

¶ 705. When an appellee asks for the dismissal of an appeal from a decree of the old court of chancery on the ground of appellant's default below, the decree must recite all those facts, which by the rules and practice of the court of chancery, entitled a party to default his adversary.—Stevens v. Townsend, 1 D. 77.

¶ 706. On motions to dismiss writs of error on the ground of being issued after the expiration of the statutory period, undisputed affidavits showing the date of the judgment, are sufficient without attaching certified copies of the judgment entries.—Bliss v. Caille Bros. Co., 157 Mich. 258.

¶ 707. On a motion for relief from delay in filing return, counter-affidavits may be read showing that it would be against good faith for the plaintiff in error to avail himself of the error complained of.—Lathrop v. Hicks, 2 D. 223.

¶ 708. On motion to dismiss for want of a sufficient bond, affidavits will not be received to enlarge or restrict the officer's certificate of approval.—Maynard v. Hoskins, 8 Mich. 260.

¶ 709. Counter-affidavits may be read in opposition to a motion without having been served.—Lathrop v. Hicks, 2 D. 223.

§ 167. ——Notice of motion.

Service of counter-affidavits, see ante ¶ 709.

Notice for argument of motions, see Sup. Ct. Rule 28.

Methods of serving notices and papers in Supreme Court, see Sup. Ct. Rules 22-26.

¶ 710. Notice of special motions is in all cases necessary where the opposite party has appeared in the cause.—Scribner v. Doseman, 5 Mich. 283.

¶ 711. A plaintiff in error is always in court and always entitled to notice of special motions.—Scribner v. Doseman, 5 Mich. 283.

¶ 712. Motion to strike from docket on ground that cause was noticed by counsel for defendant in error who had not caused an appearance to be entered in the Supreme Court will not be heard without notice in the absence of counsel representing the other side.—Frost v. Lawler, 33 Mich. 348.

¶ 713. When counsel has appeared notices must be served upon him and not upon the party.—People v. Houghton County Sup'rs, 19 Mich. 9.

¶ 714. Motions in causes not on the docket will not be heard without notice.—Carpenter v. People, 19 Mich. 9.

¶ 715. A motion to dismiss a writ of error in a cause not on the docket of the term when the motion is made will not be heard without notice.—Hill v. Bowers, 21 Mich. 303.

¶ 716. When notices are served upon an agent, the distance of the attorney's residence from the place of holding the court will determine the time for which notice must be given, and not the distance of the agent's residence from the court.—Maynard v. Penniman, 7 Mich. 333.

¶ 717. The usual route of travel must govern in the computation of the time required to be given by rule in the service of notices of motions, etc.—Raymond v. Hinckson, 15 Mich. 517.

¶ 718. Four days is the shortest time of notice allowable on ordinary special motions, except where the time has been shortened in cases already in court, and a longer time is necessary where service is made at a distance.—McCaslin v. Camp, 26 Mich. 390.

¶ 719. No agent for the service of papers can be recognized under the rules, unless residing at Detroit or Lansing.—Maynard v. Penniman, 7 Mich. 333.

§ 168. ——Issues, hearing and matters considered.

Nonconsideration of merits on motion for rehearing, see post § 547.

Arguments and briefs on motions, see Sup. Ct. Rules 27, 30.

¶ 720. The merits of a case cannot be considered on a motion to dismiss an appeal therein.—First Nat. Bank of Detroit v. E. T. Barnum Wire & Iron Works, 58 Mich. 315.

¶ 721. A question as to whether a principle heretofore settled by the court is or is not applicable to a case now pending is a question to be discussed at the hearing and not on motion to docket and dismiss.—Tower v. Detroit & M. R. Co., 7 Mich. 10.

¶ 722. Whether the plaintiff in error appeared and argued the cause in the court below, or consented to the judgment then entered, is one which cannot be raised on affidavit on motion to dismiss.—Tower v. Detroit & M. R. Co., 7 Mich. 10.

¶ 723. The contention that an appeal is frivolous and made for the purpose of delay cannot be considered on a motion to dismiss.—Detroit Society for Study & Prevention of Tuberculosis v. Detroit Society for Study & Prevention of Tuberculosis, 167 Mich. 97.

§ 169. Order on motion to dismiss, and effect of same.

Reinstatement of cause after dismissal, see post § 171.

Costs on dismissal, see Costs, V.

[Note. There are numerous paragraphs preceding in this division which mention that costs were allowed or denied on motion to dismiss. Such mention is merely incidental to the point, but references to such paragraphs will be found in Costs, V, along with the decisions on that point.]

Denial of dismissal on conditions, see also ante §§ 149-163, wherein will be found paragraphs showing incidentally that conditions were imposed.

Denial of motion on conditions, see Sup. Ct. Rule 9.

¶ 724. On a motion in the Supreme Court to set aside a stipulation dismissing the suit without consent of the moving attorneys, who claim a lien on the judgment, the motion was held under advisement, and the matter referred to the trial court to determine on issues whether there was any indebtedness to the attorneys.—Kirby v. LaDow, 102 Mich. 345.

¶ 725. A writ of error is of right, and its dismissal is equivalent to a nonsuit and does not bar the issue of a new writ.—Beller v. Stevens, 40 Mich. 168.

¶ 726. Where a writ of error brought by a party who had no right to maintain it is dismissed for that reason, such dismissal is no bar to a new writ sued out by a proper party who did not join in the former writ.—Taff v. Hosmer, 14 Mich. 249.

¶ 727. Dismissal of a writ of error leaves the judgment on which it was sued out operative and conclusive.—Hitchcock v. Pratt, 51 Mich. 263.

¶ 728. The discontinuance, on stipulation, of a writ of error does not vacate the judgment rendered in the court below.—Cummerford v. Paulus, 66 Mich. 648.

§ 170. Renewed or further motions.

¶ 729. Nonpayment of costs imposed on refusing to dismiss an appeal is no ground for another motion to dismiss if the refusal was not conditioned on payment.—Connorton v. Miller, 41 Mich. 1.

§ 171. Reinstatement of cause.

Right to new writ after dismissal, see ante § 169.

Dismissal of writ and remission of record with leave to sue out new writ, see ante ¶ 542.

¶ 730. When a motion is made to reinstate a cause at a term following its dismissal for want of prosecution, the party making the motion should show himself in position to proceed at once to the hearing if the motion should be granted.—Bingham v. Parsons, 9 Mich. 144.

¶ 731. A case which had been dismissed for want of prosecution was reinstated on terms, on affidavit of merit and of an oral agreement with counsel for defendant in error, giving time; and this, though the oral agreement, was denied.—Scott v. Scott, 5 Mich. 106.

¶ 732. An appeal dismissed for nonpayment of the register's fee within 30 days after settlement of the case, will not be reinstated under Pub. Acts 1905, No. 15, where an examination of the record satisfies the Supreme Court "that justice" does not "require a revision of the case upon the merits," as required by that act.—Collat v. Ives, 141 Mich. 500.

¶ 733. A motion by the surety of a plaintiff in error to reinstate and defend on its merits an appeal which has been dismissed for want of prosecution, is properly denied where made five months after notice of the intention of the plaintiff not to prosecute.—Galinski v. Security Fire Insurance Co., 147 Mich. 194.

XI. PRESENTATION AND ARGUMENT OF THE CAUSE.

A. REQUISITES AND SUFFICIENCY OF RECORD OR ABSTRACT.

§ 172. In general; jurisdictional requisites.

Contents belonging to judgment roll, see ante §§ 99, 100.

Original bill as part of record on appeal from decree after demurrers and amendments, see ante § 99, ¶ 458.

Function of bill of exceptions or case in general, see ante § 90.

Jurisdictional questions extrinsic to the judgment roll, see post § 180.

Costs for prolixity or irregularity in form or substance, see Costs, V.

Record in certiorari, see Certiorari.

Doctrine that the review will not be extended beyond the record and the errors apparent thereby, see post XII, A, B.

The record must suffice to make the error appear without resorting to presumption that error was committed. See post XII, C.

Construction and effect of record, its conclusiveness, and the presumptions indulged on it, see post XII, C.

Treating amendments as made, see post § 369.

Sufficiency of record to support motion founded thereon, see also ante ¶ 705.

Abstract in lieu of originals, see 1919 C. C. Rule 68.

¶ 734. On review of a judgment of a justice of the peace the jurisdiction of the justice must appear affirmatively upon the face of the proceeding.—Hoben v. Citizens' Tel. Co., 176 Mich. 596.

§ 173. Showing of verdict, judgment or decree.

Necessity or remand when record does not afford means for rendering judgment, see post XIII, B.

¶ 735. The Supreme Court will not consider a record which fails to show any entry of judgment below and which is not certified by the trial judge.—In re Vetter's Estate, 162 Mich. 109.

¶ 736. A return showing a judgment entry and a reference in the printed bill of exceptions to a judgment sufficiently meets an objection that the record does not embody a judgment.—Lingle v. Dalzell, 141 Mich. 399.

¶ 737. An order of the circuit court in a chancery case, entered after an appeal from an order, incorporating therein a statement that it was entered by consent of the parties in open court, at least amounts to a certificate that the order appealed from was a consent order.—Weber v. Costigan, 139 Mich. 146.

¶ 738. The practice of omitting to have the printed record or its index make any allusion as to who recovered a verdict is condemned.—Hastings v. Boland, 136 Mich. 240.

§ 174. Printing and indexing the record.

Necessity of reproducing books, papers, etc., in printed record, see also ante § 104, ¶ 491.

Use of originals as copy for printing, see also ante ¶ 497.

Setting out and identifying matter in assignments, see post §§ 211-213.

Specific references in briefs to portion of record involved in point, see post § 235.

Dismissal for failure to print properly, see ante § 159.

Printing briefs and pointing out therein the points relied on, see post §§ 231, 232.

Matter to be included in typewritten record in certiorari, see Certiorari.

Form and contents of printed record, and style of printing type and paper, see Sup. Ct. Rule 35.

Indexing record, see Sup. Ct. Rule 36.

Preparation of printed record, service of copies of same, and number of copies to be served and filed, see Sup. Ct. Rule 38.

¶ 738a. The Supreme Court declined to allow a chancery cause to go to hearing without printing the entire record, there being no appearance by counsel on one side with whom to agree, subject to the court's approval, as to how much ought to be printed.—University of Michigan v. Rose, 45 Mich. 284.

¶ 739. Where no index is furnished to the record, or to the parts thereof to which assignments of error apply, as required by Sup. Ct. Rule 61, amended July 2, 1890, the record will not be examined critically for technical errors.—Pease v. Munro, 83 Mich. 475.

¶ 740. Under (former) Sup. Ct. Rule 61, assignments of error cannot be considered where the exceptions relied on to support them are not indexed, and where the pages containing them are not referred to either in the assignment of error or in the brief of counsel.—Reeder v. Moore, 95 Mich. 594.

¶ 741. The index to the record should in some way name or describe the exhibits so as to identify them.—Sprague v. Moore, 130 Mich. 92.

¶ 742. Where neither by index nor by other reference is the Supreme Court referred to all of the exceptions and specific errors complained of in the record, as required by (former) Sup. Ct. Rule 36, the court is not compelled to read the record until it finds them.—Barnard v. McLeod, 114 Mich. 73.

¶ 743. Where an appellant fails to index his assignment of errors, as provided by Supreme Court Rule No. 36, they will not be reviewed on appeal.—Duff v. Judson, 166 Mich. 386.

¶ 744. Assignments of error based on exhibits not printed in the record, or indexed as required by Supreme Court Rule 36 will not be considered on writ of error.—Showen v. J. L. Owens Co., 182 Mich. 26.

¶ 745. Exceptions which are not indexed in the record as required by Supreme Court Rule 36 will not be considered.—Niagara Sprayer Co. v. Wood, 186 Mich. 303.

B. REQUISITES AND SUFFICIENCY OF CASE MADE OR BILL OF EXCEPTIONS.

§ 175. General requisites.

Propriety and functions in general, see also § 90.

Contents of bill or case in general, see §§ 101-105.

Evidence or other matter proper to be included in bill, see 1916 C. C. Rule § 4.

Case on appeal, see 1916 C. C. Rule § 7.

Sufficiency of the bill to present particular objections and exceptions, see post §§ 179-195.
Sufficiency of the judgment roll or record proper, see ante §§ 172, 173.
Condensation of evidence or narrative rather than full transcript, see ante § 103.
Inclusion of maps or plans where essential to understanding of the record, see ante § 104.
Certified copy of judge's minutes as insufficient chancery case, see ante ¶ 510.
Necessity that bill or case be properly settled and signed, see ante § 110 et seq.
Return of record for additions or amendments, see ante § 118.
Necessity of showing matters in return to certiorari or mandamus to present same for consideration, see Certiorari; Mandamus, V.
In appeals from condemnation or highway proceedings, see Eminent Domain, VIII; Highways, II, B.

[The construction and effect of the bill as returned belongs and is treated with the rules for review (see post XII), being inseparable from the doctrine of presumptions on review. The following cross-references point out some of the leading phases of these rules.]
Construction and effect of bill or case, its conclusiveness and the presumptions arising on it or from its silence, see post XII, C.
Construction of the certificate by Supreme Court, see post § 340.
Conflict between printed record and original bill or case, see post § 341.
Conflict between two bills prepared on cross-error, see post § 341.
Presumptions as to contents and correctness, see post §§ 345-349.
Presumption as to evidence in narrative form, see post §§ 346, 347.
Presumption as to regularity of settlement and signing and conclusiveness as certified, see post §§ 348, 349.
Facts assumed to be true because of exceptions, see post § 351.
Presumptions of regularity and correctness of procedure, see post § 352 et seq.
Presumption as to effect of admission or exclusion of evidence not set out or answer not appearing, see ante § 358.
Presumption as to harm from improper argument, see post § 359.
Presumption as to matters not shown, see post §§ 361-393.
Presumptions as to admissibility of evidence where bill or case does not show it, see post §§ 370, 371.
Presumption as to other proofs or want of proof where record is not certified as complete, see post §§ 373-378.
Restriction of the review to the record, see post XII, B, 1.
Restriction of review to record proper where exceptions are not presented, see post §§ 319-321.
What questions are open on record partially insufficient, see post XII, B, 3.
Denial of dismissal and retention of cause to be heard on record, where no bill or case is settled, see ante § 157.
Dismissal or affirmance on hearing for want of any question presented, see post § 480.
Necessity of remand when record does not afford means of arriving at correct judgment, see post XIII, B.
Extraneous matters as ground for rehearing, see post § 538.

¶ 746. A bill of exceptions should show the precise theory of the case, and the issues should not be confused.—Maybee v. Tregent, 47 Mich. 495.

¶ 747. An exception which depends upon a preliminary question for the solution of which the record affords no data raises no point to be considered.—American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515.

§ 176. Showing as to completeness of evidence involved.

Certification of the bill by trial judge, see ante § 110.
Sufficiency to present error of effect of evidence, see post § 186 et seq.

¶ 748. The bill of exceptions must purport to contain all evidence necessary to a consideration of assigned error.—Connor v. Levinson, 115 Mich. 297.

¶ 749. The record must appear by a proper certificate to contain all the evidence or at least its substance in order that sufficiency to go to the jury on an issue may be reviewed.—Finkbinder v. Ernst, 126 Mich. 565.

§ 177. Showing as to objections, rulings and exceptions.

In case made, see post § 196.

¶ 750. Matters recited in the bill of exceptions cannot be reviewed unless they appear to have been excepted to and ruled on.—Ready v. Kearsley, 14 Mich. 215; Maclean v. Scripps, 52 Mich. 214.

¶ 751. An objection upon which the record shows no ruling made cannot be considered.—Julius King Optical Co. v. Treat, 72 Mich. 599.

¶ 752. Except as to the charge, questions which do not appear from the record to have been properly raised at the trial by excep-

tions to rulings or by failure of the court to correct objectionable matter when his attention was called to it, will not be considered by the Supreme Court.—Wiers v. Shaw-Walker Co., 171 Mich. 324.

¶ 753. An abuse of discretion in not allowing defendant to plead over after a demurrer has been overruled might be reviewed; but held there must be a showing of request and refusal in the case by the record.—Wyckoff, S. & B. Co. v. Bishop, 98 Mich. 352.

¶ 754. Error cannot be assigned upon a record showing that the court on inquiry said he did not desire to hear counsel upon questions of law involved in instructions requested. The desire of counsel for such hearing must have been brought to the court's attention.—Wildey v. Crane, 69 Mich. 17.

¶ 755. An assignment of error in arguing to the jury that plaintiff was discharged from employment at a given time is not supported by a record that merely shows that on an offer of evidence argument was made to the court and exception taken which touched on the question of a discharge.—Pinet v. Montague, 103 Mich. 516.

¶ 756. Argument of counsel is not presented for error, it seems, where the reporter has noted an exception but the record does not disclose that any action was requested of the trial court.—Lauder v. Township of St. Clair, 125 Mich. 479.

¶ 757. Assignments of error based upon improper argument of counsel will not be reviewed where the record does not show that objection was made at the time and that the court ruled upon such objection.—Pierson v. Illinois Cent. R. Co., 149 Mich. 167.

¶ 758. An assignment of error based on the erroneous exclusion of testimony cannot be noticed where the record fails to show an exception.—Ellis v. Whitehead, 95 Mich. 105.

¶ 759. Error in overruling a motion to strike out evidence cannot be reviewed where no exception to the ruling appears in the record.—Stauber v. Ellett, 140 Mich. 271.

¶ 760. The Supreme Court on writ of error cannot pass upon the question of variance between pleadings and proofs where the record does not indicate that said question was presented to, and passed upon by, the trial judge.—Minkkinen v. Quincy Min. Co., 169 Mich. 279.

¶ 761. Requests to charge appearing in the printed record, but not in the bill of exceptions, which does not show that any exceptions were taken to the refusal of the court to give them, or that the attention of the court was called to such requests, cannot be considered.—Lindner v. Hine, 84 Mich. 511.

¶ 762. To support the assignment of error that on the whole evidence a party is entitled to a verdict, it should appear that the court had refused to instruct the jury to find for him.—Hitchens v. Shaller, 32 Mich. 496.

¶ 763. An objection that an amendment to a bill of exceptions rendered the record unnecessarily large, will not be considered where no objection to the amendment is pointed out in the record.—Niagara Sprayer Co. v. Wood, 186 Mich, 303.

§ 178. Production of exhibits with record.

Reversal for failure to produce documents, see ante ¶ 697.

Manner of incorporating books, papers and exhibits, see ante § 104.

¶ 764. In making up the record for appeal in a suit in trover against defendant for cutting timber off plaintiff's land, the parties stipulated that plaintiff's tally books, purporting to show the amount of timber cut off by defendant, should be produced upon the hearing in the Supreme Court in view of the impossibility of making a copy which would accurately represent them. At the trial defendant objected to the admission of the tally books on the ground of unexplained erasures and suspicious alterations manifest on inspection and urged the same objections in the Supreme Court. On account of illness of plaintiff's counsel at the trial, his appealing counsel at the Supreme Court hearing was unable, through no fault of his own, to produce said books. No other evidence was presented as to the amount of timber cut by defendant. Held, the judgment in the plaintiff's favor must be reversed on account of the failure to produce the tally books.—Sullivan v. Godkin, 172 Mich. 257.

§ 179. Challenges and formation of jury.

¶ 765. Whether the court erred in overruling a challenge to the array of jurors will not be considered on error, where the record contains nothing but the challenge itself to show that the statements of fact set forth in the challenge are true, or that the jurors were in any way disqualified.—Tunnicliffe v. Bay Cities Consol. R. Co., 107 Mich. 261.

§ 180. Questions of jurisdiction.

On the face of the judgment roll, see ante § 172.

¶ 766. A ruling sustaining jurisdiction will not be reviewed where the record on error

contains neither the writs, the disclosure, nor the answers of the garnishee defendant, where service is obtained by garnishment and attachment; even though the court has no jurisdiction to render judgment against the principal defendant, if the garnishee defendant is not liable to such principal defendant. —Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712.

¶ 766a. Even in proceedings in which jurisdiction of the trial court must be made affirmatively to appear, the court of appeal will not consider exceptions to a ruling sustaining jurisdiction without the evidence upon which the ruling was made.—Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712.

¶ 767. Where the affidavit on which a special appeal by a claimant in garnishment proceedings from the justice's to the circuit court is not included in the record upon a further appeal by such claimant to the Supreme Court, an assignment that the circuit court erred in finding that the validity of the justice's judgment could not be raised on the special appeal, but should have been raised by certiorari, cannot be considered.—Dunkley v. City of Marquette, 157 Mich. 339.

¶ 767a. Where the record failed to disclose that a garnishee was a nonresident of the county wherein the principal action was brought and judgment against it rendered in garnishment, held that it could not object on appeal to the authority of the court to require it to appear and produce its books, etc., in such court.—Nichol v. Nevers, 196 Mich. 208.

§ 181. Change of venue or transfer of cause.

¶ 768. Upon a writ of error the court will not review the action of the court of one county in sending the case to another county for trial, where the proceedings before the first court are not in the record.—County of Montmorency v. Wiltse, 125 Mich. 47.

§ 182. Admission or retention of evidence.

Assigning admission as error, see post § 204.

¶ 769. An assignment of error that the court erred in permitting a witness to answer a given question will not be considered where the record fails to show that the question was answered.—Totten v. Burhans, 108 Mich. 6.

¶ 770. Admissibility of evidence as to which no exceptions are found in the record will not be considered in the court of appeal. —Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712.

¶ 771. The objection that questions are leading cannot be noticed unless brought upon the record, and will not in general be noticed even if so brought.—Church v. John Davis & Co., 93 Mich. 477.

¶ 772. Where error assigned upon a refusal to strike out testimony is not discussed in appellant's brief, and it does not appear that exception to the action of the court was taken, such error will not be considered.—Priebisch v. Ottenwess, 176 Mich. 476.

§ 183. Exclusion of evidence.

Sufficiency of showing of objections, see ante § 177.

¶ 773. An allegation of error for excluding evidence must be supported by an affirmative showing in the bill of exceptions.—Reynolds v. Continental Ins. Co., 36 Mich. 131.

¶ 774. Though a defendant sued for assault and battery may show how he was dressed at the time, the exclusion of such a question will not be reviewed unless the importance of it is shown by the record.—Kuney v. Dutcher, 56 Mich. 308.

¶ 775. The Supreme Court will not review an alleged error in refusing to admit certain letters in evidence, when neither the letters nor their contents are preserved in the record.—Bachinski v. Bachinski's Estate, 152 Mich. 693.

¶ 776. Where the record does not show an offer of testimony, its rejection cannot be considered on appeal.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 777. Where any documentary evidence is excluded or a part is admitted, and the claim is that the whole should have been introduced, such evidence excluded or not introduced should be made a part of the bill of exceptions, so that the Supreme Court can judge whether it is admissible.—People v. Coughlin, 67 Mich. 466.

¶ 778. Assignments of error that the trial court excluded evidence cannot be considered on appeal where no exceptions were taken, and the court is not informed by an offer to prove or otherwise what the testimony would have been, although it is asserted in the brief that the record makes the purpose of the evidence clear.—Henderson v. Agon, 148 Mich. 252.

¶ 779. Testimony, evidently irrelevant and immaterial, may, on motion, be ordered expunged with costs against a solicitor who insists upon its being taken; but it must be re-

turned on appeal in order that the rule may be reviewed.—Meech v. Lee, 82 Mich. 274.

§ 184. Objections to argument or conduct of trial.

Sufficiency of showing of objection, ruling and exception, see ante § 177.
Necessity of ruling to support assignment, see also post § 197.

¶ 780. An objection to language used by an attorney in his opening statement to the jury cannot be considered on error where the record does not show what the language was. —Welch v. Palmer, 85 Mich. 310.

¶ 781. An assignment of error, based on alleged improper statements by the counsel in his argument to the jury, will not be considered where the language objected to is not set forth in the record.—Farrand v. Aldrich, 85 Mich. 593; Norris v. Detroit United Ry., 193 Mich. 578.

¶ 782. Error cannot be assigned upon the remarks of counsel to the jury where the record does not show any objection or exception, or what the remarks were, or that the court's attention was called to them.—Bokenfohr v. Bush, 117 Mich. 444.

¶ 783. Error assigned upon argument of counsel cannot be considered where on the trial counsel at once disclaimed having made the argument with which opposing counsel charged him, the judge said he did not hear him make it and the stenographer did not take the argument.—Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240.

¶ 784. Reversible error cannot be founded on improper remarks of plaintiff's counsel in a suit for negligently destroying property by fire, where the record simply discloses that defendant excepted to certain statements, and where it sets out said statements but does not show that the court's attention was called to the argument as it was being made, or that the court was asked to interrupt the same, or to make any ruling with respect thereto.—Close v. Ann Arbor R. Co., 169 Mich. 392.

¶ 785. Where the question of an excessive verdict has not been preserved for review the misconduct of counsel for plaintiff in a personal injury action in referring to the circumstances of an accident to a passenger alighting from a train, to a conversation with counsel for plaintiff in such other action as to the right of recovery and the subsequent death of the plaintiff in such other action, is not ground for reversal.—Sergeant v. Grand Rapids & I. Ry. Co., 198 Mich. 385.

¶ 786. A charge of error based upon "plaintiff's seeking," in an action for alienating his wife's affections, "to show and parading before the jury that there was common and notorious neighborhood talk of defendant's relations with plaintiff's wife," cannot be considered where the record contains no evidence upon the subject.—Miller v. Lachman, 117 Mich. 68.

§ 185. Objections to instructions or refusal to charge.

Necessity and sufficiency of showing of objections, etc., see also ante § 177.
Assigning instruction as error, see post § 205.

¶ 787. A party complaining that the court charged the jury to the effect that a certain admission was made by such party on the trial should show by the record that no such admission was made.—Thompson v. Village of Quincy, 83 Mich. 173.

¶ 788. In the absence of the testimony from the record, the court has no means of knowing whether or not a charge which was conditioned upon the jury's belief as to what certain evidence tended to show, was erroneous.—Martin v. Curtis, 119 Mich. 169.

¶ 789. Objection that the charge told the jury there was no evidence on a certain issue, and that it permitted the jury to guess upon it, is not entertainable on a record that does not show what the rest of the charge was or that the objecting party made any requests to charge, and especially where it appears that there was some evidence on it. —Howe v. Morey, 141 Mich. 383.

¶ 790. Error in instructions as to the measure of damages cannot be considered in the Supreme Court where the record does not show what the judgment was, and leaves it impossible to determine the amount recovered.—MacKinnon Boiler & Machine Co. v. Central Michigan Land Co., 156 Mich. 11.

¶ 791. Where the parties in a trover suit have a stipulation with reference to damages, but the same does not appear in the record, the Supreme Court will not consider an assignment of error based on the failure of the trial court to give the correct rule of damages.—Hennes v. Charles Hebard & Sons, 169 Mich. 670.

¶ 792. Assignments of error for the refusal of requests to charge cannot be considered where the record does not give the requests. —Baylis v. Stout, 49 Mich. 215; Dennison v. Van Wormer, 107 Mich. 461; Hopkins v. Bishop, 91 Mich. 328.

¶ 793. Where an exception is taken to a refusal to charge that there is no evidence tending to prove a certain point, plaintiff in error, desiring to bring up for review this

exception, is entitled to have incorporated into the bill of exceptions all the evidence bearing upon the point in question.—People ex rel. Crane v. Wayne Circuit Judge, 24 Mich. 513.

§ 186. Effect or sufficiency of proof or writings.

Sufficiency of showing as to fulness, see ante § 176.

¶ 794. Where a bill of exceptions does not show that any exception was taken or error assigned on the plaintiff's failure to prove a certain point, and the request made by the defendant below and the whole frame of the bill imply that the point was not contested, but either clearly proved or admitted, the Supreme Court will not consider the question if raised before it for the first time.—Daniels v. Clegg, 28 Mich. 32.

¶ 795. The merits of a case cannot be considered on appeal where it is manifest that the evidence is not contained in the record.—Rumney v. Detroit & Montana Cattle Co., 129 Mich. 644.

¶ 796. The court will not, on error, construe a foreign statute unless the record shows proof below.—Belleville Sav. Bank v. Richardi, 56 Mich. 453.

¶ 797. The question whether a navigable stream has been dammed without permission of the board of supervisors will not be considered on error when the record does not show it was raised in the court below.—Nelson v. Cheboygan Nav. Co., 44 Mich. 7.

¶ 798. A purchaser's lien upon lumber for saw bills cannot be claimed to be discharged, in a replevin action, where the purchaser claims that he succeeded to the rights of a mortgagee at a defective sale, when the record does not disclose when the saw bills were paid.—Walbridge v. Barrett, 118 Mich. 433.

¶ 799. Whether a judgment was res adjudicata cannot be determined when dependent on the records and files thereof which are not put in evidence, and where the oral evidence of the prior decision leaves it doubtful whether it was on the merits.—Sherman v. Spalding, 126 Mich. 561.

¶ 800. An assignment of error in that the tax roll on which assumpsit for recovery of village taxes was brought showed on its face that the village treasurer had no authority to institute the action is not open to consideration where the tax roll is not in the return and so not before the court.—Village of Wayne v. Goldsmith, 141 Mich. 528.

¶ 801. The question of sufficiency of a tender in a justice's court is not preserved for review where the record does not show extensively the proceedings in such court, or the amount of the tender, and no request to the circuit judge on appeal to charge on the subject was made and his attention was not directed to the subject.—Gleason v. Stone, 200 Mich. 187.

§ 187. ——Evidence or documents in chancery cases.

¶ 802. The general objection on an appeal in proceedings to quiet title, that the sheriff's deed on foreclosure, under which complainant claims and which was not contained in the record, was incompetent, irrelevant and immaterial as evidence, will be disregarded.—Michigan State Ins. Co. v. Soule, 51 Mich. 312.

¶ 803. On chancery appeal the statement of the circuit judge contained in the record calling attention to the very high standing of one witness and the relatively poor credence of the other opposed cannot be considered in reviewing the weight to be given their testimony; it must appear by evidence in the record that their relative credibility is as stated before the Supreme Court can consider it.—Tomlinson v. Cornett, 128 Mich. 171.

¶ 804. Evidence in a chancery case which is not taken down nor returned pursuant to Pub. Acts 1915, No. 314, Chap. XVII, § 5, relating to the exclusion of testimony by the trial court, and providing that the court may, in its discretion, if the excluded evidence is brief, permit the same to be taken down by the stenographer separate and apart from other testimony and to be returned to the appellate court under certificate of the trial court, on appeal, is not reviewable.—Pellston Planing Mill & Lumber Co. v. Van Wormer, 198 Mich. 648.

¶ 805. Documentary evidence submitted to the court by consent at the hearing is to be considered in the same light as evidence taken by deposition, and does not require to be authenticated by the judge for the purposes of an appeal, as does evidence taken on a trial in open court.—Stone v. Welling, 14 Mich. 514.

¶ 806. Where the determination of the legality of paving assessments depends on documents, the court will not pass upon it without full proof of the documents themselves. It will not accept the inferences and conclusions of parties or counsel, but will construe them for itself.—Wilkins v. City of Detroit, 46 Mich. 120.

¶ 807. Affidavits that are not made part of the record or inserted in the settlement of the case, cannot be considered on appeal.—Holton v. Holton, 116 Mich. 669.

§ 188. Directing or refusing to direct verdict.

Sufficiency of showing of request and refusal or action, see ante § 177.
Assigning action as error, see post § 206.

¶ 808. Where the record does not contain all the testimony an assignment of error upon the court's refusal to direct a verdict cannot be considered.—Van Werden v. Winslow, 117 Mich. 564.

¶ 809. Upon a writ of error the court will not pass upon the question of the insufficiency of the plaintiff's case so as to take the case from the jury where the record fails to show that the defendants made any such request.—County of Montmorency v. Wiltse, 125 Mich. 47.

¶ 810. Error in directing a verdict for plaintiff, as to some of the notes in suit upon which recovery was claimed to have been had, will not be reviewed where it involves questions of fact the determination of which depended upon evidence, and where the record did not show that it contained all the evidence introduced upon the trial.—Marvin v. Bowlby, 135 Mich. 640.

¶ 811. Upon appeal where the error assigned is the direction of a verdict, the bill of exceptions should incorporate at least the substance of all the testimony, since error is not presumed but must be made to affirmatively appear.—Goldsmith v. Lichtenberg, 139 Mich. 163.

§ 189. Correctness and propriety of verdict or findings.

To review refusal to find, see post § 190.
Assigning the error, see post § 207.

¶ 812. The objection that the evidence does not support the finding cannot be raised unless where a case is made for review on the whole facts.—Gray v. Howard, 12 Mich. 171.

¶ 813. Where, upon a trial by jury, judgment has been rendered under Comp. L. 1871, § 6026, How. St., § 7606, upon special findings and against the general verdict, it is necessary to incorporate the material evidence bearing upon the special findings into a bill of exceptions that the Supreme Court may be enabled to stand in the same light as the trial court, otherwise the judgment will be presumed warranted.—Gilbert v. American Ins. Co., 30 Mich. 400.

¶ 814. Where, upon a trial by jury, judgment has been rendered under Comp. L. 1871, § 6026, How. St., § 7606, against the general verdict and in accordance with special findings returned by the jury, on the ground that such findings were inconsistent with the verdict, a record that brings up only the pleadings, the verdict and findings, and the judgment, is inadequate to warrant a determination that the ruling as to such inconsistency was erroneous.—Gilbert v. American Ins. Co., 30 Mich. 400.

¶ 815. Where the evidence upon which findings are based is not given, the facts found cannot be reviewed.—Fisher v. Seventh-Day Adventist Pub. Ass'n, 85 Mich. 472; Watts v. Tittabawassee Boom Co., 47 Mich. 540.

¶ 816. Where the record does not show that all of the testimony taken upon the trial was included, the findings of fact cannot be disturbed.—Hoffman v. Buschman, 95 Mich. 538.

¶ 817. The Supreme Court will not, in suits at law, look into the evidence upon which a finding of fact is based, except where the evidence has all been returned on an exception that the finding has no evidence to support it.—Scotten v. Sutter, 37 Mich. 526.

¶ 818. A party excepting to a finding must make it appear that his exception is well taken. So held where the objection was that the facts were found on parol proof duly objected to, and not on certain documents which the party bringing error did not include in the record.—Odd Fellows v. First Nat. Bank, 42 Mich. 461.

¶ 819. A court's conclusion of fact in favor of the validity of a judgment introduced in evidence cannot be reviewed if there are no facts or exceptions which would raise a doubt on the subject.—Tharp v. Allen, 46 Mich. 389.

¶ 820. Where it had been stipulated upon the trial of a case that either party might read in evidence the testimony of any witness he pleased, as such testimony had been printed for use in another designated case; but the record on error does not show what part, if any, of such testimony was read, objections that the evidence did not support the findings of the trial court cannot be considered.—Hoffman v. Estate of Pope, 74 Mich. 235.

¶ 821. A finding of no undue influence or mental incompetency alleged as grounds for setting aside a deed from grantor to his wife was not disturbed where it was not shown in the record that such grounds existed.—Trombley v. Hoffmann, 115 Mich. 14.

¶ 822. A contention that a verdict is a compromise cannot be ascertained on an appeal where the record does not contain all the evidence.—Stevenson v. Detroit & Mackinac Ry. Co., 118 Mich. 651.

¶ 823. Whether a servant suing his master for a personal injury caused by the incompetence of a fellow servant is estopped to rely on the negligence of the master in retaining such servant in its employ by the fact that such retention was due to the demands of a union of which plaintiff was a member, will not be decided on a record which does not show the agreement between the defendant and the union.—Trend v. Detroit United Ry., 149 Mich. 333.

¶ 824. If the bill of exceptions to a case pending on a referee's report does not show all the facts material to a decision on the exceptions taken, the fact should be shown by affidavit; and it should also be shown that the referee's attention was seasonably called to the defect, or an excuse given for not doing so. Otherwise the denial by the circuit court of a motion to send back the report for correction must be held to have been proper.—Cool v. Snover, 38 Mich. 562.

¶ 825. Where no bill of exceptions is settled of the evidence before a referee, and the evidence is not returned with his report, the Supreme Court cannot ascertain whether his findings of fact are supported by any evidence or not.—Garver v. Bement, 69 Mich. 149.

§ 190. Refusal of finding.

To review grant or denial of rehearing in equity, see post § 191.

¶ 826. When the record does not show that any special finding was asked of the court and refused, judgment will not be reversed for the want of such finding.—Hooper v. Hooper, 26 Mich. 435.

¶ 827. Assignments of error upon the neglect and refusal of the circuit judge to find facts claimed to have been proved cannot be reviewed where no bill of exceptions has been settled, and where the evidence is not returned.—Baldwin v. City of Hastings, 83 Mich. 639.

¶ 828. Where a ruling of the trial court on a request after judgment to open the case and permit a request for findings to be filed, does not appear in the record, it will not be considered on appeal.—Wickes v. Pulfrey, 131 Mich. 407.

¶ 829. Where upon writ of error the brief, in which a party claims to have presented the points of law deemed material for findings in alleged compliance with Circuit Court Rule 26, is not made a part of the record, it is not before the Supreme Court for consideration.—Silfver v. Daenzer, 167 Mich. 362.

§ 191. Grant or refusal of new trial.

¶ 830. Under Pub. Acts 1893, No. 134, providing that there may be incorporated in the bill of exceptions a record of the proceedings on a motion for a new trial, including the reasons for the refusal thereof, and that exceptions may be taken and error assigned thereon, the action of a trial court cannot be reviewed in the absence from the bill of the reasons therefore and exceptions to the decision.—Stevenson v. Detroit & Mackinac Ry. Co., 118 Mich. 651.

¶ 831. Certain affidavits filed in support and in opposition to a motion for a new trial which were not made part of a bill of exceptions, but extracts from which were printed in the record, held proper to be considered on appeal as part of the record where they were considered and referred to by the trial court in passing on the motion and thereby brought in.—Hampton v. Van Nest's Estate, 196 Mich. 404.

¶ 832. The refusal of the trial judge to grant a new trial will not be reviewed where the record does not show why he refused and where no request was made to him for his reasons for the denial.—Griffin v. McKnight, 116 Mich. 468.

¶ 833. The court will not review a denial of a motion for the new trial where the record does not show the reasons for such denial nor that any exceptions were taken.—Tobin v. Modern Woodmen of America, 126 Mich. 161; Mahder v. Wax, 192 Mich. 479.

¶ 834. The action of the circuit judge in refusing to grant a motion for a new trial will not be reviewed where his reasons for such refusal are not incorporated in the bill of exceptions as a part of the record of the proceedings had on said motion.—McRae v. Garth Lumber Co., 102 Mich. 488.

¶ 835. The action of a circuit judge in refusing to grant a new trial will not be reviewed on error where the record does not disclose that he was requested to give his reasons for refusing a new trial, nor that he gave such reasons, nor that any exceptions were taken.—Gillett v. Burns, 131 Mich. 616.

¶ 836. An assignment of error upon the refusal of the court to grant a new trial cannot be considered in the court of appeal, where no reasons of the trial judge for overruling the motion appear in the record.—Moerman v. Clark-Rutka-Weaver Co., 145 Mich. 540.

¶ 837. Assignments of error based upon the refusal of the trial court to grant a new trial will not be considered where the reasons for the court's refusal do not appear in the record and it does not appear that a timely request was made therefor.—Bennett v. Denton, 194 Mich. 610.

¶ 838. Where a party appealing from an order of the circuit court denying a new trial, failed to file a request to the judge for his reasons, in writing, for his decision, and where the record does not disclose such reasons, the Supreme Court will not review the trial court's ruling.—In re Bender's Estate (Appeal of Look), 159 Mich. 108.

¶ 839. A record in the Supreme Court did not indicate that defendant objected to the allowance of damages under the Survival Act, and contained no exception to any ruling upon such damages. The trial court was not requested to charge the jury that the suit was under the Death Act and not under the Survival Act. In discussing the admission of evidence at the trial, defendant apparently acquiesced in the court's statement that the suit was under the Survival Act. The plea was the general issue. The record did not show that the point was raised on a motion for a new trial. Held, defendant could not in the Supreme Court object that damages were awarded under the Survival Act on the ground that the declaration stated a case under the Death Act.—Gates v. Beebe, 170 Mich. 107.

§ 192. Grant or denial of rehearing.

¶ 840. An appeal from an order denying a rehearing will be dismissed, with costs, where the testimony before the court upon the hearing is not presented, although the application was based on the ground that the complainant was prevented by adverse circumstances from being present at the hearing in the lower court.—McDonald v. Born, 121 Mich. 595.

§ 193. Objections to judgment.

Assigning the error, see post § 209.

¶ 841. An objection that the circuit judge did not decide the case within 6 months after it was submitted (Comp. L. 1897, § 558) is not tenable where the record shows when testimony was taken and decision was made, but does not show when it was submitted.—Barkume v. Phelps, Brace & Co., 141 Mich. 545.

¶ 842. It is not necessary to decide whether a decree is void because the opinion was not filed within 6 months after the final submission of the case, as required by Comp. L. 1897, § 558, where after the testimony was in, time was given counsel to file briefs and it does not appear on the record that the opinion was filed more than 6 months after such briefs were filed, which would constitute the "final submission" of the case.—Hoste v. Dalton, 137 Mich. 522.

¶ 843. A judgment against an executor on an accounting must be affirmed on error if the record does not enable the court to settle equities and does not furnish sufficient material to determine accounts.—Duvernois v. Kaiser's Estate, 75 Mich. 481.

§ 194. Awards and allowances in equity.

¶ 844. A sum allowed as alimony in gross will not be reviewed on appeal, where appellant had failed to furnish the trial court the material facts for determining a just award.—Ferguson v. Ferguson, 145 Mich. 290.

§ 195. Accountings and references.

Remission of record for further showing, see ante ¶ 541.

Assigning error in reference, see post § 208.

¶ 845. The record on appeal in a suit for an accounting should show what items were allowed and what disallowed, with exceptions pointing out the disputed items and the rulings of the court thereon. Either party may ask the court to follow this practice, and failure to do so may reasonably be treated as a waiver of the right to raise such questions by appeal.—Loveland v. Peter, 108 Mich. 154.

¶ 846. Complainant, a contractual vendee of land, brought a bill to enjoin an ejectment suit, and for specific performance. The circuit court ordered a reference to a commissioner to determine how much complainant owed on the contract, to which order defendant did not consent. Such reference was unnecessary, as the computation was simple. From a decree for complainant, defendant appealed, without including in his record any account of the proceedings before the commissioner, and complainant on this ground moved to dismiss the appeal. Held, since the reference to the commissioner was unnecessary, the record was sufficiently complete, and the motion should be denied.—Lafrance v. Griffin, 160 Mich. 236.

§ 196. Sufficiency of case made.

Contents and substance, see ante § 105.

Dismissal for defects, see ante § 163.

Sufficiency of settlement, see ante § 110 et seq.

Presumptions as to contents and correctness, see post §§ 345-349.

¶ 847. The Supreme Court cannot review a case made after judgment where no exceptions appear on the record.—Wilkinson v. Earl, 39 Mich. 626.

¶ 848. Questions to be raised on case made must be distinctly presented in the record.—Probasco v. Cook, 39 Mich. 714.

¶ 849. No question for review arises upon a record brought up as a case made, and containing only a statement of the facts

found by the court and the judgment thereon.—Hedges v. Hibbard, 46 Mich. 551.

¶ 850. A mere recital showing the facts of a case at law, the nature of the judgment, and the fact that a party excepted to it, presents no question for the Supreme Court, if there are no findings and the judgment is good in form.—Chatterton v. Parrott, 46 Mich. 432.

¶ 851. Where the record in ejectment shows no finding of facts or exceptions to the rulings of the judge, but merely recites that the parties proved certain things and that the judge decided for plaintiff, and rendered judgment in his favor that he recover of defendant the possession of the premises, there is no case made for review.—Wertin v. Crocker, 47 Mich. 642.

¶ 852. Where a case is made after judgment for review by the Supreme Court upon the whole facts, it should embody all the evidence given at the trial.—King v. Moore, 10 Mich. 538; Gray v. Howard, 12 Mich. 171.

C. REQUISITES AND SUFFICIENCY OF ASSIGNMENTS.

§ 197. Objections and exceptions as basis for assignments.

That there must be objection and exception in order to save the question for review, see Saving Questions for Review.

Sufficiency of bill or case to sustain assignments, see ante XI, B.

Want of basis for assignments as reason for denying further time to file return, see ante § 129.

Assignment on exception on findings, see Jud. Act, Chap. XVIII, § 15; Comp. L. 1915, § 12587.

Assignment without exception on rulings and charge to jury, see Jud. Act, Chap. XVIII, § 60; Comp. L. 1915, § 12632; and see also Comp. L. 1915, § 14576.

Assignments of error where no bill of exceptions is settled, see Sup. Ct. Rule 11.

¶ 853. Rulings not excepted to cannot be assigned for error, and assignments thereon cannot be noticed.—Lee v. Hardgrave, 3 Mich. 77; Hill v. Robinson, 23 Mich. 24; Roberts v. Fitzgerald, 33 Mich. 4; Snyder v. Willey, 33 Mich. 483; Hall v. People, 39 Mich. 717; Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 296; Manistee Township School Dist. No. 1 v. Cook, 47 Mich. 112; Prescott v. Patterson, 49 Mich. 622; Barton v. Gray, 57 Mich. 622; Cotherman v. Cotherman, 58 Mich. 465; People v. Barker, 60 Mich. 277; Banks v. Cramer, 109 Mich. 168.

¶ 854. No notice will be taken of an assignment of error that is too general to connect it with any exception.—Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239.

¶ 855. The propriety of Laws 1885, Act No. 101, authorizing assignments of error upon the charge of the court without exceptions taken, doubted, and the unfortunate working of the statute pointed out.—Just v. Porter, 64 Mich. 565.

¶ 856. Laws 1885, Act No. 101, permitting assignment of errors to a charge without exceptions thereon, applies to cases pending when it took effect as well as to those begun afterwards.—Hufford v. Grand Rapids & I. R. Co., 64 Mich. 631.

¶ 857. Error may be assigned upon the record without exceptions, where the only question is whether the facts found support the judgment, the finding being treated in such cases as a special verdict.—Trudo v. Anderson, 10 Mich. 357; Peck v. City Nat. Bank of Grand Rapids, 51 Mich. 353; and see Amboy, L. & T. R. R. Co. v. Byerly, 13 Mich. 439.

¶ 858. An assignment of error in allowing a hypothetical question is untenable where it sets out a departure from the evidence differing from the objection made on the trial and neither the one nor the other is borne out by the record.—Boehm v. City of Detroit, 141 Mich. 277.

¶ 859. Unless a ruling is required of, or made by the court, an assignment of error based upon an exception to improper argument by counsel will not be entertained.—Gungrich v. Anderson, 189 Mich. 144.

§ 198. Findings as basis.

On findings without exceptions, see Jud. Act, Chap. XVIII, § 15; Comp. L. 1915, § 12587.

¶ 860. A general assignment of error that the facts found do not support the judgment may be based upon the record, without any bill of exceptions.—Hubbard v. Garner, 115 Mich. 406.

¶ 861. Where the party moving for a new trial has filed a request that in case the motion is denied the court file in writing its reasons for denying the same, and findings are not filed by the court, and exception to the denial of the motion has been duly filed, error may be assigned upon such refusal, regardless of the absence of such findings.—Clark v. Onaway-Alpena Tel. Co., 196 Mich. 168.

§ 199. Sufficiency of assignments in general.

Number of assignments, see ante § 120.

Making the assignments, see ante VI, E.

Pointing out and connecting matters in record bearing on question, see post §§ 211-213.
Separate party assigning, see post § 209, ¶ 917.
Amendments and additional assignments, see ante § 124.
Dismissal for want of sufficient assignments, see ante § 158.
Striking cause for want of proper assignments, see ante § 165.
Costs for excessive or irregular assignments, see Costs, V.

¶ 862. Assignments of error should clearly raise the questions of law to be considered. —Finch v. Karste, 97 Mich. 20.

¶ 863. An assignment of error in trespass that the court erred in finding certain tax-deeds void does not entitle plaintiff in error to a review of the facts where such was a conclusion of law excepted to as matter of law.—Hecock v. Van Dusen, 96 Mich. 573.

§ 200. Specification of error relied on.

Particular errors and sufficiency of the assignment, see post § 202 et seq.
Statement of errors in brief, see post § 232.
Dismissal of case made for want of statement of errors, see ante § 163.
Assigning and specifying errors, see 1916 C. C. Rule 66, § 5.

¶ 864. Assignments of error must be specific.—Polhemus v. Ann Arbor Savings Bank, 27 Mich. 44; Burt v. Olcott, 33 Mich. 178; Fowler v. Gilbert, 38 Mich. 292; Webber v. Billings, 184 Mich. 119.

¶ 865. Under Circuit Court Rule 47, an appellant is required to make a detailed assignment upon all of the alleged errors upon which he proposes to rely, and the Supreme Court will ordinarily not consider assignments not made in conformity with this rule. —People v. Lewis, 166 Mich. 513.

¶ 866. An assignment of error is not sufficiently specific if the error relied on is not singled out by the assignment or by the exception on which it rests.—Baylis v. Stout, 49 Mich. 215.

¶ 867. Assignments of error are not open to the objection that the errors are not specifically assigned where the ground of error is fairly indicated, though not precisely stated. —Genrow v. Modern Woodmen of America, 151 Mich. 250.

¶ 868. An assignment of error which embraces several subjects is too general to warrant a review.—Greenleaf v. Lambert, 192 Mich. 411.

§ 201. ——In cases heard by circuit on appeal or certiorari.

¶ 869. Where error is brought to review a judgment rendered upon certiorari to a justice, an assignment of errors in referring to the errors stated in the affidavit for certiorari makes such errors a part of the assignment. —Berry v. Lowe, 10 Mich. 9.

¶ 870. Where error is brought in the Supreme Court upon a judgment in the circuit, in a case brought there by certiorari to a justice of the peace, an assignment of errors that "the circuit judge erred in holding that the justice's judgment was erroneous in the several causes of error assigned in the affidavit for certiorari" is a sufficient special assignment.—Berry v. Lowe, 10 Mich. 9.

¶ 871. No assignments of error other than those contained in the affidavit for certiorari are essential in certiorari cases removed to the Supreme Court by writ of error.—Chicago & G. T. R. Co. v. Campbell, 47 Mich. 265; overruling Burnham v. Van Gelder, 32 Mich. 490.

¶ 872. Where a justice's rulings have been objected to, but his judgment affirmed at the circuit, it is enough to assign the rendition of judgment as error; if the rulings were all passed on, the enumeration of them is surplusage, as a review of the judgment must bring them under examination.—Conley v. Winsor, 41 Mich. 253.

¶ 873. Where a justice certifies that his return to a certiorari contains all the testimony, the question whether any substantial part of the cause of action is unsupported by proof is sufficiently raised by assigning error on the affirmance of the judgment.—Chicago & C. S. R. Co. v. Peters, 45 Mich. 636.

¶ 874. Where a justice's judgment in a case tried without a jury had been reversed on certiorari and there were no findings of law, the only assignments of error that were considered were general, viz.: that the court had erred in sustaining the writ of certiorari and in giving judgment against the surety for costs.—Boatz v. Berg, 51 Mich. 8.

¶ 875. Under an assignment of error that the circuit court on certiorari erred in affirming the judgment rendered in justice's court, the only question which the Supreme Court can consider is whether the justice had jurisdiction to render the judgment he did.—Village of Vicksburg v. Briggs, 85 Mich. 502.

¶ 876. On error from the affirmance of a justice's judgment on certiorari the plaintiff cannot assign errors not alleged in the affidavit for certiorari.—Lee v. Hardgrave, 3 Mich. 77.

¶ 877. On error from a judgment for defendant in a certiorari to review drain proceedings, an assignment that the court erred in not granting plaintiff's motion for an amended return is too general, where no record is shown to be omitted from the return, and there is no reference to a particular amendment which should have been allowed.—Lickly v. Bishopp, 150 Mich. 256.

§ 202. Disqualification of judge or jurors.

¶ 878. Where it is assigned as error that the circuit judge entered the various judgments and heard and determined motions to vacate the same when he was disqualified by relationship with one of the parties, affidavits as to such relationship being offered, such an assignment of error is sufficient in form to raise the question of the disqualification of the judge, and the consequent invalidity of the judgments.—Bliss v. Caille Bros. Co., 149 Mich. 601.

§ 203. Rulings on the pleadings.

¶ 879. Where plaintiff assigns for error that the court erred in sustaining the demurrer to his declaration, such assignment is sufficiently specific and definite.—Johnson v. Desmond Chemical Co., 152 Mich. 84.

§ 204. Rulings on admission or exclusion of evidence.

Sufficiency of the record, see ante §§ 182, 183.

¶ 880. An assignment of error that "the court erred in admitting improper evidence to go to the jury on the part of the plaintiff" does not comply with the rules and will not be considered.—O'Neil v. Newman, 132 Mich. 489.

¶ 881. Where in a cause tried by the court the plaintiff on appeal assigns errors in admitting testimony without pointing out how the testimony resulted in his injury, he cannot secure a reversal for such alleged errors.—Markey v. Mutual Ben. Life Ins Co., 164 Mich. 350.

¶ 882. An assignment of error to admission of evidence that a street car at the time of an accident was running faster than other cars, does not cover an objection to testimony to the effect that the car was stopping as it did on other days.—Purulewski v. Detroit United Ry., 181 Mich. 133.

§ 205. Instructions and disposal of requests.

See also post ¶ 940.

By assigning ruling on new trial motion, see post § 216.

Exclusion of objection by assigning insufficiency of verdict, see post ¶ 942.

Sufficiency of the bill or case, see ante § 185.

Identifying the instruction by reference to the record, see post §§ 211-213.

¶ 883. Where several exceptions were taken to the charge of the court, an assignment that the judge "gave the several instructions to the jury asked by the defendant, and refused to give the several instructions, or any or either of them, asked for by the plaintiffs," is sufficiently special, and the words "several instructions" must be rendered distributively, and as applying to each.—Niles v. Rhodes, 7 Mich. 374.

¶ 884. An assignment of error for refusal to give each and every one of defendant's requests is sufficiently specific.—People v. DeFore, 64 Mich. 693.

¶ 885. Assignments of error should clearly raise the questions of law to be considered, and it is objectionable to allege errors upon the charge, sentence by sentence, consecutively, and including nearly all of the charge itself.—Finch v. Karste, 97 Mich. 20.

¶ 886. Where the refusal to give a request to charge is justified, but the court, in connection with such refusal, instructs the jury that a certain fact exists which is not shown by the evidence, and error is assigned only upon the refusal to give the request, the erroneous instruction, though prejudicial, does not afford a basis for relief.—Schmittdiel v. Moore, 101 Mich. 590.

¶ 887. The charge cannot be regarded as erroneous in that it ignored objector's theory of the case, where the error, if any, laid in refusing two out of nine requests, and such refusal was not specifically assigned as error, but the assignment was for error in giving instructions.—Totten v. Burhans, 103 Mich. 6.

¶ 888. In an action by a servant for personal injuries sustained by the operation of a dredge, where there were specific requests to charge that under neither count of the declaration could a recovery be had and exceptions to the refusal to so charge were made, and error specifically assigned upon such refusal and, on refusal to charge the fellow servant rule, this is sufficient to permit the Supreme Court to consider the question of the application of the fellow servant rule.—Hartnett v. Owosso Sugar Co., 147 Mich. 650.

¶ 889. Where plaintiff in error assigns as error that the case was submitted to the jury upon an erroneous theory, his contention will not be considered in this court unless the error is assigned to some specific part of the charge, especially where the question is now raised for the first time.—Putnam v. Phoenix Preferred Acc. Ins. Co., 155 Mich. 134.

¶ 890. The failure of the trial court to leave to the jury the question whether defenses had been waived, will not be consid-

ered by the Supreme Court where the alleged error in so doing is assigned only in general terms.—O'Toole v. Ohio German Fire Ins. Co., 159 Mich. 187.

¶ 891. Where error is claimed in mere general terms for the trial court's failure to give a number of requested instructions, without specifying the particulars in which such failure constitutes error, the assignment will not be considered on appeal.—Duff v. Judson, 160 Mich. 386.

¶ 892. Claimed errors in instruction and remarks of the trial court not specifically pointed out will not be considered on appeal.—Detroit United Ry. v. City of Pontiac, 193 Mich. 466.

¶ 893. Where the charge of the court on the measure of damages fills two printed pages, a general assignment of error thereupon is too broad.—Plumb v. Hecla Co., 157 Mich. 562.

§ 206. Directing or refusing to direct verdict.
See also post §§ 215, 216.
Sufficiency of bill or case, see ante § 188.

¶ 894. An assignment of error that the court "erred in directing the jury to find a verdict in favor of the defendant" is too general.—Johnson v. Ballou, 25 Mich. 460.

¶ 895. Under (former) Sup. Ct. Rule 12, requiring assignments of error to be special, an assignment that the court erred in refusing to direct a verdict for defendant is too general to be considered.—Alberts v. Village of Vernon, 96 Mich. 549.

¶ 896. Where, on a trial of a suit upon a promissory note, the defense is confined to a denial of the execution of the note and of a consideration therefor, defendant cannot interpose, under an assignment that the court erred in refusing a general request to direct a verdict in his favor, the defense that plaintiff failed to comply with an accompanying agreement that payment should not be compelled during the lifetime of the maker, unless he failed on demand to secure such payment.—Shattuck v. Hart, 98 Mich. 557.

¶ 897. An assignment of error "that the court erred in directing a verdict for the defendant" is not too general to preclude its consideration (former Sup. Ct. Rule 12), where it is apparent from the record that the error relied on is that there were facts in the case upon which a jury might find plaintiff entitled to recover.—Conely v. Dudley, 111 Mich. 122.

¶ 898. Under 1897 C. C. Rule 47 and Sup. Ct. Rule 11, assignments of error that the court erred in directing a verdict for plaintiff and in not directing a verdict for the defendant, are not sufficiently specific.—Jackson Bridge & Iron Co. v. Lancashire Ins. Co., 122 Mich. 433.

¶ 899. Where a claim for an annuity had been presented to an estate and disallowed and there were but two questions litigated, that the statute of limitations had run against the claim, and that if allowable no interest could be included, an assignment of error that the court had erred in directing a verdict for the plaintiff is sufficiently specific and complies with the rule as to necessity of specifically assigning particular error.—Stringer v. Stevens' Estate, 146 Mich. 181.

¶ 900. An assignment of error in that "the court erred in directing a verdict in favor of the said defendant of no cause of action," is not too general to be considered, where no one has been misled, and the case has been throughly briefed on both sides, and where the court and counsel both understood that the question was whether, upon the testimony offered by plaintiff, the case should be submitted to the jury.—Wolfe v. Stack, 153 Mich. 445.

¶ 901. An assignment that the court erred in refusing to direct a verdict for defendant is not sufficiently specific to require consideration by the Supreme Court.—Canerdy v. Port Huron, St. C. & M. C. Ry. Co., 156 Mich. 211.

¶ 902. An assignment of error, "for that the court erred in not directing a verdict for the defendant," is too general to require consideration on appeal.—Gold v. Detroit United Ry., 169 Mich. 178.

¶ 903. An assignment of error that the court erred in not directing a verdict for the defendant, is not sufficiently specific.—Nelson v. Michigan Tanning & Extract Co., 184 Mich. 108.

¶ 904. An assignment of error that defendant in the circuit court was not allowed an opportunity of defending upon the merits was held frivolous where the record showed the court permitted defendant to offer his defense, and he declined, and he had asked no continuance, but announced himself ready for trial, and after plaintiff rested stated he had nothing further to offer.—Bitzer v. Wagar, 83 Mich. 223.

§207. Improper verdict or findings.
Sufficiency of bill or case, see ante §§ 189, 190.

¶ 905. The assignment of error that there is no evidence to support the finding covers the whole group of facts found, and is too

broad where the finding contains some unquestioned facts.—Behler v. Drury, 51 Mich. 111.

¶ 906. Assignments of error that the verdict was not warranted by the evidence, that the judgment was not warranted by the evidence, that the court erred in rendering judgment are insufficient and will not be considered.—Bills v. A. W. Stevens Co., 146 Mich. 515.

¶ 907. An assignment of error upon the finding that judgment should be entered for plaintiff is sufficient as an assignment that the findings do not support the judgment. —White v. Schaberg, 131 Mich. 319.

¶ 908. An assignment of error that the verdict is contrary to the evidence does not raise the question that it is contrary to the overwhelming weight thereof.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 909. An assignment of error that there is no evidence in the case to support a verdict for plaintiff is definite.—Sandstrom v. Minneapolis, St. P. & S. S. M. Ry. Co., 198 Mich. 99.

¶ 910. Nothing is presented for review by assignments of error which do not allege either that the findings of fact are not supported by testimony, or that the facts found do not sustain the conclusions of law.—Niagara Sprayer Co. v. Wood, 186 Mich. 303.

¶ 911. Assignments of error as presented and construed by counsel for the appellant, held not to raise the question whether the finding of the trial court was supported by the evidence.—In re Hoffman's Estate, 183 Mich. 67.

¶ 912. Where a court has tried a cause without a jury and has filed a special finding under the rule, an assignment of error that there was no evidence of a fact found does not raise any question that the Supreme Court can consider on error where it is tantamount to urging that the facts require a contrary judgment to that rendered on the general evidence.—Peabody v. McAvoy, 23 Mich. 526.

§ 208. Proceedings and judgment on reference.

Question presented by exception to referee's report, see post ¶ 1377.

¶ 913. A general assignment of error in rendering judgment upon a referee's report will not sustain the objection that the report was bad for want of specific findings. —Berwick v. Fletcher, 39 Mich. 25.

¶ 914. Where a cause was tried before a referee and several exceptions taken, and the circuit court refused to set aside the referee's report, and rendered judgment thereon, an assignment of error that "the court overruled the motion of the counsel for the plaintiff to set aside the report of the referee and confirmed the same," was held too general.—Altman v. Wheeler, 18 Mich. 240.

§ 209. Improper judgment.

See also post ¶ 939.

Assigning refusal to give judgment non obstante, see also post ¶ 946.

¶ 915. An assignment that judgment should have been for the plaintiff in error is too general to be noticed by the court.—Webster v. Fisk, 9 Mich. 250; Altman v. Wheeler, 18 Mich. 240; Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239.

¶ 916. An assignment that the "court erred in rendering judgment for the defendants" is general and bad under (former) Sup. Ct. Rule 12.—Hecock v. Van Dusen, 96 Mich. 573.

¶ 917. An error concerning but one of two defendants in a joint judgment in tort cannot be reached by a general assignment that the finding does not support the judgment, for if the judgment is good against either of the defendants, the error touching the other must be specifically pointed out.—Continental Improvement Co. v. Ives, 30 Mich. 448.

¶ 918. Where the only allegation of error is that the facts do not support the judgment, the Supreme Court will not entertain the objection that there is no regular finding.—Fletcher v. Moore, 42 Mich. 577.

¶ 919. An assignment of error held sufficient to present the question whether a judgment was supported by the stipulated facts on which it was rendered.—Kooman v. DeJonge, 186 Mich. 292.

§ 210. Showing connection and context of matter.

¶ 920. It is bad practice to assign error in parts of a charge designated by quotation marks without at least indicating typographically that there is an omission of the connective matter, and it is better to show what the connection was.—Bettys v. Township of Denver, 115 Mich. 228.

§ 211. Setting out or identifying matter objected to.

See also post §§ 212, 213.

Indexing the assignments in the record and briefs, see ante § 174, post §§ 231, 232.

¶ 921. An assignment of errors in the following form, "the court erred in overruling the objection of defendant's counsel numbered one on the margin of the record," is insufficient.—Carby v. Combs, 166 Mich. 347.

§ 212. ——Describing instructions by numbers or pages.

See also post ¶ 1026.

¶ 922. An assignment of error on the refusal to grant certain requests for instructions as designated by numbers is insufficient, if meant to be taken distributively, and is immaterial if the substance of the requests is given in the charge.—People v. Sweeney, 55 Mich. 586.

¶ 923. An assignment "that the circuit judge erred in charging the jury and in giving the requests for plaintiff found on pages 134-140 of record," cannot be considered, where the pages cited contain many statements by the court in which the law is correctly stated, whatever may be said of the rest.—Wanner v. Mears, 102 Mich. 554.

¶ 924. Where the charges given by the court appear in the record in paragraphs numbered consecutively, error on such charges may be assigned by referring to them by number instead of repeating their language.—In re McMaster's Estate, 163 Mich. 210; Cooper v. Harlow, Id.

¶ 925. Where requests to charge are numbered in the record, an appellant may assign as error the failure to give such requested charges by referring to them by number instead of repeating their language. —In re McMaster's Estate, 163 Mich. 210; Cooper v. Harlow, Id.

§ 213. ——Instructions described as a whole.

¶ 926. It is not proper practice to assign error "upon the charge as a whole."—Snyder v. Patton & Gibson Co., 143 Mich. 350.

¶ 927. An assignment of error which points to the whole of a charge composed of distinct propositions is too general to be considered—Tupper v. Kilduff, 26 Mich. 394.

¶ 928. An assignment that "the charge of the court, on his own motion, as a whole, was error," was held too general.—People v. DeVore, 64 Mich. 693.

¶ 929. An assignment of error "that there was manifest error in the charge of said court as given to said jury" is not sufficiently specific, where the whole charge is not set forth in the record.—Green v. Brookins, 23 Mich. 48.

¶ 930. An assignment of error that "the court erred in charging the jury upon its own motion as a whole, its entire tenor and effect being prejudicial to the rights of the plaintiff" without pointing out in what respect the charge is erroneous will not be considered.—Thompson v. Citizens' St. Ry. Co., 125 Mich. 249.

¶ 931. An assignment of error setting out the charge of the court at length is not sufficiently specific in alleging error in charging the jury, where said charge contains conclusions of fact as well as of law.—Weston v. Dunn, 168 Mich. 563.

¶ 932. An assignment of error directed to an entire charge, held too general, where the instruction was correct in many respects.—Brown v. Mitts, 187 Mich. 469.

¶ 933. An assignment of error predicated upon defendant's general exception to the whole charge of the trial court is too general to reach a specific objection that an instruction in said charge, relating to the duty of defendant's motorman with reference to sounding the gong, was erroneous.—Nissly v. Detroit, J. & C. Ry. Co., 168 Mich. 676.

¶ 934. An assignment of error stating that "the court erred in his charge to the jury," is to indefinite to require consideration.—Van Leuvan v. Ann Arbor R. Co., 167 Mich. 355.

¶ 935. Assignments of error upon instructions claimed to have been argumentative, and to have laid too much stress upon, given undue prominence to and emphasizing rules of law, issues, claims and testimony favorable to the opposite party, held too general to be considered where a consideration of the subject would necessitate going through the entire charge and picking out sentence by sentence matters to which the attention of the court was not directed.—Kaaro v. Ahmeek Mining Co., 178 Mich. 661.

¶ 936. Assignment that "the court erred in his charge to the jury and did not leave to the jury to decide, if it was a question for the jury, the vital issues in this case," held too indefinite.—Springer v. Fuller, 19 Mich. 628.

¶ 937. Where a charge of the court includes a number of requests, most of which are correctly given, an assignment of error upon the whole charge is too general.—Pratt v. Burhans, 84 Mich. 487.

§ 214. Construction of assignments.

Of joint and several assignments, see post § 217.

Conflict between record and assignment of error, see post § 341.

¶ 938. An ambiguous assignment of error should be construed most favorably for the party against whom it is made.—Browne v. Moore, 32 Mich. 254.

¶ 939. A general assignment of error that the findings of fact "do not support the findings and conclusions of law" will be treated on review as alleging that the facts do not support the judgment.—Union Tel. Co. v. Ingersoll, 178 Mich. 187.

§ 215. Scope of assignments; errors covered.

Restriction of review to the errors assigned, see post § 311.

¶ 940. An exception to a charge may be supported in the Supreme Court by the assignment of any reasons which the record will justify, whether they were stated in the court below or not.—Vanneter v. Crossman, 39 Mich. 610.

¶ 941. Where the correctness of the ruling of the court in directing a verdict depends entirely upon the correctness of prior rulings admitting certain evidence, error should be assigned upon such earlier rulings as well as upon such direction.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 942. Where a plaintiff securing a verdict brings error on the ground of the insufficiency thereof, he cannot base anything on the failure of the trial court properly to state the rule as to preponderance of evidence.—Mills v. Warner, 167 Mich. 619.

¶ 216. ——Direction of verdict or refusal of new trial.

Assignment of previous errors as well as direction, see also ante ¶ 941.

¶ 943. An assignment of error that a certain charge having been given at defendant's request, the jury should have found a verdict for defendant, cannot be made the basis of an argument that the charge so given was inconsistent with other portions of the charge.—Plumb v. Hecla Co., 157 Mich. 562.

¶ 944. An assignment of error that the court erred in overruling a motion for a new trial based on the failure to charge a jury as requested by the defendant in its several requests, is too general, where some of the instructions requested were actually given, and others were improper.—Eberts v. Mt. Clemens Sugar Co., 182 Mich. 449.

¶ 945. Where at the close of the plaintiff's case, the defendant's motion for a directed verdict, because of the insufficiency of the evidence, was denied with leave to renew at the close of the case, which was done without any reason for the motion being then given, an assignment of error that the court erred in refusing to direct a verdict as requested by the defendant at the close of the case, refers to the reasons stated as the basis for the first motion.—Nelson v. Michigan Tanning & Extract Co., 184 Mich. 108.

¶ 946. Where defendant fails to assign error on the refusal of the court to enter judgment for him non obstante veredicto, he cannot raise the point on appeal, by reason of the fact that he assigned errors involving the same theory on other separate and distinct matters.—Beauerle v. Michigan Cent. R. Co., 152 Mich. 345.

§ 217. Joint and several assignments.

General assignment by one party to judgment good against coparty, see ante ¶ 917.

Separate consideration of separate questions comprised in assignments, see post § 271.

¶ 947. In an action of tort where several defendants unite in bringing a writ of error, and assign errors jointly, the assignment will be considered joint and several, or joint or several, as the nature of the errors assigned and the interest of the respective parties require.—Fisher v. Thirkell, 21 Mich. 1.

D. ERRORS PRESENTED; WHO MAY URGE ERROR.

§ 218. In general.

Right dependent on relation of the party objecting as appellant or appellee, see post §§ 219-223.

Waiver or estoppel cutting off right, see post §§ 225-230.

Who may notice cause for hearing, see ante § 133.

Sufficiency of the record or bill of exceptions to present error and the accompanying matter essential to its review, see ante XI, A, B.

Sufficiency of the assignments to present the error, see ante XI, C.

The doctrine that the review will not be extended beyond those questions presented by the appeal or writ and necessary to dispose of it is treated post XII, B.

One cannot complain of an error that has been favorable to him or that has not

prejudiced him or has been prejudicial, if at all, to another party not united in interest, nor which though prejudicial in the beginning has been cured by something else in the course of the trial or by the verdict or the judgment. These general principles, sometimes phrased in the form of a statement that the appellant cannot complain of them, are really the doctrine of Harmless Error, and are treated in that topic.

¶ 948. An objection that the verdict in an action for slander failed to specify the amount awarded for damages to feelings separately from the amount awarded for damages, as required by Pub. Acts 1895, No. 216, § 2, comes too late, where the case was pending when the act went into effect, and the point is raised for the first time in a supplemental brief.—Hewitt v. Morley, 111 Mich. 187.

§ 219. Nonappealing parties.

Where objector is not united in appeal or interest with appellant, see post §§ 222, 223.

Declination of questions affecting nonappellants, see post §§ 265, 315.

Denial of relief by modification to nonappellants, see post § 520.

¶ 949. The Supreme Court usually does not consider alleged errors made against a nonappealing party.—Bowsher v. Grand Rapids & I. Ry. Co., 174 Mich. 339.

¶ 950. The Supreme Court, on appeal will not consider contentions by a party made in the trial court which were overruled, where objector did not appeal.—Lowe v. Schuyler, 187 Mich. 526.

¶ 951. A defendant as to whom the bill has been dismissed cannot, where he has not appealed, raise on appeal the question of costs on the dismissal.—Macomb v. Prentis, 78 Mich. 255.

¶ 952. Where a respondent in proceedings on the auditor-general's petition to collect delinquent taxes has not appealed, his claim that his tender before the hearing of the amount which the court found to be due should have prevented a decree against him cannot be considered.—Aplin, Auditor-General v. Baker, 84 Mich. 113.

¶ 953. Complaints that an instruction below was erroneous, raised in the brief of counsel for a party who has not brought or assigned error cannot be considered.—Smith v. Detroit Loan & Building Ass'n, 115 Mich. 340.

¶ 954. Where a fact does not affect the issue it does not concern appellants. So held where, pending suit, one of the appellees had reconveyed to another his interest in the subject-matter of the suit.—Hill v. Mitchell, 40 Mich. 389.

¶ 955. Defendants in a bill in aid of execution who have not appealed from a decree, entered after a hearing on the merits, cannot on an appeal by the complainant, claim for the first time that the proceeding was not brought in time under Comp. L. 1897, § 9167, and that it should have been dismissed.—Cleland v. Clark, 123 Mich. 179.

¶ 956. On appeal from a decree for an accounting, objections urged by a nonappellant cannot be considered.—Bundy v. Youmans, 44 Mich. 376; Sweeney v. Neely, 53 Mich. 421.

¶ 957. Complainant in an action for an accounting between partners, who has not appealed, will not be heard to ask for an increase of the amount allowed him by the decree.—Snyder v. O'Beirne, 132 Mich. 340.

¶ 958. An interest account cannot be scrutinized on appeal to see if the party who has not appealed has not paid more than was due.—Voigt v. Beller, 56 Mich. 140.

¶ 959. An appellee on appeal from allowance of a claim against an estate, it alone appealing, cannot assign error in disallowing an item of the claim.—Wilkinson v. Estate of Baxter, 97 Mich. 536.

¶ 960. A garnishee defendant who does not appeal from the judgment of the trial court finding that he has in his possession a certain sum for which he is liable cannot complain of such judgment on appeal.—American Steel & Wire Co. v. Dedrick, 196 Mich. 731.

§ 220. ——Right to urge matter making error harmless.

Offsetting rights of nonappellants against changes in appellant's favor, see post § 521.

¶ 961. The defendant in error is in no position to dispute a finding of the court below and claim that the error therein rendered the other errors immaterial.—Scotten v. Sutter, 37 Mich 526.

§ 221. Urging one's own error to sustain result.

Right of appellee to urge harmlessness, see ante § 220.

Urging that nominal damages only could have been allowed, and hence that judgment for defendant should be sustained, see post § 481, ¶ 2140.

¶ 962. Plaintiff will not be heard on appeal to urge that certain testimony used to obtain the verdict in his favor, should be disregarded as hearsay and also because the witness was disqualified, in order to sustain the verdict.—Card v. Fowler, 120 Mich. 646.

§ 222. Errors affecting opposite party.

Consideration of point to prevent reversal, see post § 316.

¶ 963. Where complainant appeals from a decree, and is denied additional relief, the relief granted him will not be examined if defendant did not appeal.—Tapert v. Detroit, G. H. & M. R. Co., 50 Mich. 267.

¶ 964. As a general rule errors claimed to have been committed against the appellee will not be considered.—Eames v. Barber, 193 Mich. 1.

¶ 965. On writ of error questions not decided adversely to complainant by the trial court will not be considered.—Wolverton v. Village of Saranac, 171 Mich. 419.

¶ 966. Questions decided adversely to one who does not appeal from a decree against him, will not be reviewed on the appeal of the opposite party.—Beach v. Rice, 186 Mich. 95.

¶ 967. Where a case rests upon several grounds, some of which are negatived by the charge or by waiver, and the party presenting them nevertheless recovers, it is unnecessary to consider them in reviewing the case at the instance of the other party. —De Mill v. Moffat, 49 Mich. 125.

¶ 968. A foreclosure complainant cannot, on an appeal by a defendant, where he himself has not appealed, raise the question that the decree erroneously gives a lien of certain nonappealing defendants priority over his own mortgage.—Tomlinson v. Gates, 5 Mich. 49.

¶ 969. Where the appellants' objection to a question on cross-examination of his witness was sustained and an exception taken by appellee, error cannot be predicated thereon by the appellant.—Stetson v. Mackinac Transp. Co., 182 Mich. 355.

¶ 970. A decree for complainant, whose mortgage was declared void, adjudging instead a lien on the dower interest of one of defendants whose dower right it was intended to extinguish with the money realized from the mortgage, cannot be complained of because of the fact that part and not all of the dower interest was to be applied to the lien, where complainant has taken no appeal from the decree, the appeal being by the defendants.—Campbell v. Smith, 103 Mich. 427.

¶ 971. On an appeal by a wife from a decree for her separate maintenance, her solicitor will not be heard to complain that her former solicitor was decreed an excessive amount since the amount allowed concerned defendant alone who did not appeal. —Wagner v. Wagner, 132 Mich. 343.

§ 223. Errors separately affecting coparty.

Errors affecting party opposed in interest but involving party on same side with appellant, see ante § 222.

Joint and several assignments of error, see ante § 217.

Separation by assignment of error, see ante §§ 200, 209, ¶ 917.

¶ 972. An appellant cannot be heard to urge as a ground for reversing the decree the equities of codefendants who have not joined in the appeal.—Abbott v. Alsdorf, 19 Mich. 157; Oliver v. Shoemaker, 35 Mich. 464.

¶ 973. If only one of several joint parties appeals, only such questions as affect his interests can be considered on the appeal. —English v. Carney, 25 Mich. 178.

¶ 974. Where defendants to a bill in equity file different answers and only one appeals, a point made only in the answer of a nonappellant is not at issue in the appellate court.—Fairbairn v. Middlemiss, 47 Mich. 372.

¶ 975. A joint defendant solely served who stipulates for taking a deposition cannot assign as error the rejection of the deposition at the instance of the other defendant, who afterwards appeared.—French v. Canada Southern R. Co., 42 Mich. 64.

¶ 976. In a suit by a mortgagee of an undivided half interest of timber land to enjoin the co-owner from cutting timber, a codefendant cannot raise the question of the validity of the mortgage taken pro confesso as executed by a corporation defendant to secure the debt of an individual.— Collins v. Rea, 127 Mich. 273.

¶ 977. In an action against a railroad company and the Pullman Company for the death of a passenger by being thrown through the door of a vestibule between sleepers, the railroad company was not interested in the question of error in directing a verdict for the Pullman Company, as the verdict and judgment were not conclusive of the liability of the Pullman Company to the rail-

road company under the contract between them as to the use of sleepers.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

¶ 978. Assignments of error as to which the plaintiff in error is not concerned but which relate to a defendant against whom no judgment was taken, and who does not occupy the position of plaintiff in error will not be considered.—Bickle v. Jameson, 146 Mich. 483.

¶ 979. Claims of fraud, duress, and usury in the execution of instruments can be set up only by the party injured, are not assignable, and cannot be taken advantage of on appeal, by others than the injured party. —Schmidt v. Gaukler, 156 Mich. 243.

§ 224. Errors affecting infant or insane parties.

Duty of court to consider question on its own motion, see post § 258.
Decision of questions injurious to infants though not saved or presented on appeal, see post § 314.
Waiver as affecting error injurious to infant, see post § 225.

¶ 980. Courts are bound to consider the interests of infant legatees on an appeal from a construction of the will whether the infants have appealed or not.—Toms v. Williams, 41 Mich. 552.

§ 225. Waiver of error; stipulations.

Waiver of right to bring error or to appeal, see ante § 63.
Elimination of questions for review by concessions or stipulations, see post § 266.
Waiver of error in instructions by assigning error in inadequate verdict, see ante ¶ 942.
Assigning failure to follow charge as waiver of error in such charge, see ante ¶ 943.
Estoppel to urge error when based on the invitation, inaction or inconsistent action of the objector in the court below with respect to the error or ruling in question is really a phase of the doctrine that the error must be properly objected to in order to save it for review. The waiver of error by having chosen an inconsistent course of action below is also a phase of that doctrine. See full treatment in Saving Questions for Review.

¶ 981. Errors in an order that affect prejudicially the rights of infants, or that go to the jurisdiction of the court to make any such order, cannot be waived by consent.—Smith v. Smith, 13 Mich. 258.

¶ 982. Error lies to review a judgment of the circuit on appeal from a justice, claimed to have acquired no jurisdiction, though the plaintiff in error appeared specially in the circuit to question the jurisdiction, that not having constituted a waiver. —McCaslin v. Camp, 26 Mich. 390.

¶ 983. A bill of exceptions in a civil case can include no ruling made after verdict. Taking out a writ of error and filing a stay-bond cannot therefore be treated as a voluntary waiver of the right to relief for matters subsequent to the verdict.—Churchill v. Alpena Circuit Judge, 56 Mich. 536.

¶ 984. Where counsel for both parties at the conclusion of a case state that only questions of law are involved for determination by the court, they cannot complain upon appeal that questions of fact are involved. —Kyselka v. Northern Assur. Co. of Michigan, 194 Mich. 430.

¶ 985. Stipulations consolidating trials and regulating the mode of trial cannot be set aside on error.—Harris v. Sweetland, 48 Mich. 110.

¶ 986. The defendant cannot upon appeal complain of a provision in a decree suspending the operation of a perpetual injunction, upon the filing of a certain bond by the defendant, where the giving of the bond was optional and was voluntarily given by the defendant.—Decker v. Pierce, 191 Mich. 64.

§ 226. ——By omission to brief and argue point.

Jurisdictional errors, see also post ¶ 1054.
By failure of brief to point out portion of record containing objectionable matter, see also post § 235.
Points made for first time in supplemental brief or on oral argument, see post §§ 238, 239.

¶ 987. An assignment of error is supposed to be abandoned if not argued or otherwise insisted upon in the Supreme Court.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183; Roberts v. Wilkinson, 34 Mich. 129; Irwin v. Schlief, 48 Mich. 237; Estey Mfg. Co. v. Runnels, 55 Mich. 130; Shippy v. Village of Au Sable, 85 Mich. 280; Sullivan v. Hall, 86 Mich. 7; Lynch v. Craney, 95 Mich. 199; Graves v. City of Battle Creek, 95 Mich. 266; Ferguson v. Wilson, 122 Mich. 97; Carmer v. Hubbard, 123 Mich. 333; Hathaway v. Washington Milling Co., 139 Mich. 708; Shaw-Walker Co. v. Fitzsimons, 148 Mich. 626; Kincade v. Peck, 193 Mich. 207; Ward v. Carey, 200 Mich. 217.

¶ 988. Assignments of error not argued in the brief of plaintiff in error or referred to in the oral argument will be regarded as

waived though the brief states that they are not so waived.—Ashman v. Flint & P. M. R. Co., 90 Mich. 567.

¶ 989. Assignments of error that are not discussed in the brief will be treated as abandoned, notwithstanding the assertion therein that all of the assignments are relied upon.—Warnes v. Brubaker, 107 Mich. 440.

¶ 990. Under Sup. Ct. Rule 40 the Supreme Court will not notice errors not argued in the brief.—Lubbers v. Township of Manlius, 172 Mich. 387; Smith v. Michigan Realty & Construction Co., 175 Mich. 600; In re Warring's Estate, 196 Mich. 720; McGinnis v. McCarn, Id.

¶ 991. Failure to present brief precludes consideration of errors assigned by plaintiff in error.—Busch v. Fisher, 89 Mich. 192.

¶ 992. A question which is not raised in the trial court or in the original brief cannot be raised on appeal.—Lake Erie Land Co. v. Chilinski, 197 Mich. 214.

¶ 993. Where an assignment of error is sufficiently specific, it is waived by the failure of counsel to refer to it in their brief, under Supreme Court Rule 40.—Nissly v. Detroit, J. & C. Ry. Co., 168 Mich. 676.

¶ 994. Complaints in appellant's brief containing no argument will not be considered.—Greenman v. O'Riley, 144 Mich. 534.

¶ 995. An error which, though complained of in appellant's brief, is not argued, nor the ground on which it is based stated, will not be considered on appeal.—Eberts v. Detroit, Mt. C. & M. C. Ry., 151 Mich. 260.

¶ 996. Objections to rulings on evidence are considered on review as abandoned if the bill of exceptions does not show their basis and the briefs do not notice them.—Hurd v. Newton, 36 Mich. 35.

¶ 997. Assignments of error stated in the brief, but not argued by the appellant in the Supreme Court or supported by reasons will not be considered.—Walker v. Mack, 129 Mich. 527.

¶ 998. Where in a suit for personal injuries against a street railway, defendant on appeal relies for reversal on the erroneous instruction of the court with respect to the duty of the motorman in sounding the gong, but raises said point neither in its assignments of error nor in its brief, said point cannot be considered by the Supreme Court.—Nissly v. Detroit, J. & C. Ry. Co., 168 Mich. 676

¶ 999. Assignments of error based upon the improper admission of testimony but not argued will not be considered on appeal.—Bilakus v. Kelley, 200 Mich. 125.

¶ 1000. An assignment of error upon the admission of correspondence in relation to specified transactions will be disregarded, where a large number of letters were introduced, and those to which reference is had are not pointed out in the briefs of counsel.—Ranson v. Weston, 110 Mich. 240.

¶ 1001. Assigned error on a refusal to strike will not be considered if not discussed.—Priebisch v. Ottenwess, 176 Mich. 476.

¶ 1002. An assignment of error reading "the court further erred in refusing to charge the jury as requested by the plaintiff in 14 requests to charge, and erred in each several instance and as appears by the exception to such refusal" without being accompanied by argument and without pointing out in what the error consists will not be considered.—Pichler v. DeHate, 125 Mich. 247.

¶ 1003. In an action for the balance due on a land contract and for the amount of a promissory note alleged to have been given to the vendor by the purchaser upon receiving back a part of the original payment as a loan, the question of whether or not the payments extending over several years amount to a full satisfaction of the debt will not be determined on appeal in the absence of discussion and computation by counsel.—McLeod v. Hunt, 128 Mich. 124.

¶ 1004. The contention that the verdict is against the weight of evidence cannot be raised on error where such point is not made in the brief.—Williamson v. Hannan, 200 Mich. 658.

¶ 1005. Only such points as are made in the original brief of counsel can be considered by the court. So held where the original brief contained only eight pages with three points, and where, in a supplemental brief of forty pages, forty-five points were relied upon for reversal.—Black v. Dawson, 82 Mich. 485.

¶ 1006. A contention that the evidence in foreclosure proceedings shows the property to have been occupied by the mortgagor and his wife as a homestead, and therefore to be exempt from sale under a mortgage signed by the husband alone, will not be treated as abandoned because the discussion thereof is inadvertently omitted from defendant's original brief, if it is thereafter urged in a timely supplemental brief, and the omission explained.—Hammond v. Rathbone, 113 Mich. 499.

¶ 1007. Whether or not, when the capacity of a testator is assailed on the ground that he is a monomaniac, the competency of a nonexpert witness to express an opinion is determined by a different rule than that which is applied when testator's capacity is assailed on the ground of general incompetency, will not be considered where the contention is not urged in appellant's brief.—O'Dell v. Goff, 153 Mich. 643.

¶ 1008. Where an appellant makes several assignments of error, and then states in his brief that there is only one question before the court, the other assignments of error are thereby waived.—Rosenthal v. Rosenthal, 154 Mich. 533.

§ 227. ——By pleading over demurrer or plea.

¶ 1009. Where a plaintiff has taken advantage of a discretionary order permitting him to amend his declaration, and has not objected to the terms of the order, such terms cannot thereafter be made a ground of error.—Tupper v. Kilduff, 26 Mich. 394.

¶ 1010. Where a defendant does not elect to stand upon his demurrer, when overruled, but pleads issuably and goes to trial on the merits, an assignment of error on the overruling of the demurrer will not be considered.—Ashton v. Detroit City R. Co., 78 Mich. 587.

¶1011. Points raised by a plea in abatement will be waived unless the pleader stands upon his plea.—Steel v. Clinton Circuit Judge, 133 Mich. 695.

¶ 1012. The right to a review of an order overruling a demurrer to a plea in abatement to the special count of a declaration consisting of the common counts and such special count was waived, where the general issue had been pleaded without any indication that it was pleaded to the common counts only, and where the case went to trial under the general issue.—Griffin v. Wattles, 119 Mich. 346.

¶ 1013. Even though the right to a review of an order overruling a demurrer to a plea in abatement to a special count of a declaration consisting of the common counts and such special count, might not have been waived by the filing of a plea to the merits, the action of the defendant in having a default upon the special plea set aside on the ground that a plea to the merits was on file, was equivalent to a new plea to the merits to the special count.—Griffin v. Wattles, 119 Mich. 346.

¶ 1014. Cir. Ct. Rule No. 6, permitting the filing of a plea in abatement together with a plea to the merits, to the same count, does not permit a review of an order overruling a demurrer to a plea in abatement, after a trial upon the plea to the merits; as Rule 6 did not abrogate the common-law rule that rulings upon dilatory pleas cannot be reviewed when the defendant has subsequently pleaded.—Griffin v. Wattles, 119 Mich. 346.

§ 228. ——By remitting portion of verdict or judgment.

Remission imposed as condition of affirming, see post § 485.

¶ 1015. The amount of a judgment in excess of the ad damnum clause can be remitted even after error brought.—McCormick Harvesting Mach. Co. v. McKee, 51 Mich. 426.

¶ 1016. As to effect of indorsing down judgment after error brought, see Olcott v. Hanson, 12 Mich. 452.

¶ 1017. Where one who has recovered judgment in justice's court for more than $100 remits the excess to save a reversal and the case is nevertheless appealed, it cannot thereafter be claimed that plaintiff had released so much of the demand in suit as had been remitted.—Manistee Township School District No. 1 v. Cook, 47 Mich. 112.

¶ 1018. Where a plaintiff claiming damages for the wrongful removal of timber from land as to a portion of which his ownership was disputed remitted a portion of the damages claimed, corresponding to the amount taken from the disputed tract, errors committed by the trial court in rulings relating to the true boundary became immaterial.—Tuttle v. White, 49 Mich. 407.

¶ 1019. Remission upon the record, after error brought, of excess of judgment over ad damnum clause precludes complaint of such excess and cannot be objected to by plaintiff in error.—Hubbell v. Palmer, 76 Mich. 441.

§ 229. Waiver by coparty.

¶ 1020. Where two partners sued on a partnership account, employ the same counsel, who admits the liability of one of them at the trial, complaint cannot be made by the other of a direction of the court to the jury to find a verdict against his partner, in any event.—P. Hoffmaster Sons Co. v. Hodges, 154 Mich. 641.

§ 230. Estoppel to urge error.

Preclusion of question by estoppel, see also post ¶ 1300.
Preclusion to claim error on point settled by law of the case, see post XII, G.

Right to urge one's own error to support judgment, see ante § 221.
The doctrine of estoppel by act done on trial to claim error is a phase of the duty to save the error by proper and timely objection below, and is treated in Saving Questions for Review.

¶ 1021. A judgment rendered in favor of A. and B. against C., upon the award of arbitrators, on filing the same pursuant to the statute (R. S. 1838, p. 532, How. St., § 8481), will not be reversed on error on the ground that B. had no claim against C., he having joined with A. in executing the submission to arbitration of all matters arising out of a contract between A. and C., for the faithful performance of which contract by A. he was recited, in the submission, to be bound to A. by a separate instrument, and the award having been made in favor of both A. and B.—City of Detroit v. Jackson, 1 D. 106.

¶ 1022. Where the record fails to show the positions taken by counsel on the trial of a case in which the court directs a verdict in favor of defendant upon his own motion, defendant is not barred from raising in the Supreme Court the question of a variance between the declaration and the proofs.—Pennington v. Detroit, G. H. & M. R. Co., 90 Mich. 505.

¶ 1023. In an action for negligence, the only error alleged was that the court refused to direct a verdict for defendant. Upon oral argument counsel stated that a new trial was not desired, and if reversal could not be granted without new trial the error would be waived. The evidence did not affirmatively and conclusively show that there was no negligence. Held that, since if there was error upon the trial, a new trial would be granted, the error was waived and judgment was affirmed.—Strong v. Weber, 139 Mich. 512.

¶ 1024. Failure of complainant to appeal from a finding that a cross-complainant's demand was not barred as alleged is not conclusive that the full amount remains due on it, where the appealing cross-complainant seeking to enforce such demand has raised issues under the cross-complaint as to the amount due by alleging payments to toll the statute.—Carr v. Carr, 138 Mich. 396.

E. BRIEFS AND ORAL ARGUMENTS.

§ 231. Printing, style, filing, and service of briefs.

Substance of briefs as printed, statement, arguments, citations, etc., see post § 232 et seq.
Printing and indexing the record, see ante § 174.
Service of briefs as waiver of notice of appeal, see ante § 70, ¶ 312.
Dismissal for failure to print and serve briefs, see ante § 159.
Striking cause for want of proper briefs, see ante § 165.
Loss of brief from files as ground for rehearing, see post ¶ 538.
Rules respecting printing and indexing, see Sup. Ct. Rules 35, 36.
Service of copies of printed briefs, see Sup. Ct. Rule 41.
Filing copies of brief, and number to be filed, see Sup. Ct. Rule 42.

¶ 1025. The court cannot interfere with the printing of briefs by counsel, unless perhaps where it is manifest that the counsel has unnecessarily extended his brief for the express purpose of adding to the costs, which would be unlikely to happen in any case.—George W. Roby Lumber Co. v. Gray, 73 Mich. 363.

¶ 1026. Where a record and brief of plaintiff in error are printed and served at the same time, it is permissible to call attention to the clauses of the charge which are objected to by enclosing them in brackets, to which the assignments of error refer by numbers.—Dikeman v. Arnold, 83 Mich. 218.

§ 232. Statement of facts and points.

Mode of traversing facts stated in brief, see post § 233.
Making points for first time in supplemental brief, see post § 238.
Statement of points without argument as waiver of them, see ante § 226.
Necessity that errors be assigned, see ante VI, E.
Omission of statement of facts in opinion when not made in brief, see post § 488.

¶ 1027. A brief of an appellant not containing a statement of the errors relied upon, or of the questions involved or of the manner in which they were raised does not comply with Rule 40 of the Supreme Court.—Keenan v. City of Mt. Pleasant, 176 Mich. 620.

¶ 1028. Supreme Court Rule 40 relative to the requisites of printed briefs should be complied with, as obedience to the rule not only saves labor on the part of the court, but aids the court in apprehending the precise points which are involved and the appellant's contentions.—Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131.

¶ 1029. A statement of facts citing disconnected excerpts from the testimony is not a compliance with Supreme Court Rule 40.—Carby v. Combs, 166 Mich. 347.

¶ 1030. Where the errors relied on in a record are discovered in appellant's brief only after reading a general discussion preceding any reference to them, the rule of court requiring the brief to state such errors is violated.—Ruttle v. Foss, 161 Mich. 132.

¶ 1031. Where a brief merely states that the charge of the court "was prejudicial to the rights of defendants and not based on the testimony in the case," the Supreme Court will not review the charge in a search for possible errors.—McKerchey v. McIlvenna, 161 Mich. 57.

¶ 1032. A mere general statement in defendant's brief that the court declined to grant requested instructions will not be considered on appeal.—In re Johnson's Estate, 160 Mich. 585; Beecham v. Wetherbee, Id.

¶ 1033. For the plaintiff in error to urge an alleged error with a bare statement that a refusal to instruct was error, citing no authorities, and the defendant to ignore it in his brief, is condemned as needlessly adding to the labor of the court.—Gerardo v. Brush, 120 Mich. 406.

¶ 1034. The court will not search through a record to determine whether there was error in giving or refusing instructions unless specifically pointed out in the brief.—Thompson v. Citizens' St. Ry. Co., 125 Mich. 249.

¶ 1035. Where appellant in his brief on appeal fails to show, distinct from argument, a statement of the errors relied upon, the questions involved and the manner in which they are raised, as required by Supreme Court Rule 40, the court will not search the record to discover whether errors have been committed by the trial court in the trial of a case without a jury, in rendering its findings as it is for counsel to point out the errors claimed to have been committed in such manner that the Supreme Court may find particular exceptions well grounded and particular errors well assigned.—Couple-Gear Freight Wheel Co. v. Lake Shore & M. S. Ry. Co., 196 Mich. 429.

¶ 1036. The practice of mixing up fact with arguments and conclusions drawn from facts is criticized as in violation of Supreme Court Rule 40, which requires appellant in his statement of facts, and distinct from the argument, to state the errors upon which he relies, the questions involved and the manner in which they are raised.—Ferguson v. Wilson, 122 Mich. 97.

¶ 1037. Appellant's brief should comply with Rule 40 of the Supreme Court, and contain a statement of the errors relied upon, the question involved, and the manner in which it arose, distinct from the argument.—Gould v. Young, 143 Mich. 572.

¶ 1038. The statement of facts in a case does not comply with the requirements of Rule 40 where the same is not distinct from argument.—Reed v. McCready, 170 Mich. 532.

¶ 1039. Under Rule 40 of the Supreme Court, requiring the brief of an appellant to contain a concise statement of the facts of the case, distinct from argument, the rule is violated where the appellant's statement of facts is made up largely of quotations from and statements of the effect of the testimony of certain witnesses, accompanied by argument.—Wavle v. Michigan United Rys. Co., 170 Mich. 81.

¶ 1040. Sup. Ct. Rule 40 requires that the appellant's main brief contain, distinct from argument, a statement of the errors relied upon, the questions involved, and the manner of their being raised, so that the members of the court may at once be apprised of what is before them for decision other than being put to the necessity of searching the record for errors.—Couple-Gear Freight Wheel Co. v. Lake Shore & M. S. R. Co., 196 Mich. 429.

§ 233. Objections and contradiction of statement.

¶ 1041. Where appellant's statement of facts in a brief fully complies with Sup. Ct. Rule 40 with references to support the statement, appellee cannot make a statement from his point of view and leave the court to examine the record and both statements and determine which is correct, and in such case appellant's statement will be taken as correct.—Shinglemeyer v. Wright, 124 Mich. 230.

¶ 1042. Under Sup. Ct. Rule 40, requiring inaccuracies in the appellant's statement of facts to be specifically pointed out, it is better practice to so point them out in the beginning of appellee's brief; and to state at the opening of appellee's brief in general terms that the statement "is partial and incorrect," but since the facts are few that such inaccuracies "can be pointed out in the argument" and therefore need not be presented "here," comes short of the spirit of the rule.—Monger v. New Era Ass'n, 145 Mich. 683.

¶ 1043. Where no objection is made to the statement of the case by appellant in his brief, it will be taken as correct, although counsel for appellee also made a statement.—Cobe v. Summers, 143 Mich. 117.

¶ 1044. A statement of facts made by an appellant in its brief will be considered by the Supreme Court as sufficient and accurate

where the appellee has not pointed out anything to the contrary, as provided by Rule 40 of the Supreme Court.—Chase v. Michigan United Rys. Co., 165 Mich. 493.

¶ 1045. Where, instead of pointing out errors in appellant's statement of facts, appellee's statement is entirely distinct and raises questions not involved in appellant's statement, only the questions raised by the statement in appellant's brief will be considered.—Haden v. Closser, 153 Mich. 182.

¶ 1046. Under the Supreme Court Rule 40 the appellant's statement of fact will be followed where the appellee does not show there has been a misstatement, and new statement of facts by the appellee will be disregarded.—Berry v. Harbor Springs Ry. Co., 173 Mich. 181.

¶ 1047. Where prospectuses, which are the basis of an action for fraudulent sale of corporate stock, are not printed in the record, and the appellant, in his statement of facts, declares that they contain no representations of existing facts, but only expressions of intentions or opinions, and this statement is not amended or excepted to in appellee's brief, the statement in appellant's brief, will, under Supreme Court Rule 40, be accepted as true.—Bartholomew v. Walsh, 191 Mich. 252.

§ 234. Arguments and citations of authorities.

Intermingling statement and argument, see also ante § 232.

Failure to argue point as waiver of it, see ante § 226.

Dismissal for failure to argue cause, see ante § 160.

Restriction of review to the errors argued, see post § 312.

Right to pass on questions argued but not answered by opposing brief, see post § 313.

Concessions in argument as making decision unnecessary on particular points, see post § 266.

Duty to affirm on the issues though appellee refrains from argument, see post § 476, ¶ 2125.

New points as ground for rehearing, see post § 539.

Exclusion of arguments to the merits on motion for rehearing, see post § 547.

Costs for undue prolixity, see Costs, V.

Substance and contents of printed briefs, and mode of questioning same, see Sup. Ct. Rule 40.

Arguments and briefs on motions, see Sup. Ct. Rules 27, 30.

¶ 1048. Under former Supreme Court Rule 61, which requires the errors relied upon to be argued in the brief of plaintiff in error, that in which the error is claimed to consist should at least be pointed out, and it is not sufficient to say, in support of assignments relating to the charge of the court, that all of said assignments are well taken, and that the instructions upon which error has been assigned tended to mislead and did mislead the jury, as the verdict shows.—Mason v. Partrick, 100 Mich. 577.

¶ 1049. Where counsel for the plaintiff in error devote the major portion of their brief to the discussion of the main question involved in the case, and simply refer, without discussion, to the remaining questions, the court is not called upon to elaborate upon such latter questions.—French v. Ryan, 104 Mich. 625.

¶ 1050. Counsel must cite Michigan cases by the regular reports where such cases have been officially reported.—Webber v. Hayes, 117 Mich. 256.

¶ 1051. Citations of cases in the briefs should be to the official Michigan reports, wherever possible, and not to such cases as reported in other publications.—People v. Jamieson, 124 Mich. 164.

¶ 1052. The practice of citing cases in briefs without giving the names of parties is confusing and in violation of the rules.—Schulte v. Kelly, 124 Mich. 330.

§ 235. References to and quotation of record.

Connecting assignments with matter in record by citation, see ante §§ 211-213.

¶ 1053. Briefs making a contention of fact as shown by the evidence should refer to the pages of the record where the fact appears, and it should also appear that the bill of exceptions contains all the evidence on that subject.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

¶ 1054. A decree may be reversed on appeal for jurisdictional defects, notwithstanding they are not pointed out on the argument.—Smith v. Smith, 13 Mich. 258.

¶ 1055. Where error is assigned upon the exclusion of evidence, attention should be called to the exception taken to the ruling complained of by citing the page of the record where it may be found, unless exceptions are indexed under Supreme Court Rule 61 (New Rule 36).—Dake Engine Mfg. Co. v. Hurley, 99 Mich. 16.

¶ 1056. Assignments of error upon the admissibility of testimony will not be considered where no reference is made, either in the assignments or in the brief, to the pages of the record, an examination of which is necessary to the investigation of the questions raised.—Zimmerman Mfg. Co. v. Dolph, 104 Mich. 281.

¶ 1057. A contention that the court erred in instructing the jury that there was no evidence upon a certain branch of the case will not be considered unless the testimony in the record which is claimed to controvert the statement of the court is pointed out.—Rogers v. Ferris, 107 Mich. 126.

¶ 1058. Upon the review of a case involving the validity of tax deeds covering taxes for several years, the briefs of counsel should carefully collate the statutes and decisions applicable to each point raised, and contain references to the testimony, objections, rulings, and exceptions.—Hoffman v. Pack Woods & Co., 114 Mich. 1.

¶ 1059. Conduct of counsel in asking of a defendant why a witness was not brought to court will not be considered if neither in the brief nor in the assignments any reference is made to the record.—Bowen v. Chandler, 172 Mich. 678.

¶ 1060. Improper conduct on the part of the attorney for an interurban railroad in interrupting counsel for plaintiff during the examination of plaintiff on the question of his injuries received as the result of being thrown from defendant's car and in making improper comments during the course of such examination will not be deemed to be reversible error where either side might have been prejudiced as much as the other, although a verdict in favor of the defendant is returned, where counsel for the plaintiff does not point out any particular conduct, ruling, or failure to rule which can be said to be reversible error.—McKenzie v. Detroit, J. & C. Ry. Co., 195 Mich. 218.

¶ 1060a. An objection that a charge gave an improper measure of damages cannot be considered, where plaintiff's counsel does not advise the Supreme Court as to what he deems the proper measure of damages.—Brown v. Spiegel, 167 Mich. 645.

§ 236. References to extrinsic matters.

Attaching photographs to brief, see post ¶ 1116.

¶ 1061. A weather report dated one year after the trial of a case and not a part of the bill of exceptions has no place in the brief, and will not be considered by the court.—Monyhan v. Detroit & Saline Plank-Road Co., 129 Mich. 549.

¶ 1062. Where parties stipulate that the evidence taken in another case involving the same subject-matter shall apply in the case at bar where competent, they may freely refer to the record of said other case in arguing an appeal.—Backus v. Killmaster, 162 Mich. 594.

¶ 1063. A brief in which, in commenting on the conflict in the testimony of the opposing attorneys who tried the case in the court below, the court is asked to go outside the record and inquire as to their character and standing by consulting a law directory, and which sets out their respective ratings as contained in such directory, is improper, and such matter should be stricken out.—Sellers v. Perry, 191 Mich. 619.

§ 237. Impertinence and acrimony.

Intemperate or disrespectful language as contempt, see Contempt.

¶ 1064. It is contrary to professional ethics for counsel in the brief to make vituperative attacks on the motives of the trial judge in making rulings complained of, and to charge that the judge was "gunning for game on his own account" and had committed a "wanton prostitution" of his office.—Blumeno v. Grand Rapids & I. R. Co., 101 Mich. 325.

¶ 1065. In error to a judgment for complainant in a summary proceeding to reverse it because it was brought pending garnishment of the tenant by a creditor of the landlord, it is not proper to make comments in the brief about the oppressiveness of forcing litigation of the landlord's claim of exemption indirectly by such a summary proceeding where such comment has no helpful bearing on the sole question of law whether a summary proceeding will lie pending garnishment.—O'Connor v. White, 124 Mich. 22.

¶ 1066. Strictures in the brief upon the trial judge which are unwarranted by the record are to be strongly condemned.—Henrich v. Saier, 124 Mich. 86.

¶ 1067. While due allowance will be made for partisanship of counsel, the administration of justice is not aided by the use of acrimonious language in briefs.—Feldkemp v. Ernst, 177 Mich. 550.

§ 238. Additional and supplemental briefs.

See also ¶ 1075.

¶ 1068. A point mentioned for the first time in a supplemental brief need not be considered on appeal.—Hart v. Doyle, 128 Mich. 257.

¶ 1069. Questions first raised in the supplemental brief will not be considered.—Foster v. East Jordan Lumber Co., 141 Mich. 316; Lewis v. Jacobs, 153 Mich. 664.

¶ 1070. A question not raised in the original brief cannot be brought in by the supplemental brief.—Anketell v. Hayward, 1 Mich. 525.

¶ 1071. The ground for reversal stated in appellant's original brief is the only ground to be considered upon appeal.—South Arm Lumber Co. v. Silverthorne, 138 Mich. 465.

¶ 1072. Under Sup. Ct. Rule 40, which provides that the original brief shall contain a statement of the errors upon which counsel rely, only such points as counsel make and rely upon in the original brief will be considered in disposing of the appeal.—People, for use of Cook, v. Cole, 139 Mich. 312.

¶ 1073. Where the original brief was filed August 1st, and a reply brief August 29th, a new point, first set up in a supplemental brief filed November 7th, with the explanation that "The feature of the law now to be suggested did not occur to us before," might be disposed of by refusing to consider it because not made earlier.—Bartle v. Houghton County St. R. Co., 132 Mich. 290.

§ 239. Oral argument and reargument.

Waiver of errors by omission from original brief, see also ante § 226.
Rehearing of cause after decision, see post XIV.
Right to oral argument in calendar causes, see Jud. Act, Chap. I, § 5; Comp. L. 1915, § 12010.
Argument of counsel on request of counsel or court, see Jud. Act, Chap. I, § 11; Comp. L. 1915, § 12016.
Submission without argument, see Sup. Ct. Rules 45, 47.
Time allowable for oral argument, see Sup. Ct. Rule 46.
Necessity of reargument to decide on material points not argued, see Jud. Act, Chap. I, § 11; Comp. L. 1915, § 12016.

¶ 1074. Calling the attention of the court in the oral argument, to a part of the general charge of the trial judge, brings up no question for review where the record fails to show the taking of an assignment of error.—Perry v. Detroit United Ry., 135 Mich. 515.

¶ 1075. The Supreme Court will not consider questions raised for the first time on oral argument, and in a supplemental brief, but will limit its review to questions determined by the court and raised by counsel in the original brief.—Escanaba Timber Land Co. v. Rusch, 147 Mich. 619; writ of error dismissed in 214 U. S. 528, 53 L. ed. 1069, 29 Sup. Ct. Rep. 693.

F. AMENDMENTS AND ADDITIONAL RECORDS, PAPERS AND EVIDENCE.

§ 240. In general; power to allow amendment or additions.

Sending record back for correction or amendment, see ante § 118.
New proofs or evidence as ground for rehearing, see post § 542.
Amendments and additional assignments of error, see ante § 124.
Power to call for oral testimony in Supreme Court, see Jud. Act, Chap. I, § 29; Comp. L. 1915, § 12034.
Procedure for discovery of books, etc., see Jud. Act, Chap. I, §§ 17-22; Comp. L. 1915, §§ 12022-12027.

¶ 1076. The general power of the Supreme Court to allow amendments to the record for the purpose of correcting mistakes, and errors of haste and inadvertence, considered.—Farrand v. Bentley, 6 Mich. 281.

¶ 1077. The Supreme Court has no authority to amend the record sent up on error, but it may, in a proper case, compel correction by the court below.—Sweetzer v. Mead, 5 Mich. 33; Scribner v. Gay, 5 Mich. 511; Evans v. Norris, 6 Mich. 69.

¶ 1078. The Supreme Court has no power, after hearing, to correct, on its own motion, errors in the record.—People v. Grand Rapids & W. Plank-Road Co., 64 Mich. 618.

¶ 1079. Leave to amend the pleadings can be granted only by the court below.—Bank of Michigan v. Niles, W. 398.

§ 241. Additional testimony under Water Craft Act.

Dismissal for irregularity in taking proofs on appeal, see ante § 161.
Taking additional testimony in water craft cases on appeal, see Sup. Ct. Rule 57.

¶ 1080. Supreme Court Rule 57 requires that an appellant desiring to take additional testimony must give notice to the other party within ten days after the filing of the return. Held, that the failure to comply with this rule is waived where the other party appears and participates in the taking of depositions.—Detroit Lumber Co. v. The Petrel, 163 Mich. 245.

§ 242. Application to amend.

¶ 1081. The proper practice when such an amendment is desired is to apply to the Supreme Court, on affidavit showing the reasons for the amendment, to remit the record for that purpose; and the court can then judge whether the case is a proper one to prevent an amendment with a view to affect proceedings already taken in the Supreme Court.—O'Flynn v. Holmes, 7 Mich. 454.

¶ 1082. Where, six months after errors had been assigned in the Supreme Court, the defendant in error obtained, without leave from the Supreme Court, an amendment to

the record in the court below, with a view to obviate the errors assigned, and then moved the Supreme Court for an order for a further return to bring up the amendment, it was held that the application was too late. —O'Flynn v. Holmes, 7 Mich. 454.

¶ 1083. Where, after error assigned in this court, defendant in error without leave of this court obtained an amendment to the record in the court below with a view to correct the error assigned, this court refused to amend the transcript to make it correspond with the amended record, nor would it award a certiorari to bring up the amendments; but under the circumstances of the case defendant in error was allowed to make a new application below for leave to amend, with leave to plaintiff in error to discontinue at the cost of defendant.—O'Flynn v. Eagle, 8 Mich. 136.

¶ 1084. A motion to amend the return comes too late if made after the cause is on hearing, and six months after the defect was known to the party who claims to have been prejudiced by it.—Verplank v. Hall, 21 Mich. 469,rehearing denied, 22 Mich. 80.

¶ 1085. Where a petition was presented for leave to amend, by inserting additional facts, after a decree sustaining a demurrer to the bill had been affirmed by the Supreme Court on the same reasons which had governed in chancery, leave was refused.—Bank of Michigan v. Niles, W. 398.

§ 243. Propriety of sending back the record.

Return of record for additions or amendments, see ante § 118.

¶ 1086. Though the court may, on a proper showing, compel bills of exceptions to be corrected so as to conform to the facts, it will not do so until it is shown that mistakes exist which are injurious to the party applying for the correction.—Scribner v. Gay, 5 Mich. 511.

¶ 1087. Where the judge who signed the bill of exceptions had since gone out of office, it was not remanded for correction.—Scribner v. Gay, 5 Mich. 511.

¶ 1088. Where a circuit judge omits to include in the bill of exceptions matter believed by appellant to be material, and exception to such course is taken by appellant, but the latter causes the bill of exceptions to be settled and signed by the judge, to be printed, and the record to be filed in the Supreme Court, said appellant is not entitled to have the record remanded for amendment, since it was his duty to make a motion in the court below that the bill be amended in the desired particulars, in order that action of the trial court in denying said motion might be reviewed in the Supreme Court by mandamus.—McIntire v. Carr, 168 Mich. 462.

§ 244. Compelling amendment or correction.

¶ 1089. Correction of the bill to include all the evidence bearing on a refusal to charge that there is no evidence tending to proof of a given issue, may be compelled by mandamus.—People ex rel. Crane v. Wayne Circuit Judge, 24 Mich. 513.

¶ 1090. A plaintiff in error who has delayed making his application until after the lapse of one term from the filing of the bill of exceptions, and has, in the meantime, filed assignments of error to the bill as settled, has thereby waived his right to mandamus to compel an amendment of the bill of exceptions.—People ex rel. Fowler v. Manistee Circuit Judge, 31 Mich. 72.

§ 245. Form and manner of amendment.

¶ 1091. The original files should not be altered even by the consent of the parties. If an addition is desired, it should be by stipulation, or other separate paper, without changing the original.—Farrand v. Collins Iron Co., 8 Mich. 136.

¶ 1092. An assignment of error based upon the refusal to give certain requests to charge is not available, where the requests appear to have been added to the bill of exceptions without authority, and are not certified to by the court.—People v. Macard, 109 Mich. 623.

¶ 1093. Where a so-called judgment contained purported findings but the record showed no request for findings and no exceptions, held that such record was not amendable on appeal by an offer to supply stated proposed findings and exceptions said to have been furnished to the court subsequently to the judgment.—Federal Audit Co. v. Sawyer, 196 Mich. 566.

¶ 1094. In a proceeding in equity to which a mortgagee was a party and wherein he sought payment of his mortgage, the omission to introduce the note below, was remedied by its being filed in the Supreme Court with an affidavit explaining why it was not introduced below and by the admission in the mortgagor's answer that the amount was due and unpaid. Proof of the amount due is thereby supplied.—Van Vleck v. Conklin, 123 Mich. 442.

§ 246. Amendable matters.

Amendments to show matters improperly returned under certificate, see also ante ¶ 701.

¶ 1095. The Supreme Court may permit a bill of foreclosure, filed to enforce void securities, to be so amended after the hearing as to ask for an accounting for the debt.—Burton v. Schildbach, 45 Mich. 504.

¶ 1096. Where return has been made to a chancery appeal, the Supreme Court having obtained jurisdiction will give opportunity to make good such defects as were not due to appellant's negligence; and if the transcript has not been signed, it will allow the filing of a certificate from the trial judge that the case was settled and that the proofs are correct.—Gram v. Wasey, 45 Mich. 223.

¶ 1097. Where defendants, in a bill to remove cloud from title, have not been prejudiced or surprised, an amendment may be granted in the Supreme Court on appeal to make the description of the land conform to the proofs, e. g., where the land is described in the bill as a "sand-bar" or "a piece of middle-ground" and the proofs show it to be an island.—Butler v. Grand Rapids & I. R. Co., 85 Mich. 246, affirmed in 159 U. S. 87, 40 L. ed. 85, 15 Sup. Ct. Rep. 991.

¶ 1098. The record in an action on an executor's bond which had been prosecuted to judgment in name of probate judge for use of a contingent residuary legatee, who had no definite interest, was amended in Supreme Court so as to show administrator as party in interest.—Cranson v. Wilsey, 71 Mich. 356.

¶ 1099. An amendment of the declaration in regard to the character in which plaintiff sues will not be allowed in the Supreme Court when, the amount due not being conceded, the case cannot be disposed of upon the merits in that court.—Wheeler v. Stewart, 94 Mich. 445.

¶ 1100. An amendment to an answer permitting defendants to aver estoppel will be allowed even on appeal under the circumstances of the suit.—Union Trust Co. v. Detroit & R. St. C. Ry., 127 Mich. 252.

¶ 1101. Amendment of a bill for specific performance making a radically different case from that presented to the lower court, is not permitted on appeal.—Lewandowski v. Althouse, 136 Mich. 631.

¶ 1102. In a suit in equity by a township to enforce rights relative to a cemetery, where an objection that the board of health should have been joined, is first made on appeal, the absent party may be brought in by amendment, if necessary.—Township of Oneida v. Allen, 137 Mich. 224.

¶ 1103. The lower court refused to sign the plaintiff's bill of exceptions except upon his agreement to attach thereto a certain Exhibit D which the court understood to embody a certain bill of sale. Exhibit D as attached to the bill of exceptions did not contain said bill of sale. Held, defendant's motion to amend the bill of exceptions by adding the bill of sale should be allowed.—Suchocki v. Calumet Ins. Co. 158 Mich. 62.

¶ 1104. A bill of exceptions cannot be revised on error to meet a conflict with the stenographer's minutes.—Bates v. Kitchel, 166 Mich. 695.

¶ 1105. It is within the power of the Supreme Court to permit amendment of pleadings to conform with the testimony where the subject is related and has been fully gone into and there is no claim of surprise.—Atkinson v. Akin, 197 Mich. 289.

¶ 1106. In an action to recover damages for injuries alleged in the declaration to have been due to certain negligent acts of the defendant, where the proof showed that such injuries were due to certain other negligent acts of the defendant, and the court charged the jury that the only negligence to be considered by them was that alleged in the declaration, resulting in a verdict for the defendant, and plaintiff made no motion in the trial court to amend the declaration, held that amendment was not allowable on writ of error under Comp. Laws 1897, § 10273, How. 2nd Ed., § 12974, providing for amendments to cure omissions, imperfections, variances and defects not against the right and justice of the matter of the suit and not altering the issue between the parties or the trial.—Johnson v. Muskegon County, 195 Mich. 722.

¶ 1107. Where there is a variance between the bill and the proof in a suit for specific performance of an agreement for a lease an amendment to the bill setting out the oral agreement so as to correspond with the proof may be made on appeal, although the question of variance is first raised on appeal.—Charlet v. Teakle, 197 Mich. 426.

§ 247. Counter amendments and additions.

¶ 1108. In a suit to remove a cloud on title consisting of a deed made to the defendant upon an execution sale where the complainant is permitted to amend his bill by alleging that the defendant has taken no steps to determine the rights and equity of the judgment debtor under Comp. L. 1897, § 9167, defendant was allowed, upon appeal, twenty days within which to file in the Supreme Court a certified copy of proceedings taken in pursuance of the act, in default of which, a decree for the complainant will be affirmed.—Kunze v. Solomon, 126 Mich. 290.

§ 248. Stipulations and consents.

Exclusion of extraneous writings and stipulations on review, see post § 285.

¶ 1109. The court will not, by consent of parties, treat that as a part of a bill of exceptions which is not actually incorporated therein by the judge who settled the same.—Niagara Fire Ins. Co. v. De Graff, 12 Mich. 10; Wessels v. Beeman, 66 Mich. 343; and see People ex rel. Dickinson v. Sackett, 14 Mich. 243.

¶ 1110. New facts cannot—even by stipulation—be introduced into the record on appeal.—King v. Carpenter, 37 Mich. 363.

¶ 1111. The record as sent up cannot be amended by stipulation of counsel.—McDonald v. Lewis, 42 Mich. 135.

¶ 1112. The record on appeal to the Supreme Court is the matter duly certified, and it cannot be amended by stipulation of counsel.—Rabior v. Kelley, 194 Mich. 107.

§ 249. Affidavits and documents supplementary to record.

Effect of certificate of clerk accompanying record of judgment on certiorari to justice, see post ¶ 1227.

Affidavit and showing on motions, see ante § 166.

Affidavits on rehearing, see post § 548.

Depositions to bring in excluded testimony, see Jud. Act, Chap. XVII, § 5: Comp. L. 1915.

¶ 1113. The Supreme Court has no power to allow the appellant to supply, by a sworn copy, a paper discovered, after the appeal, to have been lost from the files of the court below. But it seems that the court below would have power even after the appeal, to supply the paper in order to give effect to the appeal.—Sears v. Schwarz, 1 D. 504.

¶ 1114. On the hearing of an equity cause the Supreme Court will not allow affidavits to be read to supply alleged defects in the return as to the merits of the controversy.—Verplank v. Hall, 21 Mich. 469; rehearing denied, 22 Mich. 80.

¶ 1115. The affidavit of counsel as to what is shown by the tax return roll, it not being returned on certiorari to a judgment of the justice and error to the judgment of the circuit court thereon, cannot be regarded to sustain an assignment of error that such roll showed on its face that the village treasurer had no authority to institute the action for delinquent personal taxes.—Village of Wayne v. Goldsmith, 141 Mich. 528.

¶ 1116. Photographs attached to the brief, but not submitted in the court below, will not be considered on appeal.—Carley v. Jennings, 131 Mich. 385.

§ 250. Return of amendments and additions.

¶ 1117. Where an amendment has been made in the court below since the cause was removed to the Supreme Court by writ of error, but no further return has been made, the court cannot entertain a motion based upon such amendment on an affidavit that such an amendment has been made.—O'Flynn v. Eagle, 7 Mich. 306.

XII. REVIEW AND CONSIDERATION OF CAUSE BY COURT.

A. HEARING AND GENERAL NATURE OF REVIEW.

§ 251. Hearing and scope in general.

To be reviewable the action or suit must be one which by law is the subject of a writ of error or of an appeal as a chancery cause, and the judgment or decree must have been "final" and not merely interlocutory. This, however, goes to the right of review and the character of judgment which is reviewable, and has been treated, ante I, III.

In order that the case may be reviewed there must be a sufficient record to show the judgment below and the errors complained of with the objections, rulings thereon, and evidence material to the decision of each question. For the sufficiency of such record, see ante XI, A, B.

Being revisory in its object an appeal or error does not reach any errors but those pertinent to the judgment or decree under review, which must appear by the record and bill or case, and be presented for consideration by proper objections, exceptions and argument. As to these restrictive rules of review, see post XII, B.

Adherence to theory of case, see post §§ 267-270.

Unnecessary questions, see post §§ 261-266.

Consideration of matters tending to sustain judgment, see post § 316.

Review of record alone where exceptions are lacking, see post §§ 319-321.

A further restrictive principle is that error will not be presumed, and hence the record must be read and considered subject to that presumption and the intendments will be so taken as to sustain the judgment or decree. This principle is treated post XII, C.

Decisions based on the discretion of the lower court in a matter within its discretion are legally correct, if the discretion was not abused; and hence the review is not extended to disturb such decisions. See post XII, D.

Nature of the decision on review, see post XIII.

Dismissal or other disposal of case before hearing without examination of questions presented, see ante X.

Rehearings, see post XIV.

Avoidance of merits on motions, see ante § 168.
Scope of rehearing, see post § 548.
Issues open on motion for rehearing, see post § 547.
Notice for hearing, calendaring and striking from calendar, see ante VIII.
Hearing as waiver of notice of appeal, see ante § 70.
Consolidation of causes, see ante § 141.
Hearing motion and cause together, see ante § 166.
Briefs and argument on hearing, see ante XI, E.
Scope of review on appeals from probate, see Probate Courts, III.
Precedents as rules of decision, see Courts, IV.
Federal or state decisions as controlling precedents, see Courts, IV.
Quorum of Supreme Court, see Jud. Act, Chap. I, § 5; Comp. L. 1915, § 12010.
Terms for hearing, and putting undecided causes over to next term, see Jud. Act, Chap. I, § 5; Comp. L. 1915, § 12010.

¶ 1118. A chancery appeal and a separate proceeding in an action at law brought up by writ of error, cannot be consolidated and heard together.—Stevens v. Stevens, 181 Mich. 449.

§ 252. ——In appeal cases.

The review of the evidence on appeals is on the whole record with the object of making such decree as the chancellor should have made on the evidence shown in the record. As to the review of the conclusions of fact found by the chancellor, see post XII, E, 1.
Restriction to record, see generally post § 272.
Trial de novo, see post XII, H.
Review of discretionary orders, see post XII, D.
Consolidation of law and equity hearings, see ante ¶ 1118.

¶ 1119. The Supreme Court in appeal cases follows principally the practice of the English House of Lords.—Ryerson v. Eldred, 18 Mich. 490.

§ 253. ——On writ of error.

When error is proper remedy, see ante I.
The object of the writ being to reach errors of law and not of fact, unless the sufficiency of facts is presented as a question of law, the sufficiency of the evidence adduced on trial to sustain the verdict or findings of fact is not primarily open to review. The decision of the jury or the trial judge on the facts, accordingly will be examined only to see if the same is legally supported by the evidence. See post XII, E, 2.
Jurisdiction over errors of fact, see also ante ¶ 50.
Orders based on discretion, see post XII, D.
Restriction to record, see generally post § 273.
On error to judgments on appeal or certiorari from justice or probate court, see also post §§ 458, 459.
See also cross-references, ante § 251.

¶ 1120. The Supreme Court reviews judgments in law cases upon questions of law only.—De Mill v. Moffat, 45 Mich. 410.

¶ 1121. Error of fact, e. g., the death of one of the defendants before the suit was brought, may be assigned in the Supreme Court on the common writ of error.—Teller v. Wetherell, 6 Mich. 46.

§ 254. ——On case made.

What matters reviewable, see ante § 5.
Review of findings, see post § 463.
Restriction to record, see generally post § 276.

¶ 1122. The act of 1851, p. 311, which was repealed in 1853, did not intend that parties to suits in circuit courts should be at liberty to have a case at law reheard in the Supreme Court upon the merits, like an appeal in chancery. The court was to judge of the case as if it were an application for a new trial, and to ascertain from an inspection of the whole case whether the circuit judge manifestly erred, either in his conclusions upon the facts, or in respect to the law applicable to them.—Hill v. Lafayette Ins. Co., 2 Mich. 476.

¶ 1123. Only those questions are before the Supreme Court which appear to have been passed upon by the court below.—Van Kleek v. Eggleston, 7 Mich. 511.

¶ 1124. Under Comp. L. 1857, § 3421, How. St., § 6469, other questions of law besides those arising upon the evidence may be reviewed on case made.—Sallee v. Ireland, 9 Mich. 154.

§ 255. Nature of error; law or fact.

Generally a decision of fact on the effect or sufficiency of the evidence will not be reviewed, since the decision below is conclusive in an action at law, unless by a proper objection and exception the sufficiency has been made a question of law and ruled on as such. As to such matters, see post XII, E.
In chancery appeals, where the trial is de novo on the record, it will be reviewed accordingly. See post XII, H, and also post XII, E.
Construction of findings as of fact or law, see post § 336, and see also Verdicts and Findings.
What are law and what fact questions, see generally Trial, VI, and see specific topics treating of the subject-matter of the question.

¶ 1125. There is an error of law where findings are not supported by evidence or are contrary to the undisputed testimony.—In re Hoffman's Estate, 183 Mich. 67.

¶ 1126. If a fact is not found, or found but not supported by evidence necessary to sustain a judgment, it is an error of law.—In re Hoffman's Estate, 183 Mich. 67.

¶ 1127. Whether stipulated facts support a judgment rendered thereon is open to review when properly assigned as error.—Kooman v. De Jonge, 186 Mich. 292.

§ 256. Matters not considered or ruled on below.

General rule that question must be presented on trial and ruled on to make reviewable point, see Saving Questions for Review.
Restriction of review to matters tried and determined, see post § 289.
Questions affecting infants, see post § 258.

¶ 1128. Error cannot be based upon the legal positions taken in the argument of counsel unless the trial court adopted them.—Beauchamp v. Saginaw Min. Co., 50 Mich. 168.

¶ 1129. No question can arise in the Supreme Court upon a point of law not passed upon in the finding of the court below.—Just v. Township of Wise, 42 Mich. 573.

¶ 1130. The Supreme Court is limited to reviewing rulings of the trial court on such questions of law as were distinctly presented and passed upon.—Chatterton v. Parrott, 46 Mich. 432.

¶ 1131. Upon a directed verdict for the plaintiff in an action on an insurance policy, the question of the amount of damages will not be decided on appeal where the trial court asked counsel to say whether there was any dispute on this question and received no definite answer.—Lord v. National Protective Society, 134 Mich. 357.

¶ 1132. Under a stipulation and record and the opinion and finding of the trial court in assumpsit to recover personal property tax from which the court concluded that the sole question before the court was whether the assessment being to an individual, instead of the corporation defendant, the assessment roll was conclusive, the question whether the finding and judgment were erroneous because plaintiff did not show that the necessary proceedings for equalization, apportionment, assessment, etc., were had, was not open for review.—City of Menominee v. S. K. Martin Lumber Co., 119 Mich. 201.

¶ 1133. Where the trial court did not in its findings pass upon certain questions urged on appeal for the reason same had been eliminated by concessions of counsel, held that such questions would not be open for consideration on such appeal.—In re Reh's Estate, 196 Mich. 210.

¶ 1133a. A decree of the trial court will not be disturbed on appeal for equities or facts arising after its rendition.—Slote v. Constantine Hydraulic Co., 182 Mich. 260.

§ 257. Questions raised on court's motion.

Questions affecting infants, see post § 258.

¶ 1134. A point made by the Supreme Court on its own motion, pursuant to Comp. L. 1897, § 193, may be considered though not raised or passed on below, if the record has all of the facts necessary to such consideration.—Auditor General v. Bolt, 147 Mich. 283. [Distinguishing Gadd v. City of Detroit, 142 Mich. 683, where requisite testimony was not shown by the record to have been sent up.]

§ 258. Questions affecting infants.

Consideration without complaint from infants, see also ante § 224.
Passing on questions though not saved or presented, see post § 314.

¶ 1135. The interests of nonappellant infant legatees must be considered on appeal from construction of will.—Toms v. Williams, 41 Mich. 552.

§ 259. Moot questions.

Dismissal or affirmance on hearing for want of reviewable question or substantial grievance, see post §§ 480, 481.
Dismissal on satisfaction of judgment or decree, see ante § 162.

¶ 1136. Where a decree has been entered declaring certain liens against a building, and an appeal is taken on a stipulation of facts that the contractor had agreed with the lessees to offset the cost of construction with a debt owing from him to them, and there is evidence denying such agreement, and no evidence to the contrary, such appeal is on a moot question and will not be considered.—Pittsburg Plate Glass Co. v. Charles Klein Co., 177 Mich. 399.

¶ 1137. The question whether an officer of a corporation is rightfully holding his office becomes a moot question which will not be determined on appeal in a quo warranto

proceeding where, after a judgment of ouster and pending appeal, the respondent is legally elected as an officer of the corporation, and the case will be dismissed where no other questions are involved.—Brown v. Lawrence, 197 Mich. 178.

§ 260. Questions made by consent.

Stipulation to limit jurisdiction or fix principles of decision, see ante § 12, ¶ 60.

¶ 1138. The parties cannot, by stipulation, confer on the Supreme Court jurisdiction to review, on case made, findings on the weight of evidence.—Schmidt v. Miller, 22 Mich. 278.

§ 261. Unnecessary questions.

See also post §§ 262-266.

Moot questions, see ante § 259.

Questions not considered below, see ante § 256.

Omission of discussion in opinion, see post § 487.

¶ 1138a. Where the state of the case is such that the contention is speculative, and no rights of the parties can be changed, it is not incumbent on the court to formulate opinions.—People v. Leavitt, 41 Mich. 470.

¶ 1138b. The Supreme Court is not inclined to express its opinion on questions in the record that are not necessary to a final determination of the case.—Phillips v. Village of Kalamazoo, 53 Mich. 33.

¶ 1139. Irregularities in receiving a verdict were not considered on review where the case had to go back for a new trial anyway, and it was unlikely that the same questions would again arise.—Petrie v. Lane, 58 Mich. 527.

¶ 1140. An unnecessary question need not be considered where reversal must be ordered on other grounds and the question may be eliminated on the new trial.—Williams v. Bresnahan, 66 Mich. 634.

¶ 1141. On reversal for error other errors not likely to occur in a new trial will not be discussed by the court.—Leach v. Detroit Elec. Ry., 125 Mich. 373.

¶ 1142. Questions on a foreclosure record that do not affect the complainant's right to a decree, and are presented upon needless proceedings and allegations, are not considered on an appeal from the decree in his favor.—Spear v. Hadden, 31 Mich. 265.

¶ 1143. An objection for multifariousness was not considered on appeal from an order overruling a general demurrer grounded on want of equity and multifariousness, where the bill stated a case for equitable relief, and the defendants were not particularly injured by the multifariousness complained of, and the costs in the case were within the control of the trial court, and could be adjusted on final decree.—Storrs v. Wallace, 54 Mich. 112.

¶ 1144. The Supreme Court, upon affirming an order of the circuit judge overruling a demurrer to a bill in equity, with leave to defendant to answer over, declined to pass upon certain questions discussed by counsel, which might or might not arise in the case, depending upon the nature of the proofs.—Allen v. Conklin, 112 Mich. 74.

¶ 1145. The finding in an ejectment suit tried without a jury of no adverse possession by defendant is conclusive on appeal in the absence of the testimony as to such adverse possession, and therefore questions as to the sufficiency of the notice of such defense attached to the plea need not be determined.—Norris v. Hall, 124 Mich. 170.

¶ 1146. The correctness of other reasons stated by the trial judge for overruling a motion for a new trial, will not be considered where one reason is sufficient to support the decision.—Wilson v. Medler, 140 Mich. 209.

¶ 1147. The construction of Pub. Act 1905, No. 129, in connection with 1897 C. C. Rule 47, was withheld because not directly involved in this case.—City of Detroit v. Wayne Circuit Judge, 144 Mich. 696.

¶ 1148. A judgment will be affirmed where it appears in a case tried without a jury that the record contains all the evidence and no exceptions were taken to any of the findings, and it was neither assigned nor contended that the facts found do not support the conclusions of law. Questions as to the admissibility or rejection of evidence and a claim that there was no evidence to support certain findings of fact will not be reviewed under such circumstances.—Ironton Cross Tie Co. v. Evans, 146 Mich. 197.

¶ 1149. On appeal from a decree on an accounting, where the Supreme Court has found on the proofs that a partnership existed, it will not consider the question whether the trial court's decree, finding a right to an accounting and ordering a reference thereon, was final upon the question of existence of the partnership as found.—Chase v. Angell, 148 Mich. 1.

¶ 1150. The question of the admissibility of testimony explaining a transaction with a deceased person claimed to be a fraud upon him, offered but objected to as being matter equally within the knowledge of the deceased, will not be passed upon, where there is an entire failure to prove that such transaction was a fraud as claimed.—Bangs v. Browne, 149 Mich. 478.

¶ 1151. The question whether it was error to direct a verdict for defendants will not be considered where, under the ruling of the court, the record upon a retrial will be different from the one then presented to the court.—Rosethal v. Rosenthal, 151 Mich. 493.

¶ 1152. A court of review will not consider whether the remedy sought in proceedings to collect a judgment is the best so long as it is admissible.—Regg v. Burnham, 55 Mich. 39.

§ 262. ——Secondary or controlling questions.

Decision of secondary questions because of importance or public interest, see post § 263.

¶ 1153. Where, on a writ of error, an objection is taken which goes to the jurisdiction of the court below, and is fatal to the judgment brought up for review, the court will not pass upon the other question raised by the record.—Fessenden v. Hill, 6 Mich. 242.

¶ 1154. The settlement of the main point in a case having affirmed the judgment below, the Supreme Court declined to consider the questions raised on minor points, however erroneous the rulings.—Thompson v. Howard, 31 Mich. 309.

¶ 1155. When a question of law as to the right of appellant to maintain the bill depends on a question of fact found against his position, the law question need not be decided.—Popendick v. Frobenius, 66 Mich. 317.

¶ 1156. A verdict plainly contrary to the weight of the evidence will be reversed without passing on other questions.—Wiethoff v. Shedden Cartage Co., 142 Mich. 264.

¶ 1157. Where no one appeared for the defendant in error and the record showed that hearsay evidence had been admitted against objection, the judgment was reversed without considering the other questions raised. —Brownell v. Groesbeck, 36 Mich. 501.

¶ 1158. Error in a ruling on a motion for new trial will not be considered where the case must be reversed upon another point.—Brucker v. Manistee & G. R. R. Co., 166 Mich. 330.

¶ 1159. Where an answer to a bill for an accounting raises the question of the propriety of the remedy sought, but the point is not pressed, either in the answer or in the argument of counsel for defendant, and it is clear that an adjustment of the whole matter involved is desired, such question will not be considered by this court, although it is doubtful if the bill states a case for a court of equity.—Young v. Potter, 150 Mich. 375.

¶ 1160. Where prejudicial error was committed by the trial court in an action against the warden of a state penal institution, which necessitates a reversal of a judgment for the plaintiff, it is unnecessary to determine the effect of the repeal by Act No. 219, Public Acts 1911, How. St., 2nd Ed., § 15279, of the enabling act permitting the action, section 2091, Comp. Laws 1887, How. St., 2nd Ed., § 15229, pending an appeal by the defendant to the Supreme Court from a judgment in favor of the plaintiff.—McDowell v. Fuller, 183 Mich. 639. (Per Brooke, C. J., McAlvay, Stone, JJ., Ostrander, J., holding that repeal did not deprive court of jurisdiction. Moore, and Steere, JJ., holding that court was deprived of jurisdiction and that proceedings abated.)

§ 263. ——Questions of importance or public interest.

Constitutional questions of importance, see post § 264.

¶ 1161. Where both parties desire, and the public interest demands, that a court pass upon the merits of a case, and preliminary objections do not go to the jurisdiction, the main question may be disposed of.—Lake Shore & M. S. R. Co. v. People, 46 Mich. 193.

¶ 1162. The court will treat as properly before it a question raised by an objection to testimony, although not sufficiently specific, where the same question is likely to arise on a second trial, and the judgment must be reversed on other grounds.—Sauers v. Giddings, 90 Mich. 50.

¶ 1163. An irregular plea in chancery can be considered on appeal if important to the final disposition of the case.—People ex rel. Hunt v. Jackson Circuit Judge, 41 Mich. 5.

§ 264. ——Constitutional questions.

Courts in general will avoid decision on grounds which question the constitutionality of a statute, if there are other grounds which primarily dispose of the case. See cases collected in Constitutional Law, I.

Refusal of all but constitutional question affecting the validity of the proceeding see also post ¶ 1228.

¶ 1164. Constitutional questions will not be considered nor passed upon, on appeal when other decisive questions are raised by

the record which dispose of the case.—North Michigan Water Co. v. City of Escanaba, 199 Mich. 286.

¶ 1165. Constitutional questions will not be considered on error when other decisive questions are raised by the record which will dispose of the case.—Port Huron Engine & Thresher Co. v. Township of Port Huron, 191 Mich. 590.

§ 265. ——Questions affecting nonappellants and third persons.

See also post § 315.
Declination to consider errors not affecting appellant, see also ante §§ 219-223.
Party entitled to assign or urge error, see ante XI, D.
Decree or relief as to nonappealing parties, see post § 495.
Offsetting errors against nonappellants to meet changes in appellant's favor, see post § 521.

¶ 1166. A defense to a bill in equity need not be considered on appeal if the particular defendant who made it has not appealed.—Southern Michigan Cedar Lumber Co. v. McDonald, 57 Mich. 292.

¶ 1167. On appeal in chancery the rights of such defendants as have allowed the bill to be taken as confessed cannot be considered, except so far as necessary to determine the rights of those who appeared and defended.—Morgan v. Michigan Air Line R. Co., 57 Mich. 430.

¶ 1168. On an appeal from a decree in an accounting none but the appellant's objections will be considered except where a restating of the account requires that because of a different method of computation an apparent error should be corrected.—Cutcheon v. Corbitt, 99 Mich. 584.

¶ 1169. The right of foreclosure purchasers who are not made parties and do not complain will not be considered on appeal.—Macomb v. Prentis, 57 Mich. 225.

§ 266. ——Questions eliminated by concessions.

Eliminated by concessions below, see also ante ¶ 1133.
Eliminated by estoppels, see also post ¶ 1300.
Adherence to conceded or assumed facts, see post § 269.
Waiver of right to urge error in general, see ante §§ 225-229; and see also Saving Questions for Review.
Nonwaiver of jurisdictional error, see ante § 225.
Passing on questions briefed but not answered in opposing brief, see post § 313.
Presumption as to admissions or concessions made below, see post § 350.
Addition to or amendment of record by stipulation, see ante § 248.

¶ 1170. Where counsel for defendant in error concedes that there are errors in the record and that the judgment must be reversed therefor, an argument on other points will not be heard.—Michigan Southern & Northern I. R. Co. v. Davis, 7 Mich. 10, note.

¶ 1171. Where one party concedes that the judgment of the court must be for his adversary, to the full extent of what he could claim on argument, the court will not hear an argument for the purpose of expressing their opinion on points thus rendered unnecessary to a decision of the cause.—Sanger v. Truesdail, 7 Mich. 9.

¶ 1172. Where, throughout a trial, parties have waived formal proofs and confined the controversy to the vital points in the case, objections that do not clearly go beyond the scope of such concessions and waiver will not be considered.—Earle v. Westchester Fire Ins. Co., 29 Mich. 414.

¶ 1173. Questions raised by one of the parties, both bringing error, will not be disposed of where he voluntarily waives them unless the case is to be reversed on the adverse party's appeal and where it is affirmed.—Chamberlain v. Detroit Stove Works, 103 Mich. 124.

¶ 1174. A concession of fact as to the adoption of resolutions by a city council which if made in an original bill would not have authorized an injunction, may be regarded as part of the bill when made.—Bogert v. Jackson Circuit Judge, 118 Mich. 457.

¶ 1175. Where plaintiff in error asks that the judgment be reversed without granting a new trial, or else that it be affirmed, the court will not consider the doubtful legal questions involved, where the case is not one in which the court would refuse a new trial on reversal.—Daniels v. Bay City Traction & Electric Co., 153 Mich. 96.

¶ 1176. Where after argument of a point on appeal, counsel for the appellant announced that there was no disagreement on the point between him and the opposing counsel and the trial court seemed to have been in accord with them, held that such point should not be considered.—Detroit United Ry. v. City of Pontiac, 193 Mich. 466.

§ 267. Adherence to theory of trial.

To issues made below, see post § 289.
Change of theory as departure from law of the case as laid down on former review, see post § 468.
Changing theory on retrial, see post § 559.
Shifting ground for directed verdict to avoid error, see also post ¶ 1494.

Necessity that bill or case should show theory of the case, see ante § 175.

¶ 1177. Cases will be reviewed and disposed of in the Supreme Court upon the points and theories presented in the court below.—Rivard v. Rivard, 109 Mich. 98.

¶ 1178. A party cannot upon review recover upon a theory upon which the case was not tried, and as to which his requests contained no allusion.—Truax v. Heartt, 135 Mich. 150.

¶ 1179. Where it is apparent from the record that plaintiff's recovery in a suit against a railroad company for the value of cattle killed was based upon the theory of conversion—the cattle being valuable for beef and the company having refused to allow plaintiff to take their carcasses—the case will be treated from this standpoint by this court.—Sampsell v. Chicago & G. T. Ry., 51 Mich. 606.

¶ 1180. A mortgagor cannot on appeal object to the finding in a foreclosure decree that one of the beneficiaries refused to accept the security of the mortgage and was therefore not entitled to participate, and demand a finding that, as such beneficiary agreed to assign the interest to a certain bank but failed to do so, such interest should inure to the bank, where the latter was not a party and the pleadings nowhere asserted the claim.—Gillam v. Barnes, 123 Mich. 119.

¶ 1181. In an action for damages caused by defendant's servants no question of master and servant will be considered on appeal where no such theory was advanced in defense on the trial below.—Canton v. Grinnell, 138 Mich. 590.

¶ 1182. A claim for services rendered quantum meruit, in a suit for breach of contract, not made in the trial court, will not be considered on appeal.—Kingston v. Decatur Township School District No. 5, 140 Mich. 603.

¶ 1183. On appeal the act of a passenger in sleeping, so that he was awakened at his station and thus tardily left the train and was hurt in an altercation between the conductor and riotous passengers occurring after a wait of 10 or 15 minutes at that station, cannot be considered as contributory negligence, where no such question was made on the trial. The same is true of a claim that he was negligent in getting too close to the place of the altercation.—Bass v. Cleveland, C., C. & St. L. Ry. Co., 142 Mich. 177.

¶ 1184. In an action against a railroad company for damages in delay in transporting live stock, where the declaration counts neither upon a breach of duty to deliver to a proper connecting carrier nor upon the responsibility of defendant for the acts or omissions of a connecting carrier, a directed verdict will not be reversed on error inasmuch as these questions had neither been presented to nor considered by the trial court.—Goehrend v. Pere Marquette R. Co., 146 Mich. 497.

¶ 1185. Where an action for slander was not tried upon the theory that the spoken words were privileged, the Supreme Court will not reverse a decision upon that theory although it may be said that the occasions when the words were first spoken might well bring them within the rule of privilege, when it also appeared from the defendant's own testimony there were other occasions when the words were repeated by him not within the protection of that rule.—Slater v. Walter, 148 Mich. 650.

¶ 1186. Where an action for negligence in leaving an unguarded ditch or excavation upon certain premises was tried without reference to the theory that the defendant was a mere licensee of the premises, such theory cannot be first urged on appeal.—Habina v. Twin City General Elec. Co., 150 Mich. 41.

¶ 1187. Where the defendants try the case upon the theory that plaintiffs were not entitled to recover because the declaration did not permit a recovery and was not amendable, they cannot urge upon appeal an entirely different theory of the case.—Howland v. Caille, 153 Mich. 349.

¶ 1188. A party cannot urge on appeal that parol evidence was admissible upon the ground of establishing fraud and deceit in the securing of a written contract, where such theory was not presented at the trial.—International Text-Book Co. v. Marvin, 166 Mich. 660.

¶ 1189. Where a plaintiff tries his case on a certain theory and is defeated on account of the incorrectness of such theory, he cannot ask for a reversal of the judgment against him on the ground that there were other theories upon which he was entitled to succeed.—L. Starks Co. v. Grand Rapids & I. Ry. Co., 165 Mich. 642.

¶ 1190. The theory of defendant's case can not be changed on appeal and a new state of facts relied on in the court above to support his argument against the ruling of the court in refusing to admit an answer to question put to a witness by defendant.—Ketchell v. Keene, 171 Mich. 108.

¶ 1191. Where in an injunction suit a certain theory of recovery is not advanced in t

bill of complaint or by counsel for complainant at the hearing, the Supreme Court will not consider same on appeal to sustain a decree for complainant.—Preston v. National Bank of Ionia, 169 Mich. 571.

§ 268. ——Inconsistent claims.

¶ 1192. A party cannot be permitted to occupy inconsistent positions where the exercise of assertion of one involves the abandonment of the other; he cannot take part in trial and still insist that case was not properly on docket for trial.—Peninsular Stove Co. v. Osmun, 73 Mich. 570.

¶ 1193. A plaintiff cannot maintain inconsistent positions; he cannot commence and prosecute suit upon one theory and then abandon that theory and adopt another entirely inconsistent with the first, where the assertion of the latter would positively negative the former.—Hinchman v. Weeks, 85 Mich. 535.

¶ 1194. A plaintiff in error cannot claim damages for a cause of action not urged below, e. g., where the declaration counted upon statutory liability for an injury caused by a defective sidewalk, and the declaration was not within the statute, plaintiff's position cannot be shifted so as to ask damages for an injury occasioned by a defective street.—Cooper v. City of Big Rapids, 67 Mich. 607.

¶ 1195. A claim that money was paid under duress cannot be considered on appeal when presented for the first time where the theory was payment under mistake.—Lamb v. Rathburn, 118 Mich. 666.

¶ 1196. Where in ejectment the plaintiff at the trial disclaimed all claim of adverse possession he cannot make such a claim when the cause is brought before the Supreme Court on error.—Coleman v. Robens, 146 Mich. 333.

¶ 1197. Where plaintiff tries a suit upon the theory that under defendant's amended notice attached to the general issue all liability is denied, he cannot on appeal demand judgment in his favor on the ground that the original notice filed under the general issue admits liability.—Hickey v. Lundy, 168 Mich. 336.

§ 269. ——Conceded or assumed facts.

¶ 1198. The want of averments necessary to set forth the special grievance relied on in a declaration for damages based on personal injury will not be considered for the first time on review if the case was not disposed of on such ground and if court and counsel below had treated the declaration as proper.—McKone v. Michigan Cent. R. Co., 51 Mich. 601.

¶ 1199. A declaration twice in the circuit and once in the Supreme Court treated by all parties as containing a count for false imprisonment, upon a second review, is not open to the objection that it does not contain such count, and that the count relied upon is in fact a count for malicious prosecution.—Moore v. Thompson, 108 Mich. 283.

¶ 1200. An appellate court will not feel bound to consider whether it was technically proper to implead a particular defendant, if the written stipulations of the parties and their mode of conducting the litigation have been such as to practically waive the point, and no demurrer has been interposed.—Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474.

¶ 1201. An insurance company which has defended an action upon an accident policy on the theory that there was a question for the jury as to whether the conduct of the insured had been such as to avoid the policy cannot, after an adverse judgment, complain that the court did not, on its own motion, decide the question and direct the verdict in its favor.—Johnson v. London Guarantee & Acc. Co., 115 Mich. 86.

¶ 1202. A suit in ejectment having been tried on the theory that plaintiffs were in possession, such possession being under an executory contract of sale, it cannot be first urged on appeal that plaintiffs have failed to show title in fee as set out in the declaration and therefore have failed to make their case.—Olin v. Henderson, 120 Mich. 149.

¶ 1203. Where it was conceded at the trial that a certain conversation was privileged, the court properly excluded evidence of a conclusion from such conversation, and the ruling of the court will not be reversed on the theory that the conversation was not privileged whether or not such was the case. —Meeske v. Pfenning's Estate, 120 Mich. 474.

¶ 1204. Plaintiff in ejectment could not urge on appeal that she was in any event entitled to recover because no legal foreclosure of the mortgages in question was shown, where both parties led the trial court to understand that the controlling question was the validity of such mortgages, and the court directed a verdict for defendants on that assumption.—Shreeves v. Caldwell, 135 Mich. 323.

¶ 1205. Where both plaintiff and defendant in an action proceeded upon the theory that Christian Science as taught by Mrs. Eddy's book, "Science and Health," is true, the case will be determined on that assumption.—Meyer v. Knott, 137 Mich. 714.

¶ 1206. In a suit on a contract with a corporation against a director of the same, on the ground that he had failed to sign

the annual report, as required by Act No. 232, § 12, Pub. Acts 1903; as amended by Act No. 194, Pub. Acts 1905, the defendant cannot on appeal object that plaintiff failed to prove the corporation to be a Michigan corporation and subject to said statutes, where his counsel in his conduct of the trial went on the theory that it was a Michigan corporation.—Deloria v. Van Winkle, 162 Mich. 660.

§ 270. Questions settled on former appeal.

Former appeal as law of the case, see post XII, G.

¶ 1207. Where it is determined on an appeal from an order overruling a demurrer, that grounds for equitable relief were disclosed by a bill of complaint, the only question open for consideration on a subsequent appeal from a decision on the merits, is whether the proof sustains the allegations of the bill.—Olson v. Williams, 185 Mich. 294.

§ 271. Separate consideration of separate questions.

Errors not affecting all parties, or affecting opposite party in interest, who may complain, see ante §§ 222, 223.

Separation and exclusion of questions not pertinent to the decree or judgment appealed from, see post XII, B, 2.

¶ 1208. For the purpose of review on assignments that a deed was never delivered and that it was materially altered, the distinctness of the questions must be kept in mind; since if altered it was vitiated, even if delivered, and the question of delivery in that case would be an unnecessary one to consider.—Comstock v. Smith, 26 Mich. 306.

B. SCOPE AND SUBJECTS OF REVIEW.

1. In General; Restriction to Record and Bill or Case.

§ 272. On appeal generally.

Consideration of rejected evidence on trial de novo, see post § 474.

Contents and sufficiency of record proper, see ante §§ 99, 172, 173.

When case should be settled on appeal, what orders, see ante § 90.

Retention of appeal to be heard on record where no case was settled, see ante ¶ 675.

Certified copy of judge's minutes as insufficient chancery case, see ante ¶ 510.

Additions and amendments to record, see ante XI, F.

Impropriety of relief by modification as to nonappellants, see post § 520.

¶ 1209. The Supreme Court can only review or hear a case on the record as it comes up from the court below.—Bank of Michigan v. Niles, W. 398; Ryerson v. Eldred, 18 Mich. 490; Adams v. Field, 25 Mich. 16; Booth v. Thompson, 49 Mich. 73.

¶ 1209a. Unless under very peculiar circumstances, and when all the facts are before it, the court, when the bill has been dismissed below on other grounds, will not pass upon the merits.—Kerr v. Lansing, 17 Mich. 34.

¶ 1210. Only questions properly raised by the record will be considered by the appellate court.—Trombley v. Kiersy, 147 Mich. 370.

¶ 1211. The Supreme Court in reviewing a chancery cause is confined to the case alleged; and if the proofs do not sustain it, or if they make out a different case, the bill will be dismissed.—Booth v. Thompson, 49 Mich. 73.

¶ 1212. Where the testimony in a chancery suit is taken in open court, and no case has been settled under the statute, it must stand for hearing on appeal upon the pleadings, orders, files and decree alone, and it will be presumed that there was evidence in the lower court to sustain the decree as made.—Sheldon v. Weatherwax, 75 Mich. 418; Stebbins v. Patterson, 108 Mich. 537.

¶ 1213. Either of the parties has the right to procure a case to be settled; and if the appeal is regularly taken, and neither party takes steps to have a case made and settled, the cause will stand for hearing without the testimony, and it will then devolve upon the appellant to show that the decree is not warranted by the pleadings, the presumption being that there was evidence below to authorize it.—Wright v. Dudley, 8 Mich. 74.

¶ 1214. Appeals in equity must be heard on the identical facts shown in the lower court, and the trial judge must settle the testimony, which he may do with the aid of the stenographer's minutes and on hearing counsel; but the stenographer's notes are not admissible as evidence on the appeal, and the judge must set out his own statement.—People's Ice Co. v. The Excelsior, 43 Mich. 336.

¶ 1215. The Supreme Court is bound by the record, and cannot take notice of allegations made by counsel on the hearing and not appearing of record.—Michigan & Ohio Plaster Co. v. White, 44 Mich. 25.

¶ 1216. The Supreme Court, upon an appeal in an action for an accounting, is limited to an examination of such evidence of mistake in the theory of making up an account, and to such evidences of improper allowance or disallowance of items as counsel are able to point out and sustain by the record where it does not have before it the de-

tails, books and memoranda which were before the trial court.—Steward v. Traverse City State Bank, 187 Mich. 387.

§ 273. On writ of error generally.

Contents, requisites and sufficiency of record proper, see ante §§ 99, 100, 172, 173.

Additions and amendments to record, see ante XI, F.

What questions may be reviewed on the record, where it is in some respects deficient, see post XII, B, 3.

Matters tending to sustain judgment, see post § 316.

Restriction to questions appearing on record proper, where exceptions are not apparent, see post §§ 319-321.

Restriction to evidence on review of directed verdict, see post § 388.

Restriction of rehearing to record, see post § 548.

The doctrine that the review will not be extended beyond matters apparent by the record, bill or case is also applied in the holdings that the record must suffice to show the matters urged as error. These cases are collected ante XI, B.

Preparation of the record, bill or case, see ante VI, D.

Sufficiency of record to present particular errors, see ante XI, A, B.

Sufficiency of the record to present jurisdictional points, see ante §§ 172, 180.

Inefficacy of recitals in judgment to present matter, see ante § 93.

Improper matters in the record, see post §§ 279-282.

¶ 1217. Such decisions only are reviewed in civil cases upon writ of error as are apparent upon the record, or as have been excepted to at the trial and have been made a part of the record by bill of exceptions.—Pearsons v. Eaton, 18 Mich. 79; People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

¶ 1218. Matters not in the record cannot be passed upon.—Duvernois v. Estate of Kaiser, 75 Mich. 431.

¶ 1219. Matters argued but not contained in the bill of exceptions will not be considered by the Supreme Court on error.—Holmes v. Smith, 149 Mich. 327.

¶ 1220. On writ of error, the Supreme Court exercises appellate jurisdiction and must dispose of the case on the record as made.—Boston Piano & Music Co. v. Pontiac Clothing Co., 199 Mich. 141.

¶ 1221. Allegations of error cannot prevail unless supported by the record.—Snyder v. Willey, 33 Mich. 483.

¶ 1222. A statute of another state cannot be construed in this court except upon the showing as made thereof in the trial court.—Belleville Sav. Bank v. Richardi, 56 Mich. 453.

¶ 1223. The objection that questions were leading cannot be noticed if not brought upon the record; nor, in general, if it is on the record.—Lyon v. Chamberlain, 41 Mich. 119.

¶ 1224. It cannot be maintained on error that defendant should be subrogated to the rights of a former mortgagee to pay whose claim a second mortgage was given, where it fails to appear that at the trial the second mortgagee claimed any rights growing out of the first mortgage.—Gregg v. Fox, 117 Mich. 495.

¶ 1225. An objection that an action for damages for causing death was erroneously sought under the "Death Act" instead of the "Survival Act," was not considered on appeal, where the bill of exceptions stated that the question was not raised during the trial.—Hewitt v. East Jordan Lumber Co., 136 Mich. 110.

§ 274.——To judgment on certiorari from justice.

Scope of the questions open, see post § 302.

¶ 1226. On error from the affirmance of a justice's judgment on certiorari, the review is confined to the grounds set forth in the affidavit for the certiorari.—Lee v. Hardgrave, 3 Mich. 77; Grand Trunk R. Co. v. Russ, 47 Mich. 500; Wilson v. McCrillies, 50 Mich. 347.

¶ 1227. On error bringing up a case affirmed on certiorari to a justice, the case is to be heard on the justice's return alone; the Supreme Court cannot regard a certificate by the county clerk that part of the judgment was collected by justice's execution before the decision in the circuit. Questions of payment can arise only when it is sought to enforce the judgment.—Dooley v. Eilbert, 47 Mich. 615.

¶ 1228. Where, on error to review an order of the circuit court quashing a writ of certiorari issued to review proceedings for the opening of a street and condemning land therefor, it appears that the only question raised by the affidavit for certiorari was the alleged unconstitutionality of the act under which the proceedings were taken, only that question will be considered.—Woodmere Cemetery v. Roulo, 104 Mich. 595.

§ 275. ——On consolidated record.

¶ 1229. Where actions have been properly consolidated a writ of error will not

bring up matters preceding the consolidation.—Harris v. Sweetland, 48 Mich. 110.

§ 276. On case made.

Nature of remedy by case made, and propriety of it as compared with other remedy, see ante § 5.

Contents and sufficiency of case made, see ante §§ 105, 196.

Matters improperly in case, see post § 283.

Review of findings, see post § 463.

§ 277. Omissions from record.

Omissions to find facts, see post §§ 455, 456.

Presumptions as to omitted matters, see post §§ 361-393.

¶ 1230. An affidavit for a default is no part of the record, and its absence is no ground of error; its purpose is only to inform the court that no plea has been filed, of which fact the court is bound to take judicial notice.—Leonard v. Woodward, 34 Mich. 514; Steers v. Holmes, 79 Mich. 430.

§ 278. Acts, evidence or demeanor not reducible to record.

Manner of incorporating books, papers, etc., in bill, see ante § 104.

¶ 1231. The manner of the circuit court in charging the jury, or the emphasis used, cannot be reviewed where the words employed are not prejudicial or misleading.—Gibbs v. Johnson, 63 Mich. 671.

¶ 1232. Defendant introduced in evidence a demonstration to show that plaintiff could not have been injured in the way he claimed. The trial court did not deem it conclusive in favor of the defendant, and submitted it along with the other evidence to the jury. Held, that the Supreme Court was not in a position to reverse him on the point.—Lehto v. Atlantic Min. Co., 152 Mich. 412.

§ 279. Improper or extraneous matters in record.

Consideration of matters in record but not properly saved for review, see post § 317 et seq.

In record of arbitration, see also post ¶ 1310.

Additions and amendments to record, see ante XI, F.

¶ 1233. Matters appearing in the transcript filed, but which constitute no proper part of the record, cannot be considered by the court, e. g., a motion to set aside the service of a declaration, appearing in the return to a writ of error.—Millerd v. Reeves, 1 Mich. 107.

¶ 1234. Failure to file an affidavit of defendant's default for neglecting to plead to the declaration cannot be taken advantage of on error, being no part of the record.—Steers v. Holmes, 79 Mich. 430; Leonard v. Woodward, 34 Mich. 514.

§ 280. ——Affidavits to motions.

Affidavits on appeal from justice as foreign matter, see ante § 100.

¶ 1235. Affidavits relating to a motion, but not regarded by the court in deciding it, are not part of the record and will not be regarded on error from the order made.—Noble v. Bourke, 44 Mich. 193.

¶ 1236. An omission in the record cannot be supplied by an ex parte affidavit, and such affidavits when filed are not considered except as they relate to the application on which they are made.—Wardle v. Cummings, 86 Mich. 395.

¶ 1237. In an action for injuries to goods in transit, counsel for defendant filed with his motion for a new trial certain affidavits to the effect that the goods in question had been received in good condition, from defendant, by a connecting carrier. The trial judge having certified that the affidavits were not considered because copies of them were not served upon counsel for plaintiff, they will not be considered by this court, although copies of them have been improperly incorporated in the printed record.—Reason v. Detroit, G. H. & M. Ry. Co., 150 Mich. 50.

§ 281. ——Recitals in orders or judgments.

Sufficiency of recitals and excerpts in new trial order to carry affidavits into record, see ante ¶ 831.

¶ 1238. Recitals in an order denying a motion for a new trial are no part of the record in error.—Monnier v. Mizner, 17 Mich. 271.

§ 282. ——Evidence improperly presented.

Necessity that bill or case be properly settled, see ante § 110 et seq.

¶ 1239. The evidence is no part of the record unless embodied in a case made, or bill of exceptions, and should not be returned with or among the findings of the court; and if it is, the Supreme Court will not consider it.—Peabody v. McAvoy, 23 Mich. 526.

¶ 1240. Where the evidence is not made part of a bill of exceptions, but is merely printed with it, the Supreme Court will not examine it to ascertain the facts.—People v. Cline, 44 Mich. 290.

¶ 1241. Where the only assignments of error are that the findings of fact do not sus-

tain the conclusions of law, the evidence is no part of the record and cannot be examined.—Vyne v. Glenn, 41 Mich. 112.

§ 283. Improper matters in case made.

Proper contents, see ante § 105.

¶ 1242. Mere deductions from the evidence that the "facts proven" were as stated, made after judgment as a basis for review, are not part of the record and cannot be brought up on a case made after judgment. —Hedges v. Hibbard, 46 Mich. 551.

§ 284. Resort to other records or cases.

Judicial notice in aid of record, see post § 344.

Reference in brief to other record, see ante § 236.

¶ 1243. Where for some reason not shown by the judgment a verdict had been directed in a former suit between the same parties, it is competent to resort to the record of such other case to show why the court had directed a verdict and what was the issue upon which the direction was made.—Lansing v. Mich. Cent. R. Co., 143 Mich. 48.

¶ 1244. Where mandamus was denied without any written opinion being filed, the court cannot, on appeal in a subsequent proceeding, ascertain by consulting their recollections, the ground upon which the decision was made in order to determine if it was res adjudicata of the case at bar since they can avail themselves of no evidence which was not presented to the lower court. —Hoffman v. Silverthorn, 137 Mich. 60.

§ 285. Extraneous matters; stipulations and admissions.

Making questions by consent, see ante § 260.

Reference in brief to extrinsic matters, see ante § 236.

Necessity of resort to court below for relief from alimony decree on basis of subsequent facts, see Divorce, X, E.

¶ 1245. The court is confined to an examination of the errors found in the transcript, and cannot assume, as a part of the case, facts not appearing by the transcript, though assumed by the counsel on the argument, and though, in virtue of a parol admission, they were treated as a part of the case in the court below.—Bailey v. De Graff, 2 D. 169.

¶ 1246. The Supreme Court cannot resort to evidence outside of the record to add to, or test the correctness of, the finding of facts made by the court sitting without a jury.—Peabody v. McAvoy, 23 Mich. 528.

¶ 1247. The Supreme Court cannot decide whether there are facts to support a verdict without having before them all the facts producible by a finding; and they cannot, for the purpose of learning all the facts, investigate statements agreed upon by counsel and submitted, in connection with only partial testimony, as the sole basis for a verdict.—Watts v. Tittabawassee Boom Company, 47 Mich. 540.

¶ 1248. The Supreme Court cannot go outside of the bill of exceptions even to save error.—Alderton v. Wright, 81 Mich. 294.

¶ 1249. The Supreme Court cannot undertake to construe an insurance policy or other contract upon mere stipulations of counsel as to its legal effect.—American Ins. Co. v. Reed, 40 Mich. 622.

¶ 1250. The court cannot, on appeal, draw any inference contrary to the findings of the court below, from statements in counsel's brief or from correspondence printed therein which was not put in evidence at the trial.—Hoffman v. Silverthorn, 137 Mich. 60.

¶ 1251. The court of appeal will be governed by the record rather than the claim of counsel as to an agreement of counsel at the trial upon an issue of fact.—Spacek v. Schaub, 140 Mich. 212.

2. Nature of Cause and of Judgment, and Matters Brought Up With It.

§ 286. In general.

[Note. The question, whether a particular judgment, decree or order is appealable or is subject to a writ of error, is distinct from the question what errors may be brought up by appealing from a given decree or by writ of error to a given judgment. The former question is treated ante III, and the latter in this division.]

Questions not open because not saved and presented by objections, assignments and argument, see post XII, B, 3.

Sustaining action for different reason than one assigned by trial court, see post ¶ 1345.

Trial de novo in appeals, see post XII, H.

Consideration of rejected evidence on chancery trial de novo, see post § 474.

Extraneous matters as ground for rehearing, see post § 538.

¶ 1252. Where appeal is taken from a final decree all previous orders connected with the decree and affecting the merits are open to review.—Benedict v. Thompson, 2 D. 299.

§ 287. Matters anterior to cause.

¶ 1253. The assignee with notice of a fraudulent chattel mortgage given in anticipation of a general assignment by the mortgagor of his property for the benefit of creditors is not concerned with the avails of the mortgaged property, and cannot, on appeal from the final decree made in a suit brought to set aside said mortgage, in which the appointment of a receiver by the circuit judge at chambers is confirmed, object to such appointment as beyond the power of the circuit judge to make, no appeal having been taken therefrom.—Burnham v. Dillon, 100 Mich. 352.

¶ 1254. While the appointment at chambers of a receiver in a suit brought to set aside an alleged fraudulent chattel mortgage, executed by an insolvent debtor in anticipation of an assignment of his property for the benefit of creditors, is irregular, the objection is not available to the assignor on his appeal from the final decree in the case, made upon a full hearing, in which the appointment is confirmed.—Burnham v. Dillon, 100 Mich. 359.

§ 288. Removal and remand from federal court.

¶ 1255. On appeal from a final decree entered in a circuit court of this state the action of a federal court whereby the cause was remanded to such circuit court is not reviewable.—Lewis v. Weidenfeld, 114 Mich. 581.

§ 289. Matters not in issue and not tried.

¶ 1256. An issue not presented by the pleadings below cannot be considered on appeal.—Langley v. Harmon, 97 Mich. 347.

¶ 1257. Assignments of error relating to the admission of evidence to prove the manner of execution of an instrument expressly counted upon in the declaration will not be considered where no affidavit denying execution was filed.—Jennison v. Haire, 29 Mich. 207.

¶ 1258. The Supreme Court cannot on error pass upon a defense of fact not submitted to the jury, and not admitted by the opposite party.—Castner v. Farmers' Mut. Fire Ins. Co., 46 Mich. 15.

¶ 1259. The objection that instead of a suit on a residuary legatee's and executor's bond to pay all debts proceedings should have been taken by scire facias on the footing of a former judgment for the penalty of the same bond is disregarded on review, if not properly raised by the pleadings.—Durfee v. Abbott, 50 Mich. 479.

¶ 1260. A plaintiff in error cannot claim damages for a cause of action not urged below, e. g., where the declaration counted upon an injury caused by a defective sidewalk, but was insufficient, plaintiff's position cannot be shifted so as to ask damages for an injury occasioned by a defective street.—Cooper v. City of Big Rapids, 67 Mich. 607.

¶ 1261. Where a bill complained of nine real estate transactions, the issue on appeal could not be broadened so as to cover more than the number averred in the bill.—Stradley v. Cargill Elevator Co., 135 Mich. 367.

¶ 1262. An appealing defendant who applied under Comp. L. 1897, §§ 10995, 10996, for the allowance in ejectment of the value of improvements, cannot after plaintiff has elected under section 10997 to take the value of the land, as he might under that statute, claim that such statute, being the general law applicable in ejectment, does not apply where the defendant holds under a tax homestead in view of the statute (Tax Law, § 104), which specially gives to tax purchasers a right to recover for improvements and a lien for same. The applicability of the general law not having been questioned on trial cannot be questioned on error.—Platz v. Englehardt, 138 Mich. 485.

¶ 1263. Objections to a special assessment not contained in contestant's answer to the petition of the auditor general cannot be considered on appeal.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 1264. A defense not contained in the defendant's plea and notice of special defense will not be considered on appeal.—City of Kalamazoo v. Perrin, 194 Mich. 484.

¶ 1265. Comp. L. 1897, § 826, establishing the presumption of execution of a negotiable instrument unless denied under oath at the time of pleading, cannot be urged first on appeal to impose a liability on a school district order, where the plaintiff declared orally on the common counts and there was no suggestion either in justice court or in circuit court that the testimony of non-execution was incompetent under the pleadings.—First Nat. Bank of Cassopolis v. Carter, 138 Mich. 421.

¶ 1266. Claims not set up in a bill to vacate a foreclosure decree cannot be raised on appeal.—Gaines v. Simons, 124 Mich. 47[illegible]

¶ 1267. In an action to recover taxes paid under protest, grounds for reversal were not considered which were not covered by the protest filed.—Aurora Iron Min. Co. v. City of Ironwood, 119 Mich. 325.

¶ 290. Rulings relating to summons or capias.

¶ 1268. Proceedings on a motion to set aside a capias ad respondendum constitute no part of the record proper, and are, therefore, not subject to review on writ of error on final judgment.—Miller v. Rosier, 31 Mich. 475.

¶ 1269. The question of jurisdiction of the trial court, the defendant not having waived the same by appearing, is properly raised in the court of appeal through a writ of error and assignments to review the judgment; where, in an action against a fraternal benefit association, the proceedings and judgment had by declaration and rule to plead are void on the face of the record for want of jurisdiction, irrespective of the question whether defendant's motion in the lower court to quash the affidavit of service and the order denying the motion are part of the record proper.—Monger v. New Era Ass'n., 145 Mich. 688.

¶ 1270. The denial of a motion to quash a writ of capias ad respondendum is not subject to review by writ of error after final judgment.—Miller v. Du Val, 191 Mich. 386.

¶ 1271. Any error of a court in overruling a motion to quash a writ of capias ad respondendum for insufficiency of the affidavit for the writ may not be reviewed on writ of error after final judgment.—Baxter v. Woodward, 191 Mich. 379.

¶ 291. Questions of practice at trial.

Review of discretionary rulings, see post XII, D.

Review of orders regulating reception and order of proof, see post § 405.

¶ 1272. Appeal will not review rulings of the court on matters of practice not affecting the merits.—Hess v. Final, 32 Mich. 515.

¶ 1273. The question of the validity of a notice of trial will not be reviewed on writ of error.—Worth v. Hand, 30 Mich. 264.

¶ 292. Taxation and retaxation of costs.

¶ 1274. The question of double costs, under Comp. L. 1871, § 4246, How St., § 5704, granting a penalty for refusal, on tender and request, to discharge a mortgage, more properly arises on the final hearing in the circuit than on an appeal from a decree on demurrer.—Collar v. Harrison, 28 Mich. 518.

¶ 1275. The affirmance by the trial court, on appeal, of the clerk's taxation of costs, cannot be considered upon writ of error to review the judgment.—Moore v. Daiber, 92 Mich. 402.

§ 293. Judgment on plea or demurrer.

Review of demurrer with appeal from final judgment, see post § 296.

¶ 1276. On appeal from an order overruling a general and special demurrer, the statute authorizing such appeal (Laws 1883, Act No. 58) only allows a consideration of the questions raised by the general demurrer.—Shaw v. Chase, 77 Mich. 436.

¶ 1277. On appeal from an order overruling a demurrer to a bill, only questions of whether the bill is sufficient to confer jurisdiction in the court of equity will be considered under Comp. L. 1897, § 549, allowing an appeal only in case of general demurrer.—Smith v. Boyd, 127 Mich. 417.

¶ 1278. Grounds of demurrer to a bill for partition that it did not specifically set forth a party's source of title were not considered on appeal, where the demurrer did not specify such ground.—Martens v. Cook, 135 Mich. 35.

¶ 1279. An objection that a bill is improperly framed cannot be considered upon an appeal from an order dismissing it on demurrer for multifariousness and want of equity.—Proctor v. Plumer, 112 Mich. 393.

¶ 1280. On error by respondent to review a judgment which was rendered providing for the forfeiture of the rights and franchises of a private corporation under Comp. L. 1897, § 9950, which judgment was rendered pursuant to a motion for judgment on the pleadings, the questions proper to be considered and determined are those arising upon the practice followed and upon the information and plea.—People ex rel. Attorney General v. Grand Rapids Sticky Fly Paper Co., 144 Mich. 221.

¶ 1280a. On error to review proceedings to forfeit the franchise and dissolve a private corporation under Comp. L. 1897, § 9950, where judgment was on a plea confessing the allegations, only matters of record will be considered, and none of the matters produced at the hearing, save the information filed, is before the Supreme Court.—People ex rel. Attorney General v. Grand Rapids Sticky Fly Paper Co., 144 Mich. 221.

§ 294. Judgment without findings.

¶ 1281. A question not raised by the record and without any finding of facts to support it cannot be considered.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

¶ 1282. Where, on appeal from a judgment in a case tried without a jury, the record contains no findings of fact, the ques-

tion whether the evidence sustains the judgment will not be considered.—Wickes v. Pulfrey, 131 Mich. 407.

¶ 1283. A case begun by attachment, tried by the court without requests for findings and taken up on error from a judgment without findings presents nothing to review.—Daniels v. Crane, 141 Mich. 499; McDonell v. Union Trust Co., 139 Mich. 386.

§ 295. Interlocutory decrees reviewable with final decree.

See also ante ¶¶ 186, 187, 1252.
Matters reviewable on appeal from intermediate final order, see post § 307.
Reviewableness with final decree as test of appealability of judgment on dilatory plea, see ante § 40, ¶ 184.
Review of discretionary rulings, see post XII, D.

¶ 1284. There are interlocutory orders the merits of which are not open to re-examination on appeal from the final decree.—Miller v. McLaughlin, 135 Mich. 646.

¶ 1285. Where the proceedings are such as to give rise to more than one appealable final order or decree, it is questionable how far the court, on an appeal from the later order or decree, could interfere with matters settled by the prior one from which no appeal had been taken, if the subsequent proceedings had developed no new facts bearing upon the matters originally determined.—Brown v. Bronson, 35 Mich. 415.

¶ 1286. An order denying a petition for leave to file a supplemental bill in an action to foreclose a mechanic's lien is not subject to review on appeal from the decree, adjudging a lien, where no appeal was taken from the order denying such petition.—Zilz v. Wilcox, 190 Mich. 486.

¶ 1287. A motion to dismiss a petition to set aside tax sales is in no sense a demurrer, and on appeal from a decree granting the petition, the Supreme Court cannot consider the chancellor's order denying the motion or the ex parte affidavits submitted by the defendant in support of his motion to be permitted to appear generally.—Aztec Copper Co. v. Auditor General, 128 Mich. 615.

§ 296. ——On demurrer or plea.

Matters open on appeal from judgment on demurrer or plea, see ante § 293.
Waiver of point in court above or by pleading over, see ante §§ 226, 227.

¶ 1288. Where a demurrer was overruled and the defendant then answered, and the case was heard on pleadings and proofs, and decree entered for complainant, it was held that an appeal therefrom opened for review the decision on the demurrer.—Bennett v. Nichols, 12 Mich. 22.

¶ 1289. Where, the question presented by the demurrer was one that might have been raised at the trial, and where counsel for both parties presented full briefs, the court passed upon the merits of the case; although error lies only from the judgment.—Fitzsimmons v. Milwaukee, L. S. & M. R. Co., 98 Mich. 257.

¶ 1290. The sufficiency of a bill in chancery cannot be raised on appeal where no appeal is taken from the decision of the lower court overruling a demurrer to it.—McManus v. City of Petoskey, 164 Mich. 390.

¶ 1291. The proper way to secure the review of an objection that a bill does not state a cause of action, is by appeal from an order overruling a demurrer upon such ground.—Babcock v. Babcock, 150 Mich. 558.

¶ 1292. The decision of the trial court in sustaining a demurrer cannot be considered where there was no appeal therefrom but from the decree of dismissal, and it will be considered that complainant has acquiesced therein.—Carpenter v. Auditor General, 144 Mich. 251.

§ 297. Matters subsequent to decree or judgment.

¶ 1293. Proceedings subsequent to the decree appealed from are not reviewable.—Kellogg v. Hamilton, 43 Mich. 269.

¶ 1294. Matter set up in defense to a motion for a writ of assistance cannot be received to affect the decree determining the defendant's rights.—Howe v. Lemon, 47 Mich. 544.

¶ 1295. A sheriff's proceedings after judgment perfected cannot be taken advantage of upon writ of error.—Hitchcock v. Hahn, 60 Mich. 459.

§ 298. Grant or refusal of new trial.

¶ 1296. Assignments of error based on a refusal to grant a new trial cannot be considered upon writ of error to review the judgment.—Moore v. Daiber, 92 Mich. 402.

¶ 1297. Findings on a motion for a new trial cannot be brought up for review with the rest of the case.—People v. Pearsall, 50 Mich. 233.

§ 299. Collateral and related decrees.

¶ 1298. Where on appeal from a decree of divorce the record of a collateral pro

ceeding, in which conveyances by defendant were set aside, was sent up with the divorce record, but no appeal was taken from the collateral decree, nothing could be done with it.—German v. German, 57 Mich. 256.

¶1299. The order of the court setting aside an assessment of members of a mutual fire insurance company, in receivership proceedings, is not reviewable in an appeal from a member of such company from a judgment rendered against him for a subsequent assessment, unless such order was void.—Nichol v. Murphy, 145 Mich. 424.

¶1300. On error to the second of two certioraris taken to the circuit court from the action of the township board whereby it sought to review the decision of the highway commissioner that a proposed road was necessary, no question as to the regularity of the first attempted action by the township board will be entertained, where petitioner for the first certiorari thereby admitted its irregularity conclusively, and where the other parties by failing to bring any appeal (error) have allowed the circuit court's decision that it was irregular to become conclusive on them.—Sanger v. Township Board of Brownstown, 118 Mich. 19.

§ 300. Judgment in garnishment proceedings.

¶1301. Where a plaintiff sees fit to submit his case in the circuit court without taking, or attempting to take, advantage of the provisions of How. St., § 8085, by impleading a party shown by the disclosure to claim the indebtedness due from the garnishee, or the property in his hands, the Supreme Court cannot aid him, but must pass upon the judgment as rendered at the circuit.—Kennedy v. McLellan, 76 Mich. 598.

¶1302. In reviewing a judgment rendered in favor of garnishees on the trial of an issue formed on their disclosure, the case stands as it did at the time of such trial, unaffected by a subsequent stipulation.—Kennedy v. McLellan, 76 Mich. 598.

§ 301. Decisions on appeal from probate court.

On review of findings, see post § 459.
Matters for consideration on appeal from probate, see Probate Courts, III.

¶1303. The Supreme Court, upon writ of error in a will contest, can only determine whether proper rules were followed in the circuit court in determining the issue as to whether the paper propounded is the will of the testator since that is all that the probate and circuit courts could decide. They could not determine whether the proponent was barred from claiming under it.—Barney v. Barney, 187 Mich. 145; In re Barney's Will, Id. (Brooke, C. J., and Moore, J., dissenting).

¶1304. Where the circuit court retains jurisdiction of an appeal from the probate court by an order reinstating the appeal, the complaining party, provided he does nothing amounting to a waiver, may review the order by writ of error after final judgment.—Gifford v. Washtenaw Circuit Judge, 189 Mich. 546.

§ 302. Decisions on appeal or certiorari from justice.

Review of findings, see post § 458.
Construction of the justice's record and affidavit, see post § 339.

¶1305. Where a justice's judgment in a suit against a justice of the peace for false imprisonment by the issuing of a warrant against the plaintiff is brought to the circuit by certiorari and there affirmed, and the decision of the circuit is brought up for review, only such objections to the validity of the proceedings for the imprisonment as were passed upon in the court below will be considered by the Supreme Court.—Pardee v. Smith, 27 Mich. 33.

¶1306. A motion to dismiss an appeal from a justice's court on the ground that the sureties did not justify is not brought up by writ of error.—Conrad v. Freeland, 18 Mich. 255.

¶1307. Judgment having been entered on appeal in the circuit court against a surety on the appeal bond from justice's court without notice to him, he moved to vacate it on the ground, supported by affidavits, that he executed the bond solely upon the condition, not performed, that another was to become co-surety. Held, the motion having been denied, that the only errors, if any, which could be considered on the surety's writ of error were those going to the justice's jurisdiction over the persons of the defendants.—Buehler v. DeLemos, 84 Mich. 554.

§ 303. Judgments based on arbitration.

¶1308. A submission of the subject-matter of a suit to arbitration is a waiver of all errors in the action up to the time of making submission.—Vanderhoof v. Dean, 1 Mich. 463.

¶1309. Where arbitrators, to whom, in accordance with a policy of insurance, a difference between insurer and insured has been submitted for final decision, wrongly construe legal rights and exclude admissible testimony, such errors cannot be corrected on error in reviewing the trial of a subsequent action at law between the parties on

the policy, if at all corrigible.—Raymond v. Farmers' Mut. Fire Ins. Co., 114 Mich. 386.

¶ 1310. Where a pending suit is submitted to arbitrators and their award confirmed by the court and a judgment rendered upon it, the record, under Comp. L. 1871, § 6903, How. St., § 8488, does not regularly include the evidence before the arbitrators nor requests made to them to find specifically on certain points, nor their findings in response to such requests; and the fact that these were returned by the arbitrators and filed in the court below, and are embraced in the return to the writ of error in this case, does not authorize the Supreme Court to review them; and assignments of error based upon them will not be considered.—Chicago & M. L. S. R. Co. v. Hughes, 28 Mich. 186.

§ 304. Accounting and partition decrees.

See also post ¶ 2116.

Declination of unnecessary questions, see ante §§ 261-265.

¶ 1311. One who fails to appeal from a decree in partition proceedings determining the title of the parties to be that of cotenants cannot have the question of title reviewed upon appeal from a subsequent decree, entered upon report of the commissioners, fixing the rights of the parties to the rents and profits.—Hunt v. Hunt, 109 Mich. 399.

¶ 1312. A decree directing that partition be had, not appealed from, is not before the court for consideration upon an appeal from an order confirming the report of the commissioners in partition.—Austin v. Austin, 132 Mich. 453.

§ 305. Foreclosure decrees.

Declination of unnecessary questions, see ante §§ 261-265.

¶ 1313. A decretal order in a foreclosure suit in chancery, settling the allowance of payments on the mortgage, and referring the cause to a commissioner for computation of amount due on the basis of such allowance, is an interlocutory proceeding merely, and will be brought to this court for review by appeal from the final decree for sale of the mortgaged premises.—Morris v. Morris, 5 Mich. 171.

¶ 1314. Matters disposed of without objection before the decree in foreclosure cannot be litigated upon an appeal therefrom, or upon a motion to dismiss such appeal, if the defendants were properly brought in and answered. The proper remedy after decree is by bill of review.—Burt v. Thomas, 49 Mich. 462.

¶ 1315. On appeal from the confirmation of a foreclosure sale the bill cannot be attacked nor the decree reviewed if the court below had jurisdiction.—Farmers' Bank v. Quick, 71 Mich. 534.

¶ 1316. A bill to restrain a foreclosure by advertisement was filed to which the mortgagee answered and cross-complained asking foreclosure. The bill's allegations that the mortgage was barred by limitations were denied by defendant, who recovered a decree for foreclosure of a part of the alleged debt. There was also a finding that the mortgage was not barred, coupled with recitals that the evidence was conflicting as to payments which would extend the period but with a finding that within the period a settlement was agreed on for a sum less than the claim to be taken as full payment. It was decreed that this should be paid and foreclosure had for that amount. Held, on appeal by cross-complainant for insufficiency of the amount, that the finding as to amount due was open to review, the want of appeal by complainant from the finding that the mortgage was not barred being not conclusive that the full amount was due.—Carr v. Carr, 138 Mich. 396.

§ 306. Contempt orders.

¶ 1317. Whether in an appeal from proceedings for contempt in disobeying an injunction the Supreme Court can consider the facts brought out by the answers to interrogatories filed, showing want of jurisdiction, or can look only to the case made by the bill in the court below, quere.—People ex rel. Brewer v, Kidd, 23 Mich. 440.

¶ 1318. The appointment of a receiver under a creditor's bill cannot be reviewed on appeal from an order holding defendant in contempt for not assigning to such receiver as ordered by the court if there was not a total want of jurisdiction to appoint him.—Bagley v. Scudder, 66 Mich. 97.

¶ 1319. The fact that an appeal, instead of certiorari, or, after commitment, habeas corpus, is taken to review an order adjudging appellant guilty of contempt in violating an injunction, will not operate to enlarge the field of inquiry in the Supreme Court beyond what it would be had the review been sought in the proper way.—Enterprise Foundry Co. v. Iron Molders' Union of North America, Local No. 186, 149 Mich. 31.

¶ 1320. On an appeal from an order adjudging defendant in contempt for failure to pay alimony, the court will not pass upon the sufficiency of a plea of a prior adjudication pending in the court below.—Filer v. Filer, 77 Mich. 469.

§ 307. Scope of interlocutory appeal; injunctions or receiverships.

Review of interlocutory order with final decree, see ante § 295.

Scope of trial de novo, reservation of questions, see post XII, H, § 473, XIII, A, B.

¶ 1321. On appeal from the dismissal of a bill made on hearing of an interlocutory petition for a receiver, and thereby cutting off a hearing on proof as to other matters alleged and relief sought, the sufficiency of the bill will be reviewed as on demurrer.—Albion Malleable Iron Co. v. First National Bank, 116 Mich. 218.

¶ 1322. Where the sufficiency of a bill filed by the minority stockholders of a corporation, alleging mismanagement of the corporate affairs and a conspiracy by the directors and majority stockholders to secure the property to the detriment of the remaining stockholders, praying for the appointment of a receiver, that the corporation be dissolved and for injunctional relief, is challenged by the defendants but not by demurrer and not with respect to the power of the court, upon final hearing, to appoint a receiver to wind up the affairs of the corporation, whether the bill states a case for equitable cognizance is a question not presented on a review of orders, before a hearing upon the merits, appointing a receiver and granting an injunction practically bringing to an end the corporate affairs.—Town v. Duplex-Power Car Co., 142 Mich. 519.

§ 308. Scope of appeal from order after decree.

See also ante ¶ 196.

Appeal from order substituting security for alimony as reaching question whether original order exacted enough security, see also Divorce, X, E.

¶ 1323. Where the appeal is from a final order (as an order confirming an appraisal and set-off under a decree in a mortgage case) the court is restricted to a review of so much of the proceedings as are connected with the final order.—Benedict v. Thompson, 2 D. 299.

¶ 1324. Where no appeal is taken from a decree which determines all matters except as equity reserved for further consideration, and the only appeal is from a subsequent decretal order determining the reserved equity, the matters determined by the first decree are not open to review on the appeal from the decretal order.—Hack v. Norris, 46 Mich. 567.

¶ 1325. A permission in a mortgage foreclosure decree, for 20 days' time to redeem, was an act of grace and not of right, and the decree not having been appealed from, the question could not in any event be raised on the review of a decree dismissing a bill to set aside the foreclosure.—McIntyre v. Wycoff, 119 Mich. 557.

¶ 1326. An appeal from an order reducing the amount of alimony awarded by a decree of divorce does not bring up for review the original decree, the question for consideration being whether such new facts have arisen since the decree as to justify its modification.—Smith v. Smith, 139 Mich. 133.

§ 309. ——Grant or denial of review in equity.

¶ 1327. Where a petition for a rehearing or for leave to file a bill of review is broad enough to call for the rescission of an order for execution for the deficiency on foreclosure, the Supreme Court may set it aside on an appeal from an order refusing such relief.—Vaughan v. Black, 63 Mich. 215.

¶ 1328. On appeal from an order of the lower court denying a petition for a bill of review, the stenographer's minutes of testimony and rulings cannot be considered by the Supreme Court where not embodied in the petitions below, and therefore not considered by the trial court.—Roberge v. De Lisle, 158 Mich. 16; De Lisle v. Wayne Circuit Judge, Id.

3. Scope of Questions Saved and Presented.

§ 310. In general.

In order to have review of a question on appeal or error it is generally essential that appropriate objection be made below on which the court rules, and unless the statutes have dispensed therewith this must be followed with an exception by which the matter is saved in the record by a bill of exceptions or case. Questions not so saved are not reviewed. As to the procedure in the trial court to save them, see Saving Questions for Review.

Questions not open because not pertinent to the judgment or decree appealed from, see ante XII, B, 2.

Questions not open because not within the record brought up, see ante XII, B, 1, and see also ante XI, B.

Restriction on case made to matters passed on below, see ante § 254.

Questions reviewable on record proper without exceptions or findings, see post §§ 319-322.

On review of verdicts and findings, see post XII, E, 2.

Trial de novo in appeals, see post XII, H.

Consideration of rejected evidence on trial de novo, see post § 474.

Refusal to consider questions become moot, see ante § 259.

Declination to pass unnecessarily on questions not considered below, see also ante § 256.

Showing in record for review of particular errors, see ante § 179 et seq.

Party entitled to complain, and waiver or estoppel of right, see ante XI, D.

Dismissal or affirmance on hearing for want of any question preserved and presented, see post § 480.

¶ 1329. The scope of inquiry in this court is limited by the suggestions made to the trial court and the errors assigned.—Muir v. Kalamazoo Corset Co., 155 Mich. 441.

¶ 1330. It is the prevailing practice of the Supreme Court to reverse judgments of the circuit court only for errors shown by the record and complained of in the appellant's brief.—Griffin v. Kennedy, 148 Mich. 583.

¶ 1331. On error from a judgment for assault and false imprisonment consisting in an arrest without a warrant, where the trial court took from the jury all issues but damages, the review will extend to the question only of the legality of the arrest, the defense of appellant having been justification as an officer.—Davis v. Burgess, 54 Mich. 514.

§ 311. Restriction to assignments.

Necessity of assignment of errors, see ante VI, E.
Making assignments, see ante VI, E.
Sufficiency and specificness of assignments, see ante XI, C.
Scope of assignments and errors thereby presented, see ante §§ 214-216.
Amendments and additional assignments, see ante § 124.
Restriction to errors assigned generally, see 1916 C. C. Rule 66, § 5; and to errors assigned on appeal from judgment non obstante, see Rule 66, § 6.
Restriction to assigned errors on writ to review judgment non obstante, see 1916 C. C. Rule 66, § 6.

¶ 1332. Questions not raised by assignments of error cannot be considered.—Monroe v. Fort Wayne, J. & S. R. Co., 28 Mich. 272; Andre v. Hardin, 32 Mich. 324; Waterman v. Waterman, 34 Mich. 490; Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 296; Gager v. Chippewa County Sup'rs, 47 Mich. 167; Supe v. Francis, 49 Mich. 266; Lymburner v. Jenkinson, 50 Mich. 488; Stevenson v. Woltman, 81 Mich. 200; Morin v. Robarge, 132 Mich. 337; Moffet v. Sebastian, 149 Mich. 451; Webber v. Billings, 184 Mich. 119; Burroughs v. Postal Tel. Cable Co., 199 Mich. 672.

¶ 1333. Objections to part of the charge upon which no error is assigned cannot be considered.—Shaw v. Township of Saline, 113 Mich. 342.

§ 312. Restriction to arguments.

Person entitled to claim error and make argument, see ante XI, D, E.
Form and sufficiency of briefs and argument, see ante XI, E.
Sufficiency of presentment of points in brief, see ante § 232 et seq.
Matters not properly indexed or briefed, see post § 318.
New points as ground for rehearing, see post § 539.

¶ 1334. The court on writ of error usually confines its attention to the points made on the argument, and does not, except under very peculiar circumstances, deem it proper to go beyond them to discuss in the opinion other objections that may have been raised by the record but are not insisted on in argument.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 1335. Under Sup. Ct. Rule 50, such points only will be passed upon as are made in counsel's brief, even though additional errors may be assigned.—Lucas v. Detroit City R. Co., 92 Mich. 412.

¶ 1336. Where only general exceptions to findings of fact and law are taken, and appellee's brief states that it is based on the findings of law, the court will conclude that no question is before it but that of whether the findings of fact support the conclusions of law.—Weston Lumber Co. v. Township of Munising, 123 Mich. 138.

§ 313. ——Arguments not answered or not fully answered.

¶ 1337. The failure of counsel to suggest an answer to a claim of error does not preclude the Supreme Court from making an answer, because if the court did not do so it would really be deciding that to be erroneous which in fact is not.—J. E. Greilick Co. v. Rogers, 144 Mich. 313.

§ 314. Errors injurious to infants.

¶ 1338. Where errors were commited affecting injuriously the rights of infants the decree should be reversed, even though no objection be taken for such errors.—Smith v. Smith, 13 Mich. 258.

¶ 1339. Even without objection a decree will be reversed where an order was made against infants based on their admissions, and costs awarded against them improperly.—Smith v. Smith, 13 Mich. 258.

§ 315. Errors affecting appellee or defendant in error.

Party entitled to urge or complain of error errors affecting others than appellant see ante XI, D.
Consideration of errors to avoid reversal see post § 316.

¶ 1340. Grievances of defendant in erro are not considered where he has not himsel

brought error.—Newton v. Gordon, 72 Mich. 642; Hughes v. Detroit, G. H. & M. R. Co., 78 Mich. 399; Redding v. Lamb, 81 Mich. 318.

¶ 1341. On an appeal in an action of trespass upon an island in a meandered river, the court will not consider whether there was evidence that the plaintiff had acquired title by adverse possession, when the question was not submitted to the jury and the plaintiff did not appeal.—Goff v. Cougle, 118 Mich. 307.

¶ 1342. In a personal injury case where the declaration contained seven counts and the case was permitted to go to the jury upon only one count, and plaintiff did not appeal, the question whether or not there was error in refusing to permit the case to go to the jury under any of the other counts cannot be considered.—Miller v. Michigan Cent. R. Co., 123 Mich. 374.

¶ 1343. A defense decided in favor of plaintiff from which defendant took no appeal, will not be passed upon on writ of error by plaintiff where the bill of exceptions was settled in view of having plaintiff's assignments of error passed upon and all the testimony relating to the defense in question is not included in the record.—Carpenter v. Carpenter, 130 Mich. 213.

§ 316. Matters tending to sustain judgment or overcome error.

Who may urge, see ante §§ 220, 221.
Presumptions to sustain judgment, see post XII, C.

¶ 1344. Where the court below took the case from the jury at the close of plaintiff's case and directed a verdict for defendant *without* specifying the ground, the Supreme Court will not search the record to ascertain whether there is any evidence to sustain the ruling, but will reverse the judgment.—Rayl v. Estate of Hammond, 95 Mich. 22.

¶ 1345. Where the trial court, in directing a verdict for plaintiff in ejectment, holds that the tax-deeds under which defendant claims are all void, giving reasons for such holding except in the case of the deed for one particular year, the Supreme Court on review is not confined to the grounds pointed out by the judge below, but may affirm his invalidance of the deed as to which no defect was specified by him.—Tillotson v. Webber, 96 Mich. 144.

¶ 1346. On appeal by both parties from a decree granting partial relief to complainant in a bill for an accounting, the court will not consider a point not made by defendant, or the purpose of reversal, but will consider it for the purpose of answering complainant's contention that the decree is too small.—Sheldon v. Miller, 151 Mich. 283.

¶ 1347. In an action on a foreign judgment, the objection that the judgment, being signed in the name of one as "clerk," was not properly attested, was not permitted to interfere with a reversal, as the point was not raised below.—Patterson v. Kennedy, 122 Mich. 343.

§ 317. Matters in record but not properly saved.

Mode of saving questions, see Saving Questions for Review.
Sufficiency of the assignments, see ante XI, C.
Where new trial reasons are not shown, see post § 325.
Failure of bill or case to show evidence or objections fully and plainly, see post §§ 323-325.

¶ 1348. Where the remarks of counsel in addressing the jury have not been excepted to and ruled upon they cannot be reviewed on error even though recited in the bill of exceptions.—Miller v. Lachman, 117 Mich. 68.

§ 318. ——Not properly indexed or briefed.

Necessity of indexing and briefing questions, see ante §§ 226, 232, 234, 235, 312.

¶ 1349. Where the appellant's brief does not contain any reference to the exceptions upon which the alleged errors are founded, nor to the pages of the record where they may be found, and the index to the record and the assignments of error do not afford this information, the Supreme Court will only examine the record and briefs sufficiently to satisfy itself that the verdict of the jury accords with the merits of the case.—Bickle v. Jameson, 146 Mich. 483.

§ 319. Questions open in absence of exceptions.

Where exceptions and objections are not shown, see post § 324.
Presumption as to objections and exceptions not apparent, see post § 372.

¶ 1350. Where no exceptions are taken no errors but those in the record can be considered.—Crippen v. Jacobson, 56 Mich. 386.

¶ 1351. Where no exception is taken to the admission of incompetent testimony, and no error assigned upon the ruling admitting it, the court will not consider whether the error was one which worked prejudice, as, under its well-settled practice, it cannot be considered.—Noble v. St. Joseph & B. H. R. Co., 98 Mich. 249.

§ 320. ——Errors in instructions.

¶ 1352. Reversal must follow error in the charge, though it escaped attention of all parties and of the trial judge and though it would probably have been corrected had attention been called to it; since under the law it is permissible to assign error on the charge without exception.—Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432.

§ 321. ——Errors in findings.

Want of findings, see post § 322.
Request as basis of review of omission to find specifically, see post §§ 455, 456.

¶ 1353. Where the court below tried a case without a jury, special findings of fact and law being filed and no exceptions taken to the findings, and no bill of exceptions being settled, the only question open for adjudication upon a writ of error is whether the findings support the judgment.—Green v. Bennett, 23 Mich. 464.

¶ 1354. Where no exceptions are taken in a case tried without a jury the only question on error is whether the finding of facts supports the judgment.—Leitelt v. Parker, 48 Mich. 297; Morgan v. Botsford, 82 Mich. 153; Baldwin v. Hastings, 83 Mich. 639; Robards v. Waterman, 96 Mich. 233; Wilcox v. Township of Eagle, 81 Mich. 271.

¶ 1355. Where the testimony has not been returned, and where the case comes up on findings of fact and law to which no exceptions have been taken, the sole question for review is whether the facts found support the judgment.—Mutual Fire Ins. Co. v. Phoenix Furniture Co., 108 Mich. 170; Weist v. Morlock, 116 Mich. 606.

¶ 1356. Where, in a case tried without jury, no exceptions are taken to the admission or rejection of evidence, and where no failure of the trial court to pass specifically upon any proposition submitted is alleged, the Supreme Court must accept the facts as found, and can only inquire whether the facts found support the judgment.—Cutler v. Huston, 158 U. S. 423, 39 L. ed. 1040, 15 Sup. Ct. Rep. 868.

¶ 1357. Where a case is tried by a court without a jury, and no exceptions are taken to the findings of the court, the only question that can be considered in the appellate court is whether the findings supported the judgment.—Rice v. City of Muskegon, 150 Mich. 679.

¶ 1358. Where exceptions to the findings of fact and law by the trial court are not filed within the four days required under Circuit Court Rule 26, and no extension of time is granted, and said exceptions are not settled and incorporated in the bill of exceptions, the only question before the Supreme Court is whether the findings of fact support the judgment.—Rameau v. Valley, 168 Mich. 569.

¶ 1359. Where no exceptions have been taken to refusals to find, the Supreme Court will not go outside of the findings of fact, and draw inferences from circumstances.—Gambs v. Estate of Sutherland, 101 Mich. 355.

§ 322. Questions open on record without findings.

See also ante § 294.
Presumptions as to findings, see post § 382.

¶ 1360. In the absence of findings of fact the evidence in the bill will not be examined to see whether it sustains the conclusion of the court below.—Morgan v. Botsford, 82 Mich. 153.

¶ 1361. Where, in a cause tried by court without jury no findings of fact or law appear in the record, the Supreme Court is confined to the question whether there was evidence to support the judgment.—O'Brien v. Evans, 107 Mich. 623.

¶ 1362. The court will not, in the absence of findings of fact, go into an examination of the testimony received on the trial of an appeal from probate court, to ascertain whether there is any testimony supporting any possible findings of fact which would sustain the judgment.—In re Buchan's Estate, 100 Mich. 219.

¶ 1363. In an appeal from an order of the circuit court dismissing an appeal taken from an order of the probate court for the allowance of a guardian's final account there is no question of law for review where it is not asserted that the findings of fact of the trial court are not supported by the evidence or that they do not support the judgment.—In re Bristol, 199 Mich. 453.

§ 323. Where evidence is not fully preserved.

Sufficiency of evidence in the bill or case, see ante § 176.
Presumptions as to matters not in record, see post § 362 et seq.
Presumption that evidence was sufficient, see post § 378.
Presumption as to other proofs, see post §§ 373-378.

¶ 1364. Where a case tried by the court without a jury is brought up on a bill of exceptions which does not purport to embrace all the evidence, and the record includes no definite finding of facts, nothing is left open for review except the validity

of the exceptions to the evidence.—Lyman v. Becannon, 29 Mich. 466.

¶ 1365. Where a bill of exceptions contained no testimony of the witnesses and only contained certain requests for findings and the findings and conclusions of the court, held that resort could only be had for the facts to such findings and to documentary evidence found in the record.—In re Reh's Estate, 196 Mich. 210.

¶ 1366. Where the record does not purport to contain all the evidence, and assignments of error are general, the conclusions of the trial court, as expressed in the judgment, must be deemed correct.—Lasley v. Preston, 157 Mich. 66.

§ 324. Where objections, rulings or exceptions are not shown.

Sufficiency of the bill or case, see also ante § 177.
In absence of exceptions or objections, see ante §§ 319-321.
Presumptions as to objections not shown, see post § 372.

¶ 1367. Where no amendments are proposed to the findings of fact and no exceptions taken to the findings as made, the only assignment of error open on a case made containing nothing but the findings and judgment is that the findings do not support the judgment.—Wood Mowing & Reaping Machine Co. v. Seaver, 90 Mich. 546.

¶ 1368. A record with testimony but without a bill of exceptions or exceptions to findings of fact, or purporting to contain all the "testimony" presents no question but whether the findings support the judgment.—Superintendents of Poor of Washtenaw County v. Rabbitt, 99 Mich. 60.

¶ 1369. Assignments of error in special findings will not be considered when not supported by exceptions to the findings.—Superintendents of Poor of Washtenaw County v. Rabbitt, 99 Mich. 60.

¶ 1370. An objection that a tax deed is void because no certified copy of the decree was annexed to the tax record in the county treasurer's office will not be considered on appeal where it is not shown that such point was raised in the court below.—Hooker v. Bond, 118 Mich. 255.

¶ 1371. Where the record fails to comply with Circuit Court Rule No. 26, in failing to contain objections or exceptions to the admission of testimony, or exceptions to the rendition of judgment, and no request was made for special findings of fact and law, there is nothing for the Supreme Court to review.—Nichol v. Ward, 156 Mich. 136.

§ 325. Where reasons for new trial ruling are not stated.

¶ 1372. On a record showing a motion for new trial denied without assigned reasons, the motion having been based on numerous grounds besides excessiveness of the verdict, reversal cannot be had on that ground, though the excessiveness is apparent.—Bass v. Cleveland, C., C. & St. L. Ry. Co., 142 Mich. 177. Grant J., dissenting on other points, concurring on this.

¶ 1373. Alleged error of the court in denying a new trial on the ground that the verdict was against the weight of the evidence cannot be reviewed under Comp. L. 1897, § 10504, in an action for personal injuries, where the record contains no statement of the reasons which actuated the trial judge in refusing a new trial; even though upon denying a second motion for a new trial, which set forth the reasons named in the first motion and the further reason of the discovery of new evidence as grounds for the motion, the judge filed reasons which referred only to the newly discovered evidence.—Wilbur v. Michigan Cent. R. Co., 145 Mich. 344.

¶ 1374. Where a trial judge in denying a motion for a new trial files no reasons in writing and there is nothing in the record to indicate that he was requested to give his reasons, his action will not be subjected to review.—Gordon v. Drake, 193 Mich. 64.

§ 326. Where no case is settled.

See also ante § 272.
Necessity that bill or case be regularly and properly settled, see ante § 110 et seq.

¶ 1375. Where the record consists of the bill, answer, replication and decree, and a copy of proofs claimed to have been taken in open court, no case however having been settled as provided by the statute, the proofs cannot be considered, but the case must be heard on the pleadings.—Fields v. Colby, 102 Mich. 449.

§ 327. Exceptions to accounts.

¶ 1376. Where certain items taken into account on an accounting are examined in detail by the briefs of the counsel for both parties, and it appears that the court below erred in respect to the same, the Supreme Court may waive the objection that the exceptions are not specific, and enter into an examination of the accounts.—Clark v. Landon, 90 Mich. 88.

§ 328. Exceptions to referee's report.
Review of referee's findings, see post § 462.

¶ 1377. Where exceptions are taken to a referee's report and are overruled, and error is assigned on the confirmation of his finding of law, the only questions raised are upon the exceptions to his conclusions of law.—Goodrich v. Hubbard, 51 Mich. 62.

C. INTERPRETATION AND EFFECT, PRESUMPTIONS, AND CONCLUSIVENESS OF RECORD, CASE OR BILL.

§ 329. Construction and effect of record generally.
Exclusion of extraneous matters from consideration, see ante §§ 279-285.
Presumptions arising on the record, see generally post §§ 345-393.
Ambiguity and conflicts in record or between record and other papers, see post § 341.
Judicial notice in aid of record, see post § 344.

¶ 1378. All reasonable intendments are made to support the rulings below.—Friedland v. McNeil, 33 Mich. 40.

§ 330. ——Of pleadings as set out.
Of judgment on demurrer, see post § 338, ¶ 1418.
Reading pleading as if properly amended without alteration of record or new filings, see post § 369.
Presumptions as to nature and ground of action, see post § 364.
Presumption as to admissibility of evidence under the pleadings, see post § 370.
Assumption of truth of facts alleged by reason of other pleading responsive thereto, see post § 351.

¶ 1379. The fact that no demurrer was interposed to a new complaint after the former one was held bad on demurrer would indicate that in the view of counsel for defendant such new complaint stated a cause of action.—Rodman v. Michigan Cent. R. Co., 59 Mich. 395.

¶ 1380. Where the printed pleadings in a chancery case are abbreviated and the record does not contain an answer in full, the insufficiency of which is claimed, it will be presumed that all allegations deemed important are stated.—Atkinson v. Akin, 197 Mich. 289.

¶ 1381. In the absence of a motion to correct a record, the Supreme Court will pass upon the sufficiency of the bill therein set forth, notwithstanding an allegation in the defendant's brief that the bill has been changed.—Sartwell v. Young, 126 Mich. 304.

¶ 1382. A demurrer in probate court to a cross-petition and answer to a petition for distribution, setting up that petitioner is not a "lawful heir" within the terms of the will, though not the regular and proper way of raising the question in the probate court, may be treated on error to the judgment of the circuit court, sustaining the overruling of such demurrer, as if the facts in the cross-petition and answer had been put in evidence in the probate court and again in the circuit court and the same judgment rendered thereon.—Turner v. Burr, 141 Mich. 106.

¶ 1383. On appeal a petition found in the office of the register in chancery cannot be considered the original petition in a tax proceeding where the original return shows a printed order signed by the circuit judge followed by a petition in the same type with the memorandum to the printer to print both, as required by Pub. Acts 1893, No. 206, § 66, and the record also contains a petition in book form containing a list of land alleged to be delinquent and bearing evidence of filing, signed by the register which appears to have been produced from the county treasurer's office and which conforms to Pub. Acts 1893, No. 206, § 61. The latter will be considered the original petition.—Barnum v. Barnes, 118 Mich. 264.

§ 331. ——Of question or offer and ruling thereon.
Offer of evidence generally, see Trial, V.

¶ 1384. An offer of testimony must, in a review of the case, be considered as it was made, and no facts not expressed or clearly implied can be intended.—Linn v. Gilman, 46 Mich. 628.

¶ 1385. An assignment of error to the court in ruling that the administrator need not produce his books is not sustained by the records, where, in an appeal from the settlement of the final account of such administrator, it appears that the witness said he would produce the books if necessary, and the court suggested that the law provided how to get them into court, but that [illegible] doubted his authority to order them in at the present state of the case.—Reed v. Whipp, 140 Mich. 7.

¶ 1386. No error can be assigned up[on] court's elicited statement that he does [not] care to hear counsel upon questions of [law] involved in instructions requested, unl[ess] counsel's request for such hearing [was] brought to court's attention.—Wildey v. Crane, 69 Mich. 17.

§ 332. ——Of objections and exceptions.

Making objections and saving question made thereby, see Trial, V; Saving Questions for Review.

Construction of assignments of error, see ante § 214.

Presumptions as to exceptions and objections not apparent on record, see post § 372.

Assumption of truth of facts on which exception rests, see post § 351.

Specific exception as implying that no others were taken or tenable, see post § 372.

¶ 1387. In an action for the purchase price of a cash register on a written order, arguments of counsel in support of testimony to show oral statements of the agent selling the machine confined the theory of the case to the question of its admissibility as showing a warranty and did not raise the question of fraud in the inception of the contract, where the parol evidence rule only is discussed, notwithstanding counsel at one place in the argument refers to the salesman's statements as inducing the purchase and states that he would show that the purchase was made by reason of the misrepresentation.—Hallwood Cash-Register Co. v. Millard, 127 Mich. 316.

¶ 1388. Upon writ of error from an order quashing a writ of replevin, it will be assumed that a motion to quash which does not refer to any affidavit or paper is based upon the record, where the affidavit, writ and declaration are attached to the motion. —Dages v. Brake, 125 Mich. 64.

¶ 1389. On error an objection to plaintiff's being sworn on the ground that she was an incompetent person will be regarded as having been an objection to her competency as a witness rather than one requiring that the court should pass on competency before admitting the testimony, where the court manifested a belief that she was competent by leaving it to the jury with instructions that if they found her incompetent they might disregard her testimony, it being a doubtful case making that the proper practice.—Mead v. Harris, 101 Mich. 585.

¶ 1389a. Exceptions to findings of fact which do not state the grounds of objection may be presumed to have rested on objection that the findings were not supported by the evidence, that being urged in the brief as the ground.—First National Bank v. Walker, 115 Mich. 434.

§ 333. ——Of evidence as set forth.

In reviewing directed verdict, see post §§ 398-398.

¶ 1390. A record showing that the vice-president of an appealing insured testified that "we had no other insurance on this property; we had a floating policy, but it did not cover this loss," will not enable the Supreme Court to say that the floating policy, which was not in the record, was "other insurance" which avoided the specific policy sued on.—Brunswick-Balke-Collender Co. v. Northern Assur. Co., 142 Mich. 29.

¶ 1391. A case will not be considered on review in the light of a stipulation of facts alone, where the record indicates that a further showing was made on the trial which disproved an essential fact as stipulated.—Edwards v. Taliafero, 34 Mich. 13.

¶ 1392. No presumption arises on appeal that a memorandum on the back of a mortgage owned by a decedent, "No. 131. January 2. Quincy, $4,719.50"—was made by the deceased in the year the mortgage matured, to represent the amount due at that time, where no attention was called to it in trial or any proofs of its authorship offered.—Rose v. Lockerby, 116 Mich. 277.

¶ 1393. On error, where a bill of sale by an association is in evidence, the offer and rejection of record proof that it was authorized leaves the case stand as if there was no such record.—Lingle v. Dalzell, 141 Mich. 399.

§ 334. ——Of instructions as set out.

General rules for the construction of the charge, or of any of its parts in relation to the whole charge, see Instructions, II, C.

Resort to evidence and issues for construction, see post § 335.

Contradiction by assignment of error, see post § 341.

Bad punctuation or grammar, see post § 343.

¶ 1394. A charge to a jury is to be construed together as a whole, and not by separate sentences or detached propositions, which standing alone, might be erroneous.—McGinnis v. Kempsey, 27 Mich. 363; Daniels v. Clegg, 28 Mich. 32; Greenlee v. Lowing, 35 Mich. 63; People v. Finley, 38 Mich. 482; Lake Superior Iron Co. v. Erickson. 39 Mich. 492; Coots v. Chamberlain, 39 Mich. 565; Frankel v. Coots, 41 Mich. 75; Wheeler & Wilson Mfg. Co. v. Walker, 41 Mich. 239; Driscoll v. People, 47 Mich. 413; Dibble v. Nash, 47 Mich. 589; Merchants' Bank of Canada v. Ortmann, 48 Mich. 419; People v. Howard, 50 Mich. 239; Kuney v. Dutcher, 56 Mich. 308; Watson v. Watson, 58 Mich. 507; Brown v. McCord & Bradfield Furniture Co., 65 Mich. 360; Kirchner v. Detroit City R., 91 Mich 400; Westra v. Westra's Estate, 101 Mich. 526.

¶ 1395. Particular sentences and phrases of a charge should not be considered as if they were independent; they must be con-

strued with their context.—Welch v. Ware, 32 Mich. 77; Burdick v. Michael, 32 Mich. 246.

¶ 1396. A charge to the jury must be considered and construed as a whole in the same connected way in which it was given, and upon the assumption that the jury did not overlook any portion, but gave due and equal weight to every part.—Anderson v. Walter, 34 Mich. 113; Hart v. Newton, 48 Mich. 401.

¶ 1397. Complaint of a portion of the charge, which, standing alone, would bear a construction that might mislead the jury, but, considered with the rest, would not be likely to, will not be sustained.—Daniels v. Clegg, 28 Mich. 32.

¶ 1398. The accuracy of a charge must be decided on a consideration of the whole charge and not merely of detached passages or isolated expressions; and an exception to a single remark of the judge, without making an effort to have it corrected or explained, will not be sustained unless the Supreme Court is satisfied that justice requires it.—Pray v. Cadwell, 50 Mich. 222.

¶ 1399. An instruction which is correct as a whole cannot be regarded as erroneous because a part of it standing by itself may seem objectionable.—Cleveland v. Miller, 94 Mich. 97.

¶ 1400. In construing a charge given to the jury the whole of it is to be considered, and error cannot be predicated upon a detached sentence that is not strictly accurate where, when considered with the context, it could not have misled the jury, the charge as a whole being correct.—Lyon v. Watson, 109 Mich. 390.

§ 335. ——Of instructions in light of the evidence and issues.

Presumption that evidence warranted charge given or refusal of requests, see post §§ 376, 377.

¶ 1401. Portions of a charge will not be considered as if standing alone, but will be construed in connection with the rest and in the light of the pleadings and evidence.—Russell v. Phelps, 42 Mich. 377.

¶ 1402. Instructions to the jury and modifications of proposed instructions are not to be construed as abstract propositions, but as they would be understood in connection with the evidence.—Sword v. Keith, 31 Mich. 247.

¶ 1403. On error the Supreme Court must construe a request for instructions to the jury as it must have been understood by the court and jury had it been given. It must therefore be construed in reference to the evidence upon the subject to which it relates.—Angell v. Rosenbury, 12 Mich. 241.

¶ 1404. In reviewing a case the charge to the jury should be considered as a whole, and in connection with the circumstances which tend to color the case but which cannot appear upon the record; and such intendments will be made in its favor as the facts will allow.—Souvais v. Leavitt, 50 Mich. 108.

¶ 1405. Charges must be construed in the light of the record and proofs, and when supported by a fair interpretation of the case as tried before the jury, and nothing is pointed out in them which could mislead the jury, will not be assumed to be incorrect.—Botsford v. Kleinhans, 29 Mich. 332.

§ 336. ——Of special findings and conclusions.

Presumptions as to findings not apparent, see post §§ 382, 383.
Presumptions as to requests, see post § 382.
Conflict between findings and pleadings, see post § 341.
Of finding reciting a collateral judgment, legality of the judgment, see post ¶ 1427.
Findings of fact and conclusions of law in general, see Verdicts and Findings.

¶ 1406. A finding that the facts in proof make out an understanding between parties that a certain transaction shall settle a demand is a conclusion of fact and not reviewable at law.—Sly v. Freeman, 38 Mich. 689.

¶ 1407. A finding of fact that a way was used at and from a certain time "under claim of right" is conclusive on the Supreme Court in reviewing a decision that there had been an easement acquired by prescription, though the finding is denominated a conclusion of law by the trial judge in the record, but where the opinion of the trial judge shows that he regarded it as a finding of fact rather than as a legal consequence of the facts found.—Toney v. Knapp, 142 Mich. 65; per Carpenter, C. J., with three other justices concurring and three dissenting.

¶ 1408. The Supreme Court cannot supply positive omissions from a finding of fact by inferences and presumptions.—Briggs v. Parsons, 39 Mich. 400.

¶ 1409. The Supreme Court, in reviewing a special verdict, cannot assume any fact not therein stated, or infer any from those found, but must take the finding as the jury have made it, subject to the allegations in the pleadings.—Buckley v. Great Western R. Co., 18 Mich. 121.

¶ 1410. Where a jury have answered special questions inconsistently and have rendered a general verdict, where the questi

were ambiguous, all serious doubts must be resolved against the propounder of the questions, and it will be presumed that the jury placed that construction upon the questions which makes their answer harmonious with their general verdict, and with their answers to other special questions.—Burke v. Bay City Traction & Elec. Co., 147 Mich. 172.

¶ 1411. Where a case is tried without a jury all essential facts must be found, but where no amendments to them were proposed and the attention of the trial court is not attracted to any alleged defects by special objection or otherwise, the findings as filed will be aided by all reasonable intendments.—Schelske v. Township of Orange, 147 Mich. 135.

¶ 1412. Where the verdict and judgment in proceedings under the log-lien law are in the usual form in assumpsit, and are silent as to the plaintiff's lien filed under such law, it will be presumed that the jury failed to find a lien, especially where the record shows that their attention was called to the fact that if a lien was found, it should be entered as a part of their verdict.—Kieldsen v. Wilson, 77 Mich. 45.

§ 337. ——Of general verdict on diverse counts or issues.

Effect of general verdict on diverse counts, see generally Verdicts and Findings.

¶ 1413. Judgment for injury done by the destruction of the freehold must be reversed if the verdict was general while title to a part of the property was not fully proved.—Anderson v. Thunder Bay River Boom Co., 57 Mich. 216.

¶ 1414. A general verdict for defendants in an action against the indorsers of commercial paper, where defendants have alleged in defense both fraud in securing their indorsement, and payment of the indebtedness, leaves the court of appeal unable to determine the ground on which such verdict rests.—Alpena National Bank v. Greenbaum, 80 Mich. 1.

¶ 1415. Where the jury, being erroneously instructed as to one of two counts in the declaration, gives a general verdict for the plaintiff, judgment must be reversed.—Rayburn v. Comstock, 80 Mich. 448.

¶ 1416. Where several issues are presented, and a general verdict rendered, a party asserting that the judgment determined a particular issue has the burden of proving it.—Hoffman v. Silverthorn, 137 Mich. 60.

¶ 1417. Where defendant in an action of assumpsit pleads the general issue and gives notice that he will claim recoupment of damages for breach of contract, the pleadings put the existence of a contract in issue; and as a verdict for plaintiff in the full amount of damages claimed does not necessarily decide the fact of its existence as against defendant, the Supreme Court can look into the case to determine whether there was any evidence of it to go to the jury.—Hudnutt v. Comstock, 50 Mich. 596.

§ 338. ——Of judgment.

Presumptions in favor of validity and regularity, see post § 352 et seq.

Of judgments on appeal from justices, see post § 339.

Construction and effect of judgments generally, see Judgments; Former Adjudication.

¶ 1418. Plaintiff requested the court which had sustained defendant's demurrer to set out the reasons for its action. The court did so, but the plaintiff did not serve notice of the request, for special reasons, on the defendant. Held, that the judgment should be considered as general, and as sustaining the demurrer for the reasons specified therein.—Johnson v. Desmond Chemical Co., 152 Mich. 84.

¶ 1419. A recital in a decree must be treated on appeal as correctly stating the facts where the alleged incorrectness was not called to the attention of the trial court.—Myers v. Myers, 143 Mich. 32.

¶ 1420. A judgment which should have been rendered against two defendants as partners but was without objection rendered against one only who, if he was liable at all, was only liable as a partner, will on appeal be treated as having been rendered against both.—McPherson v. Bristol, 122 Mich. 354.

¶ 1421. The court will not assume on appeal that the law was not complied with in tax proceedings resulting in the sale of lands.—Wilkin v. Keith, 121 Mich. 66.

¶ 1422. Judgment entered by default against a contractor in a suit against him and the owner of logs to enforce a labor lien is assumed to be regular where there is nothing of record to the contrary.—Van Slyck v. Arseneau, 140 Mich. 154.

¶ 1423. On denying specific enforcement of a contract to erect a house on land for which complainant held a contract, which land was deeded to defendant who was to raise the money and build the house and then reconvey when reimbursed, where the house was not in accordance with the contract, a provision in the decree that defendant must remove the house from the land, while possibly erroneous was regarded as one for defendant's benefit, which he need not accept

in view of an alternative that he might accept a compromise offered by the complainant.—Crawford v. Schneider, 106 Mich. 199.

¶ 1424. A judgment for the debtor in assumpsit brought for the original amount of plaintiff's compromised claim cannot be sustained, though the amount to which plaintiff is entitled was deposited in court as a condition of obtaining a new trial in which the judgment was rendered, where the order for payment into court did not require the money to be at plaintiff's disposal, and where no tender had ever been made sufficient to bar plaintiff's action; since, while the judgment would have been correct if the composition of the debt had been performed by a tender or payment into court, yet the judgment standing for defendant would bar plaintiff from recovering the amount paid in under the order.—Browning v. Crouse, 40 Mich. 339.

¶ 1425. An objection that a judgment was taken on stipulation to which objector was not a party is untenable in the face of a record showing that it was taken on proofs, but that the manner of taking the proofs was agreed upon.—Home Savings Bank v. Wayne Circuit Judge, 113 Mich. 385.

¶ 1426. On appeal from a decree for claimants in a suit to enforce mechanics' liens, where the court is shown to have spent much time in computing the amounts due each claimant, the decree will not be disturbed in the absence of specific errors pointed out in the court's computation.—Frohlich v. Carroll, 127 Mich. 561.

¶ 1427. A finding that one was committed to an insane asylum by order of the probate court with the order of that court set out and reciting therein that the insane "was duly notified," suffices on error where there are no exceptions, though there is no direct finding by the circuit court that the insane was cited and served.—Superintendents of Poor of Washtenaw County v. Rabbitt, 99 Mich. 60.

§ 339. ——Of record on appeal or certiorari in circuit.

Repugnancy of record to purported amendments, see post § 341.

¶ 1428. On error to the judgment of the circuit court, rendered on a special appeal from a justice, a point which no one reading the affidavit would have been led to consider, and as to which the justice's return is silent, cannot be the subject of review.—Courtis v. Garrison, 148 Mich. 226.

§ 340. ——Of certification of bill or case.

¶ 1429. The trial court's certificate that, "forasmuch as the matters set forth do not fully appear of record, [appellant] tenders this, his bill of exceptions, and prays the same may be signed and sealed by the judge of this court, and that said testimony be set forth in full, questions and answers, for a necessary and full understanding of the same, which said bill of exceptions is accordingly signed," etc., means that all of the evidence is set out in full.—Hatch v. Reid, 112 Mich. 430.

§ 341. Ambiguity, repugnancy and conflicts in record.

Construction of particular matters contained in record, see also ante §§ 330-340.
Ambiguous assignments of error, see ante § 214.
Ambiguities in findings, see also ante ¶ 1410.
Uncertainty as to whether judgment was on consent or on proof, see also ante ¶ 1425.
General verdict ambiguous because of diverse issues, see ante § 337.
Repugnant or inconsistent findings, see post § 457.
Conclusiveness of certificate over contrary assertion of counsel as to matter contained, see post § 349.
Statements on brief contradicting record as to terms of the pleadings, see ante § 330.
Claim of exceptions in brief repugnant to showing in record, see also post ¶ 1567.
Contention in brief as to evidence repugnant to record, see also post ¶ 1684.
Clerical errors, see post § 342.
Exclusion of extraneous matters from consideration, see ante §§ 279-285.
Conflict between original and printed record, see also Certiorari.

¶ 1430. Nothing can be inferred from an ambiguous record.—Sherman v. Palmer, 37 Mich. 509.

¶ 1431. Where it is apparent that the record gives the evidence only in condensed form, the Supreme Court cannot assume that the trial judge misstated it in charging the jury, even though his charge varies from the evidence as set forth, so long as it does not appear that his attention was called to the alleged misstatement at the time, or the record does not put the fact of misstatement beyond question.—Farmers' Mut. Fire Ins. Co. v. Gargett, 42 Mich. 289.

¶ 1432. Where an instruction to the jury, as contained in the record, includes words that render it manifestly erroneous, and which are complained of, but such words are omitted from the instruction as embodied in the assignment of error, the question is not presented, and it may be surmised that the record is incorrect.—McGuire v. Vaughan, 106 Mich. 280.

¶ 1433. The verdict as entered is not conclusively presumed to be the verdict as rendered. The bill of exceptions, when filed became a part of the record, and contain the action of the court prior to the time

when the verdict was put in force by the clerk; and the entry made by him does not necessarily compel the court to conclude that the bill of exceptions is in any respect untrue.—Guerold v. Holtz, 103 Mich. 118.

¶ 1434. Exceptions appearing in the printed record, but found to be stricken out of the bill of exceptions as returned, are presumed not to have been taken, unless it is shown that the return has been tampered with.—Atkinson v. Morse, 57 Mich. 276.

¶ 1435. Where writs of error are taken out by the opposing parties in the same case, and their several bills of exceptions are signed by the trial judge at the same time, such bills are to be treated as of equal verity, and, if they conflict as to a particular point, the Supreme Court may properly refuse to pass upon it.—Miller v. Clark, 56 Mich. 337.

¶ 1436. On error to review a judgment of the circuit court on certiorari to review a justice's judgment, there appeared in the record a paper purporting to amend the certified return of the justice. The paper was contradictory of the record, and uncertified by the justice. Held, that it could not be considered as a part of the record.—Bernstein v. Thayer, 157 Mich. 625.

¶ 1437. A statement of the trial court that he never intended to strike out certain evidence, but that the stenographer's notes are open to a contrary construction, must be accepted by the appellate court, even though it may contradict the record; where it will give the appellant the benefit of an exception taken and of which he would otherwise be deprived.—Taylor v. Ziem, 148 Mich. 329.

¶ 1438. Where in a suit to recover taxes paid under protest, including school taxes, the findings of fact fail to show the amount of such school taxes, the bill of particulars of plaintiff, which purports to show the amount, cannot be used to supply the place of such omitted finding.—Shelden v. Township of Marion, 101 Mich. 256.

§ 342. Clerical errors in record.

Bad punctuation or grammar, see post § 343.

¶ 1439. A clerical error in the record in transcribing a deed by which a copy used in a suit describes a lot as in private claim 78 instead of 678 should be disregarded where the record of the deed describes the land correctly.—Vreeland v. Monnier, 127 Mich. 304.

§ 343. Punctuation and grammar.

¶ 1440. The fact that in the stenographic notes of the original charge a comma is omitted from an instruction will not prevent its being given its ordinary meaning with punctuation more in accordance with grammatical construction and the circumstances involved in the case.—Jarvis v. Flint & P. M. R. Co., 128 Mich. 61.

¶ 1441. A clause in an instruction will be considered with reference to what preceded it and what immediately followed without reference to the punctuation of the stenographer or the attorneys.—Wilson v. Royal Neighbors of America, 139 Mich. 423.

§ 344. Judicial notice in aid of record.

Resort to other records of the court, see also ante § 284.

Judicial notice in general, see Evidence, I.

¶ 1442. The Supreme Court will not take judicial notice in a suit on an assigned judgment, that the assignee is the same person as an attorney who is an officer of the court, where it is urged that the assignment is contrary to How. St., § 7185, prohibiting such assignments for the purpose of bringing suit.—Belden v. Blackman, 118 Mich. 448.

§ 345. Presumptions as to contents and correctness.

As to matters not appearing of record, see post §§ 362-393.

On ambiguous record, see also ante § 341.

¶ 1443. The bill of exceptions must be assumed to contain all material evidence.—Rose v. Jackson, 40 Mich. 29.

¶ 1444. A statement in a bill of exceptions is assumed to be correct and counsel cannot contradict it.—Marquette, H. & O. R. Co. v. Marcott, 41 Mich. 433.

¶ 1445. On appeal the court is bound by the record as it comes up, and counsel will not be heard to urge matters not contained therein alleging it to be incomplete.—Huff v. Cole's Estate, 127 Mich. 351.

¶ 1446. It cannot be presumed that the entire evidence in the case is set forth in the bill of exceptions.—Grand Trunk R. Co. v. Ives, 144 U. S. 408, 36 L. ed. 485, 12 Sup. Ct. Rep. 679.

¶ 1447. A case made after judgment for review on both the law and the facts is presumed to contain all the evidence unless the contrary appears.—Gard v. Stevens, 12 Mich. 292.

¶ 1448. It will be presumed that the bill of exceptions contains all the testimony where it appears to set forth a connected examination of the witness from beginning to end

under a statement that the witness testified as appears in the bill.—Godkin v. Obenauer, 113 Mich. 98.

¶ 1449. Where it has been certified that the bill of exceptions "has been made sufficiently full and complete so that the Supreme Court on writ of error may by going over the same be able to make an examination of the entire case," and appellant contends that the answers to special questions and the general verdict are not supported by the testimony, it will be assumed that the record contains substantially all the testimony given at the trial.—Newell v. Reid, 189 Mich. 174.

¶ 1450. The bill of exceptions is presumed to contain all of the testimony.—Sherk v. Holmes, 125 Mich. 118.

¶ 1451. Where a bill of exceptions does not show what the contents actually were of a docket entry, claimed to have been erroneously rejected as evidence, it will be presumed that it contained all the enumerated matters required by the statute, and these only.—Goodrich v. Burdick, 26 Mich. 39.

¶ 1452. On the hearing it was claimed that certain evidence returned as a part of the record should be excluded, on the allegation that it was not actually filed in the court below, and was not considered by that court in its decision. The evidence consisted of the proof of documents set out in the bill, and appeared to have been regularly taken on proper notice. There being no ground for supposing that the party objecting had been taken by surprise, and the transcript on appeal having been on file for two years without motion to correct it, it was held that the evidence should not be disregarded.—Michigan Ins. Co. of Detroit v. Brown, 11 Mich. 265.

§ 346. ——Evidence set out with respect to given subject.

¶ 1453. Where a bill of exceptions set out what the evidence tended to show in reference to any subject-matter, it will be presumed to state it completely, or at least all that could affect any question to be raised on that subject, and no presumption will arise in support of a judgment that there was evidence, other than that so set out, to warrant the conclusion upon which the judgment was based.—Shaw v. Hoffman, 25 Mich. 162.

¶ 1454. Where a bill of exceptions raises a point and sets out evidence as tending to bear on it, it will be presumed, unless the contrary appears, that there was no evidence which would alter the effect of that which is stated.—Atlas Min. Co. v. Johnston, 23 Mich. 36.

¶ 1455. A bill of exceptions in narrative form, which expressly states that the testimony of some witnesses upon a material question is given in full, and which does not indicate that the testimony of any witness was omitted, will be presumed to contain all testimony bearing on such question.—Schermerhorn v. Merritt, 123 Mich. 310.

¶ 1456. A bill of exceptions setting out the substance of the evidence in abbreviated narrative form and certified to "contain the substance of all testimony given upon said trial, which in any manner affects the exceptions therein noted," will be presumed to have all evidence requisite to consideration of an exception for want of evidence to sustain a finding.—Farrell v. Danbury, 141 Mich. 81.

§ 347. ——Statement that evidence was "closed."

¶ 1457. Where the form and wording of the bill of exceptions indicates that the whole testimony of each witness is given verbatim, and it concludes with the recital that "the evidence was here closed," it will not be presumed that it does not contain all the evidence.—Carter v. Snyder, 27 Mich. 484.

¶ 1458. A bill of exceptions that gives the name of each witness and states that, "being duly sworn, he testified in substance as follows," closing the statement of his testimony with the words "and the testimony being here closed," is presumed to contain all the evidence bearing on the questions raised.—Hitchcock v. Burgett, 38 Mich. 501.

¶ 1459. A bill of exceptions constructed in a connected narrative form, giving the testimony of each witness, and closing with the statement "and thereupon the defendants rested their case," will be presumed to contain all of the evidence bearing on the questions raised.—Ironwood Store Co. v. Harrison, 75 Mich. 197.

§ 348. ——As to regularity of settlement and signing.

¶ 1460. A bill of exceptions signed by the circuit judge, showing the exceptions to have been properly taken on the trial, is to be presumed properly signed, and within the proper time, though dated several months after the trial and judgment, and though nothing appears in the bill itself, or in the record, to show affirmatively that time was allowed for its preparation and settlement.—Sweetzer v. Mead, 5 Mich. 33.

¶ 1461. Where the case is duly signed by the judge, and purports to have been settled before him, all previous steps necessary to its settlement must, in the absence of any showing to the contrary, be presumed to have been regularly taken.—Sallee v. Ireland, Mich. 154.

¶ 1462. An objection that the Supreme Court cannot hear an appeal on its merits for want of jurisdiction in that the case was not settled within four months from the date of the entry of the decree, cannot be sustained where the record shows that the decree was rendered September 18, 1903, but not when it was entered, and the case was settled as of January 18, 1904, the certificate stating that it is in the same form as was submitted for settlement, except that amendments submitted by the defendants on that date are inserted, and the certificate is dated February 1, 1904.—Wheeler v. Lasch, 143 Mich. 183.

§ 349. ——Conclusiveness as certified.

See also ante §§ 345-348.

¶ 1463. The certificate of a trial judge as to all matters certified is considered as conclusive by the Supreme Court.—Hoopengarner v. Stipe, 169 Mich. 307.

¶ 1464. A claim of counsel that the record does not contain all the testimony and therefore the verdict should be affirmed, will be disregarded where the certificate of the circuit judge states "that the foregoing is all the evidence given in the case covering or in relation to the matters assigned as error."—Storrs v. Michigan Starch Co., 126 Mich. 666.

§ 350. ——Admissions, concessions and waivers.

Additions and amendments of record by stipulation, see ante § 248.

Admissions by failure to contradict misstatements in opposing brief, see ante § 233.

¶ 1465. On an action by copartners there was no direct evidence of partnership. A contract signed by defendant, referring to plaintiffs by their firm name, was put in against defendant's objections. On error, it not appearing what these objections were, it was held necessary for plaintiffs to show affirmatively that they amounted to a waiver of proof of partnership.—Lee v. Hardgrave, 3 Mich. 77.

¶ 1466. Where concessions and statements of counsel are recited in the charge to the jury, they will be presumed to have been made, unless the record shows that before the jury retired the attention of the court was called to the matter, and an opportunity given for correction.—Stanton v. Estey Mfg. Co., 90 Mich. 12: People v. Skutt, 96 Mich. 449.

¶ 1467. Where on the request of counsel for a defendant that certain notes and a bill of sale, upon which plaintiff based his claim, be taken by the jury, plaintiff's counsel objected unless the bill of particulars was also taken by them, and the court ruled that, if any of the papers offered in evidence were to go to the jury, all should go that had been admitted in evidence, and that, if any were excluded, all should be, to which decision no exception was taken, it will be presumed that defendant's counsel was willing that all should go, rather than that all should be excluded, it appearing from the record that all of such papers were sent to the jury room.—Daniels v. Weeks, 90 Mich. 190.

¶ 1468. In replevin for property claimed to have been seized under an unlawful tax, plaintiff claimed for the first time in the Supreme Court that judgment against him for the amount of the tax could not be sustained in the absence of evidence of the value of the property, as the value might be less than the tax. Held, that the fair inference from the record was that the case was tried upon the understanding that the property was worth more than the amount of the tax.—Boyce v. Peterson, 84 Mich. 490.

¶ 1469. In order to justify the appellate court to declare that an appellant has waived the right to have reviewed a question obviously and necessarily determined by an adverse judgment of a lower court, such claim of waiver must be supported by the record and cannot rest on mere presumption.—Stewart v. Grand Rapids & I. R. Co., 147 Mich. 48.

§ 351. Facts taken as true or confessed.

On review of directed verdict, see post § 387.

From absence of contradiction in brief of adversary, see ante § 233.

Allegations taken as true because of other pleading, see Equity; VII; Pleading.

¶ 1470. Where a case rests upon exceptions to conclusions of law in a special finding, the exceptions must stand or fall by the finding of facts.—Upton v. Kennedy, 36 Mich. 215 (syllabus).

¶ 1471. Where a defense is proposed based on an offer to prove certain matters stated which offer is refused, the case must be considered on error precisely as though such facts had been established.—Clay Fire & Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 1472. A fact set up in an affidavit that has been made part of the record is taken to be true on review if no issue has been raised on the affidavit.—People v. Kennedy, 58 Mich. 372.

¶ 1473. On appeal from the dismissal of a bill on demurrer the bill will be assumed to be true for the purposes of the hearing, in the absence of any answer.—Compo v. Jackson Iron Co., 49 Mich. 39.

¶ 1474. Where in a suit in chancery the lower court erroneously refuses to permit defendant to introduce evidence to support the averments of her cross-bill and answer, the Supreme Court will not for this reason consider the averments to be true.—Davis v. Wardowski, 164 Mich. 561.

§ 352. Presumptions and burden to show error generally.

[Note. The general rule, exemplified by the cases collected in this division, post, is that error must appear affirmatively on the record and bill or case, except in respect to those matters which are indispensable to a valid judgment (as to these, see Judgments, VII), and that all intendments are in favor of the validity and regularity of the proceedings below. This rule takes on various forms of expression, and the ensuing section lines indicate the various forms. Further applications of this general rule are involved in the rule that rulings based on discretion are not reviewable (see post XII, D) and that findings on evidence are not reviewable, where it is susceptible of diverse conclusions of fact by the trier (see post XII, E), though the rule that error lies only to review errors of law is also a principal reason for the latter rule.]

Particular applications of the rule, and presumptions as to particular matters, see generally post §§ 353-393.

On ambiguous record, see ante § 341.

As to prejudice or harmlessness, see post §§ 353-360.

To show basis of general verdict, see also ante § 337, post § 384.

As to penal and forfeiture judgments, see post § 393.

Restriction of review to matters properly shown by the record, see ante XII, B, 1.

Sufficiency of record showing as to selection of jury, see ante § 179.

Necessity of pointing out by reference in brief the portion of record showing error, see ante § 285.

Dismissal or affirmance on hearing if no reviewable question or substantial grievance is shown, see post §§ 480, 481.

¶ 1475. Error cannot be presumed, but must be shown affirmatively from the record.—Comstock v. Hollon, 2 Mich. 355; Burnham v. People, 3 Mich. 195; Maynard v. Penniman, 10 Mich. 153; People v. Clark, 10 Mich. 310; Kermott v. Ayer, 11 Mich. 181; Morissey v. People, 11 Mich. 327; Taff v. Hosmer, 14 Mich. 309; Cook v. Hopper, 23 Mich. 511; Peabody v. McAvoy, 23 Mich. 526; Hoffman v. Harrington, 28 Mich. 90; Jennison v. Haire, 29 Mich. 207; Brown v. People, 29 Mich. 232; Gilbert v. American Ins. Co., 30 Mich. 400; Continental Improvement Co. v. Ives, 30 Mich. 448; Sirrine v. Briggs, 31 Mich. 443; Turner v. People, 33 Mich. 363; American Ins. Co. of Chicago v. Woodruff, 34 Mich. 6; Curley v. Wyman, 34 Mich. 353; Zimmer v. Davis, 35 Mich. 39; Greenlee v. Lowing, 35 Mich. 63; State Ins. Co. of Lansing v. Reynolds, 35 Mich. 304; Young v. Taylor, 36 Mich. 25; Hurd v. Newton, 36 Mich. 35; Wetherbee v. Kusterer, 41 Mich. 359; Brong v. Brown, 42 Mich. 119; Maillet v. People, 42 Mich. 262; Howard v. Patrick, 43 Mich. 121; Brown v. Haak, 48 Mich. 229; Kline v. Kline, 49 Mich. 419; Hamilton v. Langley, 52 Mich. 549; People v. Scott, 56 Mich. 154; Huff v. Hall, 56 Mich. 456; People v. Murphy, 56 Mich. 546; Walters v. Tefft, 57 Mich. 390; Duflo v. Juif, 63 Mich. 513; Manning v. Brennahan, 63 Mich. 584; People v. La Munion, 64 Mich. 709; Bostwick v. Losey, 67 Mich. 554; Turnbull v. Richardson, 69 Mich. 400; Malachiski v. Stellwagen, 85 Mich. 41; Bond v. McMahon, 94 Mich. 557; Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

¶ 1476. One who alleges error has the burden of pointing it out.—Rodman v. Clark, 81 Mich. 466.

¶ 1477. It rests upon plaintiff in error to show that error has been committed.—Sullivan v. Deiter, 86 Mich. 404.

¶ 1478. In the absence of an affirmative showing in the record on case made error will not be presumed.—Nixon v. Hood, 201 Mich. 133.

¶ 1479. No intendment can be made on review against the judgment below, but all presumptions are in favor of its validity.—Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457; Kermott v. Ayer, 11 Mich. 181; Peabody v. McAvoy, 23 Mich. 526; Jennison v. Haire, 29 Mich. 207; Gilbert v. American Ins. Co., 30 Mich. 400; Turnbull v. Richardson, 69 Mich. 400.

¶ 1480. Every presumption will be applied in support of the judgment below.—Turnbull v. Richardson, 69 Mich. 400.

¶ 1481. Where the record alone is before the court of review without any bill of exceptions no error can be presumed where the record itself does not show error.—Walters v. Tefft, 57 Mich. 390.

¶ 1482. The rulings of the trial court must be presumed to be correct in the absence of anything showing them to be wrong.—Waga v. Peck, 22 Mich. 368.

¶ 1483. Though a ruling may have anticipated counsel who sought to introduce certain testimony, no reversible error was committed, as such error must be made out and not merely suspected.—Leder v. National Union Fire Ins. Co., 175 Mich. 470.

¶ 1484. Unless the error clearly appears from the record, a judgment will not be reversed to enable a defendant to avail himself of a possible defense, which, even if good in law, is without substance.—Hill v. Robbins, 22 Mich. 475.

¶ 1485. Plaintiff in a suit before a justice of the peace to recover fees earned by him as attorney for a corporation, being unable to prove his contract on account of the death of the agent who employed him, was permitted to recover upon the quantum meruit, whereupon defendant took the case to the circuit court by a writ of certiorari, and the judgment was affirmed. On appeal to this court, defendant contends that it is to be presumed that there was an agreement as to the amount of plaintiff's fees, and that hence quantum meruit does not lie. Held, that such contention does not attempt to reverse the judgment on a meritorious ground unless the agreement was that plaintiff was to receive less than adequate compensation for his services, which will not be presumed.—Drake v. International Harvester Co. of America, 150 Mich. 561.

§ 353. Presumption as to prejudice or harmlessness.

As to harmlessness of provision in judgment, see also ante § 338.

As to harmlessness of improper provision in judgment couched in the alternative and otherwise proper, see ante ¶ 1423.

¶ 1486. The party alleging error must show error to his prejudice.—Richards v. Tozer, 27 Mich. 451; Louden v. City of East Saginaw, 41 Mich. 18.

¶ 1487. While the party complaining of error should show its existence, it generally falls to the party on whose motion error is committed to show, if he so claims, that the complaining party was not prejudiced by it.—Campau v. Traub, 27 Mich. 215.

¶ 1488. It may be presumed that the record is as favorable to plaintiff in error as he is entitled to have it as to facts that are so essential that they cannot be overlooked.—Hamilton v. Langley, 52 Mich. 549.

§ 354. ——Of matter to sustain judgment or ruling.

See also ante § 352.

As to penal and forfeiture judgment, see post § 396.

Of matters not in record, see post § 361 et seq.

As to proofs or want of proofs essential to result, see post §§ 373-378.

Presumption that evidence was sufficient, see post § 378.

¶ 1489. It cannot be assumed, in order to support a judgment, that facts existed contradicting the record.—Jacobson v. Miller, 41 Mich. 90.

¶ 1490. Where a cause was tried by the circuit judge without a jury, and improper evidence was admitted to establish a material point, and the nature of the case was such that it could not be presumed other evidence was given on that point, it was held that the judgment should be reversed, notwithstanding the bill of exceptions did not state that all the evidence was set forth.—Bliss v. Paine, 11 Mich. 92.

¶ 1491. Where an affirmative answer to a question improperly excluded might have prejudiced the prevailing party, it is not open to him to claim that the question would not have been affirmatively answered, and it is proper, for the purpose of a review on error, to assume that it might have been.—Mawich v. Elsey, 47 Mich. 10.

¶ 1492. In reviewing the action of the trial court in excluding testimony offered by defendants in support of the defense set up, the question is whether such exclusion could have worked a prejudice to their rights since in such case it should appear affirmatively that no injury could result therefrom.—Salliotte v. Williams, 130 Mich. 36.

¶ 1493. In trover by a wife for chattels belonging to her, but seized and sold under a mortgage given by her husband, evidence of the prices realized on the sale, which was admissible to rebut the plaintiff's evidence of value, was excluded, and it was urged that its exclusion did not injure the defendant inasmuch as it could not have been a safe guide to the jury, as bidders must be presumed to have allowed for contingencies of title. Held, untenable, as they might also have supposed that plaintiff meant to rely on recovering damages in the action brought by her for conversion.—Davis v. Zimmerman, 40 Mich. 24.

¶ 1494. A verdict directed for defendant on plaintiff's opening statement because the declaration was deemed to set forth a cause of action against defendant as master and also one against him as owner of premises on which plaintiff worked for an independent contractor, and was thereby rendered double and uncertain, cannot be supported regardless of that error by questioning on error for first time the sufficiency of the declaration to plead any actionable negligence against defendant as owner, and thus throw plaintiff back on a disavowed relationship of master and servant and defeat him on that, it being presumable that had objection to sufficiency been seasonably made the plaintiff would have amended.—Douglas v. Marsh, 141 Mich. 209.

§ 355. ——As to disregard of improper evidence by judge.

¶ 1495. Where no opinion of the trial court in a chancery case appears in the record it will be presumed on appeal that evidence admitted over objection at variance with the bill was disregarded.—Atkinson v. Akin, 197 Mich. 289.

§ 356. ——As to effect of ruling on subsequent course of trial.

¶ 1496. Where a party offers evidence which is inadmissible and is consequently ruled out, the court cannot presume that the party was restrained by this offer from putting in other evidence which would have been proper.—Wright v. De Groff, 14 Mich. 164.

¶ 1497. Where a trial judge, in excluding objectionable testimony, declines to exclude what relates to a certain matter that is involved with the rest, its effect cannot be supposed to have been fully destroyed.—Seligman v. Ten Eyck's Estate, 49 Mich. 104.

§ 357. ——Accepting or excusing jurors.

¶ 1498. The action of the court in excusing a juror for cause when he was not disqualified, is not error warranting a reversal when the record does not show that the objecting party was prevented from having a jury drawn from the regular panel, that it had exhausted its peremptory challenges, or that it was prejudiced by the fact that the juror was excused.—Commercial Bank of Bay City v. Chatfield, 121 Mich. 641.

¶ 1499. The overruling of a challenge for cause, where one of the jurors called in was a party to a suit then pending, and one of plaintiff's counsel in the case on trial was his attorney and the opposing party was represented by defendant's counsel, even if erroneous, was not presumed to have been prejudicial to defendant, where the record did not show that such juror actually sat in the case, or that defendant exhausted his peremptory challenges.—Simons v. Cash, 136 Mich. 558.

§ 358. ——Reception or exclusion of evidence.

See also ante ¶¶ 1491, 1492, 1493.
As to effect of ruling on subsequent offers or rulings, see ante § 356.

¶ 1500. Where upon examination of the record it cannot be said that objectionable testimony was not prejudicial, the cause must go down for a new trial.—Marshall v. Wabash R. Co., 171 Mich. 180.

¶ 1501. Where the record does not show what answer a witness gave to a question that might have been proper, the Supreme Court cannot presume that there was any injury in admitting it.—Howard v. Patrick, 43 Mich. 121.

¶ 1502. Where the record did not show distinctly that the jury made no allowance for evidence erroneously introduced, the court refused to hold the error immaterial on the inference that the verdict was not affected by it, as certain other evidence was needed to supplement it.—Mandigo v. Mandigo, 26 Mich. 349.

¶ 1503. The Supreme Court will not entertain objections based on the admission of leading questions unless satisfied beyond doubt that it occasioned injury.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 1504. Where a question of fraud is involved and a wide range of examination has been allowed, and evidence of doubtful relevancy is admitted in reply, the judgment ought not to be reversed for error in admitting such evidence, unless the court is clearly satisfied that its admission prejudiced the legal rights of the plaintiff in error.—Comstock v. Smith, 20 Mich. 338.

¶ 1505. One who complains of being prejudiced by the admission of a mere question must make a clear showing. The presumption is that the judge's discretion was fairly exercised. So held where complaint was made that a newspaper article not in proof had been put before the jury by means of questions whose apparent purpose was to ascertain whether the witness had furnished the items of which it was made up, as the article was not given in the record, it does not clearly appear whether too great latitude was allowed or not.—Somerville v. Richards, 37 Mich. 299.

¶ 1506. Where the record does not give the answers of a party on cross-examination, it cannot be assumed that the questions did any harm.—Keables v. Christie, 47 Mich. 594.

¶ 1507. The rejection of depositions cannot be held error if there is nothing in the record to show that material testimony was thereby excluded.—Snow v. Nowlin, 43 Mich. 383.

¶ 1508. Where a particular fact that would not be material unless known at a particular time to the party seeking to show it does not appear from the record to have been so known, the exclusion of testimony thereof is not regardable as prejudicial error.—Simons v. Burnham, 102 Mich. 189.

¶ 1509. Where the certificate to the bill of exceptions does not indicate that all the testimony, or all that is necessary to consider on a certain question, is before the court, it will be presumed that the verdict

as to that point was supported by evidence of probative force, and an admission of an indefinite conclusion of a witness thereon will not be regarded as prejudicial.—Haney v. Village of Pinckney, 155 Mich. 656.

¶ 1510. It cannot be said on review in an action for misrepresenting the value of land to a purchaser that the exclusion, on plaintiff's cross-examination, of the question whether he had not tried to sell or trade the land after visiting it, was not necessarily prejudicial, in the absence of something to show its materiality, since such an offer to sell may have been under circumstances that would not tend to show that he ratified the sale to himself.—Snow v. Nowlin, 43 Mich. 383.

¶ 1511. Plaintiff sought to show an alleged conversation with defendant in which the matter of the frequency of defendant's calls upon plaintiff's wife was gone over, and in which he talked about the calls, and why they were made and what he was doing there. Plaintiff's counsel admitted that he did not expect to show that any admission was made at the conversation of criminal intimacy between defendant and plaintiff's wife. The court excluded the conversation unless it should be connected with something else to make it relevant. Held, that the ruling simply went to the order of proof; that the testimony offered would not, standing alone, have been sufficient to warrant a verdict for plaintiff, and that it could not be said the ruling was prejudicial.—Hanselman v. Dovel, 102 Mich. 505.

¶ 1512. Where plaintiff read at the trial his cross-examination of witnesses whose depositions were taken by defendant, his failure to also read the direct examination cannot be held prejudicial where such direct examination does not appear in the record.—McDonald v. Smith, 139 Mich. 211.

§ 359. ——Error relating to argument.

Showing in the record necessary for review of argument or conduct of trial, see ante § 184.

¶ 1513. Unless it clearly appears that improper or impassioned arguments of counsel were unwarranted by the evidence and probably contributed to the result and worked prejudice to the defendant, a reversal will not be made on such ground.—Bosek v. Detroit United Railway, 175 Mich. 8.

¶ 1513a. No presumption of injury arises from the use of improper language by counsel in his argument to the jury, where the court immediately declares such remarks improper, in the presence of the jury.—Wenzel v. Johnston, 112 Mich. 243.

¶ 1514. Exceptions to improper remarks of plaintiff's counsel in addressing the jury, which were provoked by the course taken by defendant's counsel upon the trial in respect to the matter commented upon, will not be sustained, unless it appears quite plainly that the verdict was influenced by said remarks.—Eastman v. Lake Shore & M. S. R. Co., 101 Mich. 597.

¶ 1515. An assignment of error based upon the alleged use of improper language by counsel in addressing the jury will not be sustained, where the court cannot say that the facts disclosed by the record exclude the inferences of which the counsel thought them susceptible, as evidenced by the language complained of.—Totten v. Burhans, 103 Mich. 6.

¶ 1516. Improper argument will not be deemed harmless where it was persisted in until four objections were made, the offending counsel then having the last word.—Cavanagh v. Township of Riverside, 136 Mich. 660.

¶ 1517. Where neither the improper remarks of counsel nor the objections or rulings on the matter appear in the record except in the reasons for a motion for a new trial, and in the reasons for denying the motion in which last it is stated that the defendant was not prejudiced, that whenever the matter was called to the attention of the court it was immediately corrected and that counsel did not exceed his license in his remarks, the Supreme Court cannot say in view of the condition of the record that the trial court was not correct.—Pinkerton Bros. Co. v. Bromley, 128 Mich. 236.

¶ 1518. The fact that the plaintiff's attorney "commented to the jury upon the fact that the defendant had not produced" a scaler agreed upon by the contract, is not prejudicial error where the record does not show what he said, and it does not appear that the failure to produce him had any bearing against the defense; there being no reason why he should have been called by one party more than the other, or that he should have been called at all.—Malone v. Gates, 87 Mich. 332.

¶ 1518a. Where plaintiff's counsel in his argument makes improper reference to certain facts, but his remarks were called out by comment not preserved in the record of counsel on the other side, and plaintiff's counsel did not go outside the record in his statements, such improper reference does not afford ground for reversal.—Hogan v. Detroit United Ry., 154 Mich. 478.

¶ 1519. Reversible error does not appear in refusing one of counsel the opportunity

to argue a certain question before the jury where the ruling was subsequently reconsidered and the party's other counsel permitted to argue the question, there being nothing to show that the matter was not fully argued and no request to have it argued by a particular counsel.—Farnsworth v. Fraser, 137 Mich. 296.

§ 360. ——Error in instructions.

That jury followed instructions, see post § 379.

As to following erroneous rather than correct portion or version of charge, see post § 380.

As to effect of refusal to charge, see post § 379.

¶ 1520. A court of review cannot affirm a judgment upon the ground that an erroneous charge was error without prejudice, where the record does not purport to contain all the evidence.—First Nat. Bank of Niles v. Shue, 119 Mich. 560.

¶ 1521. It cannot be said that refusal of a proper request without mention or explanation in the charge as given was harmless where, though the subject was outside of the issues, there was evidence to which it applied.—Battishill v. Humphreys, 64 Mich. 494.

¶ 1522. When the record shows that the jury had the correct understanding of the law despite an ambiguous instruction a further instruction in answer to their question must be held erroneous, where it contained language tending to make them believe that their understanding was not correct.—Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432.

¶ 1523. Where, in an action for personal injuries caused by defendant's negligence, the jury, after being correctly instructed as to the measure of damages but erroneously as to the law of negligence, finds a verdict for plaintiff for only $150, it cannot be presumed to have been prejudiced in the assessment of damages by the erroneous instructions.—Kalembach v. Michigan Cent. R. Co., 87 Mich. 509.

§ 361. Presumption as to jurisdiction of lower court.

Sufficiency of record showing of jurisdiction or want of it, see ante §§ 172, 180.

Presumptions as to jurisdiction in general, see Courts, V; Judgments, VII.

¶ 1524. Where a bill in the circuit court, which is demurred to, alleges that the violation of a contract as charged will cause irreparable injury and that complainant's contract rights were invaded, the Supreme Court will not assume that the amount in dispute does not exceed $100.—George v. Rollins, 176 Mich. 144.

¶ 1525. If the defect of jurisdiction does not appear on the face of the record, it will be presumed that the court assumed jurisdiction after finding facts necessary to give jurisdiction over the subject-matter; hence, in the instance of tax proceedings, where the sale may be had of some lands and not of others (to-wit, those bid in by the state in prior years), that fact will be deemed to have been found so as to support jurisdiction.—Peninsular Sav. Bank v. Ward, 118 Mich. 87.

¶ 1526. A case of summary proceedings before a circuit court commissioner, to obtain possession of lands, was appealed to and tried in the circuit court, and after judgment for the complainant a case was made presenting certain jurisdictional questions for review, but the case did not set forth the affidavit for appeal; and objection was taken in the Supreme Court that only the issue upon the merits was brought up by the appeal, unless such a special affidavit was made as was necessary for a special appeal from a justice's court. It was held that if such special affidavit was necessary the court must infer that one was made—the jurisdictional questions having been raised and passed upon in the circuit court without objection to the affidavit.—Sallee v. Ireland, 9 Mich. 154.

§ 362. Presumption as to matters not in record, case or bill.

Presumptions as to contents and correctness of bill or case, see ante §§ 345-349.

As to jurisdiction, see ante § 361.

As to proofs or want of proofs not appearing on record, see post §§ 373-378.

Of evidence essential to sustain rulings, instructions or findings, see post §§ 374-378.

Scope of the questions open on record and bill which is incomplete, see ante XII, B, 8.

On appeal from condemnation proceedings or proceedings to establish highways, see Eminent Domain, VIII; Highways, II, B.

Presumption as to allowance of sum in lieu of dower being included in decree for property adjustment on Divorce, see Divorce, X, B.

¶ 1527. The rule that error will not be presumed applied where the questions in the case arose on written instruments which did not appear in the bill of exceptions.—State Ins. Co. of Lansing v. Reynolds, 35 Mich. 304.

¶ 1528. Where it did not expressly appear from the record whether certain quitclaim deeds introduced in evidence on the trial below purported on their face to have been given for a valuable consideration, yet, inasmuch as the fact seemed to have been assumed by the counsel in their mode of examination, arguments and requests to charge,

and by the court in the charges given, and as quitclaim deeds almost universally express such consideration, the Supreme Court presumed the fact.—Shotwell v. Harrison, 22 Mich. 410.

¶ 1529. Where a contract refers to a plan, specifications and profile, and makes them a part of itself, and they are not given in the record, it cannot be presumed, in a suit in equity, that they do not supply apparent omissions from the contract.—Cuming v. City of Grand Rapids, 46 Mich. 150.

§ 363. ——As to authority of attorneys and agents.

¶ 1530. Where the record of a judgment discloses that an attorney of the court assumed to answer for a defendant, and consented in writing that a judgment might be entered against him, the Supreme Court will assume, in the absence of evidence to the contrary, that the attorney was duly authorized. This would be sufficient evidence of jurisdiction of the parties.—Arnold v. Nye, 23 Mich. 286.

¶ 1531. A judgment, rendered upon an award, pursuant to Revised Statutes, 1838, p. 532, will not be reversed on error, on the ground that it does not appear that an agent, who executed the agreement for submission on behalf of one of the parties, had authority to do so, where the award recites that such party was duly notified of the hearing before the arbitrators, and appeared and was heard, with his witnesses and counsel, and where, being deemed in court by the statute, he allowed the judgment to be entered on the award without objection on the ground of such agent's want of authority; but the court will infer from these facts a recognition and adoption, by the party, of the act of his agent in executing the submission, even where such party is a corporation.—City of Detroit v. Jackson, 1 D. 106.

§ 364. ——As to nature and ground of action.

Construction of the pleadings, see ante § 330.

¶ 1532. Where the record does not show the ground of the action below it must be presumed on error to have been legal if legality was possible.—Schwab v. Coots, 48 Mich. 116.

¶ 1533. Where one sues upon a judgment in trespass as assignee before judgment of the right of action thereon and of such judgment, and the record does not show the nature of the right of action, it will not be presumed to have been assignable for the purpose of imputing error to the trial court in its rulings and judgment.—Finn v. Corbitt, 36 Mich. 318.

§ 365. ——As to commencement and pendency of action.

¶ 1534. Of two suits, one by declaration, the other by attachment, commenced on the same day by the same plaintiff against the same defendant for the same cause of action, it was presumed, the record showing nothing to the contrary, that the suit by declaration was begun first.—Wales v. Jones, 1 Mich. 254; and see Pew v. Yoare, 12 Mich. 16.

¶ 1535. Where on error the record does not disclose a copy of a plea which it was claimed was an attempt to give notice of the fact that a settlement had been effected, and evidence thereof would be given under the general issue, and no motion was based thereon nor action of the court appears in the record, and it does not appear that the matter was ever called to the attention of the trial court, and no exception was taken, the Supreme Court will conclude that the case was a pending suit, recognized as such by the parties who proceeded to try the merits without objection.—Burr's Damascus Tool Works v. Peninsular Tool Mfg. Co., 142 Mich. 417.

§ 366. ——As to consolidation or severance of actions.

¶ 1536. Suit against the maker and indorser of a promissory note. Defendants pleaded separately and the issue as to one was tried, and judgment rendered against him. On error, the record not showing that any objection was taken in the court below to the trial of the separate issue, it was held that it must be presumed either that the action was severed by consent, or by the putting off of the trial as to himself by the other defendant.—Maynard v. Penniman, 10 Mich. 153.

§ 367. ——As to continuances and interlocutory matters.

¶ 1537. Error cannot be presumed; and that a garnishment suit was not brought on for trial at the term at which judgment in the principal suit was rendered, does not require its dismissal in the Supreme Court on error, where there is nothing in the record to show that it was not continued over the term upon cause shown or by consent of counsel.—Old Second Nat. Bank v. Williams, 112 Mich. 564.

§ 368. ——As to parties and their identity.

As to identity of attorney and assignee of judgment, see ante ¶ 1442.

¶ 1538. Where initials only were used for the Christian name of a plaintiff, it was held that it would not be presumed, for the purpose of invalidating a judgment in his favor, that he had any other name than that in which suit was brought and judgment rendered.—Fewlass v. Abbott, 28 Mich. 270.

¶ 1539. A defendant to all appearances properly joined, and who, instead of putting in a sworn disclaimer, denies complainant's right to relief against him, and avers him-

self to be a stranger to the issue, must, if he appeals on the merits, be regarded as an ordinary party.—Shelden v. Erskine, 78 Mich. 627.

§ 369. ——As to pleadings and amendments.

Want of a technical amendment may be regarded as harmless error under the statute of amendments. See Harmless Error.

¶ 1540. The Supreme Court will regard an amendment to a declaration as having been made after judgment if it might have been made before on motion under How. St., § 7636.—Smith v. Pinney, 86 Mich. 484.

¶ 1540a. On review an amendment to meet a variance, which the trial court ought to have permitted if requested, will be deemed to have been made.—Robinson v. Lake Shore & M. S. R. Co., 103 Mich. 607.

¶ 1541. Appellate courts are authorized to amend declarations where the issue is not altered by the amendment (Comp. L. 1897, §§ 10273, 10272, subd. 7) and therefore an amendment which should have been made, will be considered as made.—Smith v. Cowles, 123 Mich. 4.

¶ 1542. Where an amendment to a pleading is ordered or permitted and is of such a nature that the record furnishes upon its face all the data for applying it, it may be considered as made, though no verbal changes are made in the pleadings, which are then to be read as if they had been actually amended.—Rimmele v. Huebner, 190 Mich. 247.

¶ 1543. A judgment entered on plaintiff's motion on the ground of the frivolousness of a demurrer will not be reversed because defendant was not allowed to plead over, where it does not appear from the record that he asked permission to do so, or that there was any showing made that he had a meritorious defense.—Wyckoff, S. & B. Co. v. Bishop, 98 Mich. 352.

¶ 1544. Upon review on error of case appealed from justice's court, an amendment to cure an objection—raised for the first time in the circuit court—that suit was commenced by plaintiffs in their individual capacity instead of as a church or corporation, was considered as made.—Stofflet v. Strome, 101 Mich. 197.

¶ 1545. Where, in a suit upon a justice's judgment, a question of variance between the declaration and the proof as to the date of the original summons arises, and the circuit judge decides that such variance does not exist, the Supreme Court, if, upon inspection, disagreeing with him, will treat his determination as an amendment, it being apparent that the case proceeded upon the theory that the date was correctly pleaded.—Waldron v. Palmer, 104 Mich. 556.

¶ 1546. The failure to have the order reviving a suit in the name of an administrator signed by the court, or to have it entered in the court journal, was immaterial where the general issue was filed without the objection being raised and the records showed the death and the appointment of the administrator, and the order was one which would have been granted as of course, so that it may be treated as if duly made.—Ferguson v. Wilson, 122 Mich. 97.

§ 370. ——As to admissibility of evidence.

That foundation or preliminary facts were proved, see post § 371.

As to other matters affecting harmlessness of ruling, see ante § 358.

Showing in bill or case as to admission or rejection of evidence, see ante § 182.

Showing in bill or case as to exclusion of evidence, see ante § 183.

¶ 1547. It will not be presumed that facts given in evidence were not admissible under the pleadings.—Comstock v. Hollon, 2 Mich. 355.

¶ 1548. Evidence that might have been proper must be presumed so, where the record shows nothing to the contrary.—Grosvenor v. Ellis, 44 Mich. 452.

¶ 1549. Where a relevant question has been allowed against a merely general objection, and the witness' previous testimony is not given, the ruling will not be presumed wrong unless the testimony be such as would be inadmissible from any one.—Zimmer v. Davis, 35 Mich. 39.

¶ 1550. Where the bill of exceptions states that the whole of the testimony given on a certain branch of the case is not returned, the Supreme Court cannot presume error in the reception of such testimony.—Carr v. McCarthy, 70 Mich. 258.

¶ 1551. Where the record shows that but a small part of the evidence is contained in the bill of exceptions, and where such bill nowhere states that it sets forth all the testimony for any given point, it cannot be presumed that there was error in the admission of evidence which, as appears from a charge that was not excepted to, was rendered nonprejudicial by plaintiff's own evidence on the same point not in the record.—Bostwick v. Losey, 67 Mich. 554.

¶ 1552. Where deeds were received in evidence without objection, the court cannot

presume that their relevancy did not appear. —Final v. Backus, 18 Mich. 218.

¶ 1553. Where the justice was sued for damages for refusing to accept an instrument of recognizance tendered by the party so desiring to appeal, and the suit was brought to the Supreme Court on error, the instrument tendered being spoken of in the record and by the attorneys in their examination of witnesses as a bond, and though objected to when offered in evidence, yet not objected to as a bond instead of a recognizance, the Supreme Court assumed that it was a recognizance in due form.—Guenther v. Whitmore, 24 Mich. 504.

¶ 1554. It was assigned as error that the court below allowed parol proof of the rate of interest in a foreign country. It not appearing in the record that the rate was established by statute, the judgment below was presumed to be correct.—Kermott v. Ayer, 11 Mich. 181.

¶ 1555. On writ of error a ruling out of testimony as to the master's rules for government of servants on the ground, taken as assumed, that the rules were in writing, will be aided by the presumption that if the assumed fact had not been true appellant's (master's) counsel would have made appropriate objection.—Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226.

¶ 1556. It will be presumed that the trial court, in an action for alienation of affections and criminal conversation, was correct in excluding a copy of a letter traced to the possession of defendant's wife, since deceased, where defendant was given notice to produce it and denied having it, and plaintiff claims that defendant was her administrator and as such the proper custodian of her papers, which defendant denies, claiming that his son was administrator, but where neither party points out any testimony in the record to sustain his claim.—Brown v. Evans, 149 Mich. 429.

¶ 1557. Where error is assigned on the rejection of evidence that would only be admissible as res gestae, and the record leaves it doubtful whether it really was so, its exclusion will be presumed correct.—Mabley v. Kittleberger, 37 Mich. 360.

¶ 1558. Book entries on defendant's ledger will not be presumed in a court of appeal to have been incompetent, where the record failed to show what such entries were.—Roberts v. Pepple, 55 Mich. 367.

¶ 1559. A ruling of the lower court excluding the testimony of a divorced wife as to matters contained in a manuscript written by her husband, on the ground that such matters related to the secret relations existing between husband and wife, and were therefore inadmissible under section 10213, 3 Comp. L. 1897, must be presumed to be correct, where such manuscript is not made a part of the record.—In re Mansbach's Estate, 150 Mich. 348.

¶ 1560. For the purpose of lessening plaintiff's credibility by showing a weakened memory, it is not error to ask a physician on cross-examination after he has testified to sickness consequent on the alleged assault about witness' testimony in a former action in which he then stated that plaintiff was suffering from senile dementia and to rule out portions of the former testimony as to the nature of an accident then in question and how it affected plaintiff, where the nature of that ruled out is not shown in the record; since it appears that enough to make a full cross-examination remained.—Lee v. Longwell, 136 Mich. 458.

§ 371. ——As to foundation or preliminary proofs.

Presumption as to prejudice from admission or exclusion where other essential facts do not appear, see ante § 358.

Review of findings on preliminary facts or foundation, see post § 460.

¶ 1561. Where the record does not show that all the evidence is not included in the bill of exceptions, it cannot be presumed upon error that there was not a foundation for hypothetical questions as to the value of plaintiff's services.—Crowell v. Truax, 94 Mich. 585.

¶ 1562. A court of review will not say that a circuit judge erred in assuming that an erasure in a deed was not suspicious, without an inspection of such instrument.—Munroe v. Eastman, 31 Mich. 283.

§ 372. ——As to objections not apparent on record.

Sufficiency of bill or case to show objections, etc., see ante § 177.

¶ 1563. Where the record shows an objection taken on the trial in the court below to the admission of evidence, which was overruled, the Supreme Court will consider the question presented by the objection, notwithstanding the bill of exceptions does not show an exception to the ruling. The court will presume, from the sealing of the bill of exceptions, that the ruling was duly excepted to.—McBride v. Cicotte, 4 Mich. 478; Turner v. City of Grand Rapids, 20 Mich. 390.

¶ 1564. Where, in an action of trover by a mortgagee against an attaching officer, it

appears probable from the record that the officer seized the property under a claim that the mortgage was fraudulent as to creditors, and that the validity of the mortgage was the sole question in controversy, and which was the only one submitted to the jury, the court will not presume that the question of the necessity for a demand was raised in the court below because under the defendant's requests to charge it might have been, said question not going to the merits of the controversy.—Malachiski v. Stellwagen, 85 Mich. 41.

¶ 1565. Where the record on error shows that exceptions were taken on one point only, it must be presumed that upon all other matters in the admission or exclusion of evidence the case was not open to complaint.—Arbuckle v. Smith, 74 Mich. 568.

¶ 1566. Where the record shows that exceptions were taken to a commissioner's report, but does not show what they were, it cannot be assumed, for the purpose of finding error, that they were of any force.—Ruggles v. First Nat. Bank, 43 Mich. 192.

¶ 1567. The statement in a brief that the stenographer's minutes show that certain objections were made and exceptions taken cannot be accepted against the fact that they do not appear in the record.—Lamb v. Lippincott, 115 Mich. 611.

¶ 1568. Where a case made is apparently a complete narrative of all the evidence and proceedings on the trial, no inference can be drawn from the signing of the case by the judge that any exception was taken which is not stated.—Turner v. City of Grand Rapids, 20 Mich. 390.

§ 373. Presumptions as to proofs or want of proof.

See also ante ¶¶ 1528, 1529, post §§ 374-378.
Presumptions as to contents and correctness of bill or case, see ante §§ 345-349.
Of matters to render error harmless, see ante § 354.
As to erroneous ruling dissuading party from further offers, see ante § 356.
Sufficiency of the bill or case to present the evidence, see ante § 176.
Showing in bill or case to present point, see ante § 186.

¶ 1569. In the absence of a return that the bill of exceptions embraces all the testimony in substance, it must be presumed that testimony was introduced to establish any fact essential to support the verdict.—Manning v. Bresnahan, 63 Mich. 584.

¶ 1570. Where the record does not purport to set out all the evidence given on the trial, it must be presumed that there was evidence to support the jury's finding.—Stevens v. Rose, 69 Mich. 259.

¶ 1571. The Supreme Court does not assume that any material fact, not found and not admitted upon the trial was proven.—Edgerly v. Ladies of Modern Maccabees, 175 Mich. 28.

¶ 1572. Judgment cannot be reversed on grounds resting in inference not based on evidence introduced below.—Wheeler v. Constantine, 39 Mich. 62.

¶ 1573. Where an order of court expressly refers to a specific affidavit as the evidence on which it is based, it cannot be presumed that there was other evidence.—Gillett v. Needham, 37 Mich. 143.

¶ 1574. Where a record did not show affirmatively the date of an administrator's sale held void by the court below under Comp. L. 1871, § 4562, How. St., § 6042, it was presumed, in support of the judgment, that the sale was made after the statute took effect.—Hoffman v. Harrington, 28 Mich. 90.

¶ 1575. Where one sued upon a promissory note indorsed to him, the court refused to presume that there was no evidence that he had paid value for it, when the bill of exceptions, which did not purport to give all the evidence, disclosed that the defendant impliedly conceded such payment by his course during the trial, and took no exception to the action of the court below in assuming this fact to be admitted.—Borden v. Clark, 26 Mich. 410.

¶ 1576. The Supreme Court will not treat a case as settled and compromised of which a suggestion was filed, when no motion is made to dismiss, and where the fact of settlement is disputed.—Paulus v. Nunn, 48 Mich. 190.

¶ 1577. In the absence from the bill of exceptions of a statement that all of the evidence upon the subject is set forth therein it cannot be assumed that the necessary evidence connecting certain receipts or their stubs with the delivery of certain wheat was not given.—Freese v. Arnold, 99 Mich. 13.

¶ 1578. In an action to recover for back taxes against which plaintiff's deed from defendant covenanted, it was claimed upon error that the record of the tax constituted no lien upon the land; but as such record was not before the court, and as there was nothing to show that the bill of exceptions contained all the evidence, the judgment below was affirmed.—Lynch v. Craney, 95 Mich. 199.

¶ 1579. An objection that notes of one of the beneficiaries under a mortgage in foreclosure must be deemed to have been paid because not produced below, was obviated where the record did not indicate that there was any contest over the claim, and the notes were brought into the Supreme Court and filed with the clerk.—Gillam v. Barnes, 123 Mich. 119.

¶ 1580. On error to a judgment of the circuit court rendered on appeal from a justice of the peace, it will be presumed that the justice based his judgment on satisfactory proofs of liability of the defendant, which the plaintiff had a right to make, and which were necessary to arrive at the judgment.—McMillan v. Schneider, 147 Mich. 266.

¶ 1581. On error to a judgment for trespassing on state tax lands, it will be presumed that the proceedings by which the state took title were regular, where the tax proceedings were introduced in evidence and no irregularity was pointed out or any objection made to them.—Blake v. Grondin, 141 Mich. 104.

¶ 1582. The theory that defendant signed a writing as a contract and not as a mere enrolment will be adopted by the Supreme Court on appeal the more readily where the execution of the writing is not denied.—International Text-Book Co. v. Marvin, 166 Mich. 660.

¶ 1583. In an action on a note by the administrator of the estate of a person who did a private banking business under an assumed name it will be presumed on appeal that decedent complied with the mandatory provisions of Comp. Laws 1897, § 5271, How. 2nd Ed., § 6389, relating to brokers and exchange dealers and the filing of a certificate with the county clerk setting forth the names of the members connected with the company, the name under which the business is done and the residence of such members where the record is silent on the question.—Halpin v. White, 197 Mich. 549.

¶ 1584. The right to foreclose must be assumed to be established as against defendants who do not appeal from a decree of foreclosure.—McKee v. Grand Rapids & R. L. St. R. Co., 41 Mich. 274.

§ 374. ——To sustain rulings.

As to facts making evidence admissible or not, see ante § 370.

¶ 1585. A ruling is presumed to have been supported by evidence if all the evidence does not appear in the record.—McGraw v. Germania Fire Ins. Co., 54 Mich. 145.

¶ 1586. Where a bill of exceptions does not purport to give the evidence in full or its substance, it is presumed on error that there was evidence to justify the rulings.—Wood v. Lake Shore & M. S. Ry. Co., 49 Mich. 370.

¶ 1587. Where in an action on an appeal bond against the sureties brought by one of the two parties for whose benefit the bond was given, the trial court on objection ruled that such action could be maintained by such party alone, it was held that in the absence of proof in the record that such ruling was erroneous it would not be presumed that there was no showing justifying the maintenance of the action by plaintiff alone.—Miller v. Maher, 178 Mich. 571.

§ 375. ——To sustain findings and conclusions.

As to weight and sufficiency, see post § 378.

¶ 1588. Findings are presumed to be warranted by evidence where the record does not affirmatively show that the evidence is all returned.—Randall v. Randall, 37 Mich. 563.

¶ 1589. A finding is presumed, on review, to have been supported by the testimony if the evidence does not appear in the record.—Berry v. Monroe, 57 Mich. 187.

¶ 1590. A referee's conclusions are presumed to have been warranted by the proofs if the bill of exceptions does not contain all the evidence.—Grosvenor v. Ellis, 44 Mich. 452.

¶ 1591. The Supreme Court in reviewing cases at law will assume that all conclusions of fact were warranted.—Belleville Sav. Bank v. Richardi, 56 Mich. 453.

¶ 1592. Unless the record distinctly shows that it contains all the evidence, a general determination for plaintiff, no special finding having been asked or given, cannot be held unwarranted by the finding.—Gass v. Van Wagner, 63 Mich. 610.

¶ 1593. Where the record does not purport to contain all of the testimony, it will be presumed that there was evidence to support the jury's finding upon a fact submitted to them.—Cappon & Bertsch Leather Co. v. Preston Nat. Bank, 114 Mich. 263.

¶ 1594. Where the record does not purport to contain all the evidence, a finding of facts made by the trial court without the aid of a jury must be deemed conclusive.—Lasley v. Preston, 157 Mich. 66.

¶ 1595. The reviewing court could not say that any finding of fact made in a trial without a jury was wrong, where the record indicated that the testimony was not all returned.—Mason & Hamlin Co. v. Gage, 119 Mich. 361.

¶ 1596. It will be presumed on appeal in an action of ejectment that there was no mistake by the government surveyor in making a government plat which was introduced as evidence and was used as a basis for the findings of the court.—Bransfield v. Wallace, 195 Mich. 41.

¶ 1597. Where amendments were not proposed to the findings of fact made by the court on a trial without jury in the manner provided by the rules, it is presumed on error that the evidence warrants such findings.—Merrill v. Newton, 99 Mich. 226; Becker v. Headsten, 137 Mich. 478.

¶ 1598. Where findings of a trial court are not proposed within ten days after judgment as required, and the time is not extended, it will be presumed on error that the evidence warranted the findings.—People v. Southern Surety Co., 199 Mich. 30.

¶ 1599. Where no bill of exceptions was settled, the Supreme Court on writ of error must assume that the testimony supported the findings of fact made by the circuit judge. —Loveland v. Bump, 198 Mich. 564.

§ 376. ——To sustain charge given.

Construction of the charge, see ante §§ 334, 335.

Presumption as to admissions of fact on which charge is based, see ante § 350.

That evidence was sufficient, see post § 378.

Showing in the bill or case, see ante § 185.

¶ 1600. A charge is presumed to be warranted by the evidence where the bill of exceptions does not purport to set forth all the evidence or to give its substance.—Cook v. Hopper, 23 Mich. 511; Greenlee v. Lowing, 35 Mich. 63; Wicks v. Ross, 37 Mich. 464; Fowler v. Gilbert, 38 Mich. 292; Hall v. Johnson, 41 Mich. 286; Cummins v. People, 42 Mich. 142; Brown v. Dunckel, 46 Mich. 29; Wilson v. Bowen, 64 Mich. 133; Stevens v. Rose, 69 Mich. 259; Botsford v. Chase, 108 Mich. 432; Westra v. Westra's Estate, 101 Mich. 526; Saunders v. Closs, 117 Mich. 130.

¶ 1601. Where the record does not show that all the evidence is included in the bill of exceptions, it must be assumed that there was sufficient evidence to justify instructions whereby certain issues were submitted to the jury.—Bond v. McMahon, 94 Mich. 557.

¶ 1602. It will not be presumed that the court, in stating the facts to the jury as they appeared on the trial, assumed things to have appeared which did not.—Taff v. Hosmer, 14 Mich. 309.

¶ 1603. An instruction will not be deemed erroneous in the absence from the record of a material exhibit on which it is based.—Kimball v. Macomber, 50 Mich. 362.

¶ 1604. Where an instrument disputed for uncertainty in its wording is not sent up with the bill of exceptions, the existence of a doubt is assumed in support of a charge submitting it to the jury.—Paine v. Ringold, 43 Mich. 341.

¶ 1605. Where the record contains only that portion of the charge upon which error is alleged, it is to be presumed that the rest of the charge was correct and satisfactory upon the hypotheses warranted by the evidence.—English v. Caldwell, 30 Mich. 362.

¶ 1606. Where one of three partners is defending against a draft, drawn in the firm name by another partner to pay the individual debt of the third, the submission to the jury of the question whether he did not authorize the giving of the draft, or ratify it afterwards, cannot be presumed to be error where it appears that he was himself questioned as a witness on this subject and answered fully, but none of his evidence is given in the record.—Hurd v. Newton, 36 Mich. 35.

¶ 1607. If the party alleging error claims that there is a want of evidence to sustain an instruction to the jury he must show it, where the bill of exceptions does not purport to give the whole of the evidence, and especially if the trial judge in charging the jury stated, without objection, that there was such evidence.—Kline v. Kline, 49 Mich. 419.

¶ 1608. A charge that, while plaintiff could not recover for any more goods than his bill of particulars set forth, he was not bound by a mistake in carrying out the rate or price, but could show what he was actually to have, it not appearing by the record what were the contents of the bill of particulars but it appearing that plaintiff claimed there was a mistake in it in that respect, held not to have been erroneous.—Ames v. Quimby, 106 U. S. 342, 27 L. ed. 100, 1 Sup. Ct. Rep. 116.

¶ 1609. Where the forgery of the instrument sued upon was the only disputed question of fact, and the jury asked for further instructions, the judge's response that the question for them to consider was whether the signature to the instrument was genuine and that if genuine their verdict should be for the plaintiff, and, if a forgery, for the defendant, was presumed to have been a satisfactory explanation of the matter on which they sought guidance, where the record does not disclose on what point they desired further instruction.—Herbstreit v. Beckwith, 98 Mich. 98.

§ 377. ——To sustain refusal of charge.

Construction of the request and of charges given, see ante §§ 334, 335.

Showing in the bill or case, see ante § 185.

¶ 1610. Where a request to charge assumed that there was certain evidence, of which the record furnishes no indication, it will not be presumed that there was in fact such evidence, for the purpose of holding the rejection or the request to have been erroneous.—Tupper v. Kilduff, 26 Mich. 394.

¶ 1611. Where the bill of exceptions does not affirmatively show that there was no evidence tending to establish a specified fact, a refusal to charge that there was none cannot be presumed to be erroneous.—Curley v. Wyman, 34 Mich. 353.

¶ 1612. The burden is upon plaintiff in error to show error affirmatively; and when he complains that a question was not properly submitted to the jury he must show that there was evidence warranting the charge he asked.—Anderson v. Walter, 34 Mich. 113.

¶ 1613. A refusal to charge that there was no evidence to establish a particular fact can hardly be overruled where the bill of exceptions does not purport to give all the evidence, although it states that the substance of that on plaintiff's part is given.—Hayes v. Homer, 36 Mich. 374.

¶ 1614. The rejection of a request to charge, as being correct, but having nothing to do with the case, will not be held to be error, unless its relevancy is made to appear by the record.—Herbstreit v. Beckwith, 35 Mich. 96.

§ 378. ——As to weight and sufficiency of evidence.

That there was proof, see ante § 375.

That jury followed the evidence, see post § 384.

As to ruling having destroyed effect of evidence allowed to remain, see ante § 356.

Conclusiveness and effect of verdicts and findings on the evidence, see post XII, E.

¶ 1615. In support of a judgment the evidence will be presumed to have been sufficient.—Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457; Jacobs v. Callaghan, 57 Mich. 11.

¶ 1616. Where no motion for new trial is made upon the ground that a verdict is against the weight of testimony, it must presumed that the plaintiff's version of the transaction is true.—Salabrin v. Ann Arbor R. Co., 194 Mich. 458.

¶ 1617. The objection that judgment is not supported by the evidence cannot prevail where the record does not show that all was reported, and where that which was has some tendency to support the finding.—Young v. Taylor, 36 Mich. 25.

¶ 1618. Sufficient evidence to warrant the judgment is presumed to have been produced where the bill of exceptions does not purport to contain all that was given.—Barnes v. Michigan Air Line R. Co., 54 Mich. 243.

¶ 1619. Where the record does not purport to contain all or substantially all of the testimony, it is presumed that the evidence introduced was sufficient to sustain the judgment.—Conger v. Flint & P. M. R. Co., 86 Mich. 76.

¶ 1620. Where the evidence is not given in the record it must be assumed to be sufficient to support the verdict.—Jenks v. Brown, 38 Mich. 651.

¶ 1621. Where the circuit judge who signs a bill of exceptions certifies that it contains the substance of all the evidence, the verdict will be presumed to be warranted by the evidence if it stated that any was introduced tending to prove the material issues.—Rolfe v. Dudley, 58 Mich. 208.

¶ 1622. An objection that there was no evidence warranting the submission to the jury of a particular claim will not be considered where the record does not purport to contain all of the evidence on that subject.—Boyer v. Soules, 105 Mich. 31.

¶ 1623. Where a defendant, who has introduced in his defense a receipt by plaintiff showing a settlement of the claim sued upon, requests the court to instruct the jury that, unless the settlement is found to have been procured by duress, verdict should be in his favor, it will be presumed on error that there was sufficient evidence to warrant the submission of the question of duress to the jury.—Boyer v. Soules, 105 Mich. 31.

¶ 1624. It cannot be assumed that evidence that was given, but is not set forth in the record, was inconclusive.—Donkersley v. Levy, 38 Mich. 54.

¶ 1625. Where a defense is based solely on complainant's testimony, it is presumable that it could not have been strengthened by the testimony of others.—Higman v. Stewart, 38 Mich. 513.

¶ 1626. Where there is no finding that a possession was or was not adverse, though there was evidence of some possession, it cannot be said on error to a judgment in eject-

ment tried by the court without a jury that plaintiff was barred because the possession continued during the statutory period.—Perkins v. Nugent, 45 Mich. 156.

¶ 1627. Where a trial of an action against attorneys for negligence in failing to perfect an appeal has been had upon the merits and a decree rendered against plaintiffs, such decree is prima facie right and the presumption of its validity will not be overcome by a showing of the amount involved in the original action or the amount of costs paid by reason of that decree.—Cornelissen v. Ort, 132 Mich. 294.

¶ 1628. The court cannot say, in appeal from judgment on a promissory note, that the judgment was not justified by the testimony, where, in his certificate to the bill of exceptions, the circuit judge states that not all of the testimony is contained therein.—Cannon v. McIntyre, 140 Mich. 24.

¶ 1629. On appeal from a decree quieting title to land, based on an administrator's deed executed in pursuance of a decree for specific performance, where no attack is made in the briefs on the formal regularity of the probate proceedings put in evidence, but not printed in the record, it will be presumed that the probate proceedings were regular, and in accordance with the provisions of chapter 255 (§§ 9472-9486), 3 Comp. L. 1897, and authorized the making of the decree.—Chandler v. Clark, 151 Mich. 159.

¶ 1630. In a suit for personal injury, the verdict will not be set aside as excessive where there was evidence of permanent injury, and where the testimony of the defendant's physicians was taken, but is not on record.—Van Orman v. Lake Shore & M. S. Ry. Co., 152 Mich. 185.

¶ 1631. It could not be said, as a matter of law, that, with evidence which the plaintiff, in an action for the death of a servant caused by inhaling ammonia gas blown out of a pipe joint claimed to have been packed with an improper gasket, might have produced except for erroneous rulings, the cause of the accident would appear to be entirely conjectural, or that the case presented would be one devoid of evidence that a previous inspection would have been of value; where the evidence showed that the gasket in question was of rubber, and being examined shortly after the accident was found to be rotten and appeared old, that oil was necessarily in the pipes and that oil will soften rubber, that ammonia is dangerous to handle and that the ammonia in the pipes was subjected to high pressure, that the joint in question had not been examined since the installation of the plant, four years prior to the accident; and where the court refused to admit evidence that other gaskets of the same material, placed at the same time, and subject to the same influences, as the one in question, had been removed because of deterioration.—Kaess v. Tivoli Brewing Co., 149 Mich. 371.

§ 379. Presumption as to application and construction of charge by jury.

Presumption as to harm from improper charge, see ante § 360.

That jury was misled by conflicting or ambiguous charge, see post § 380.

Construction of the charge and relation of its parts to the whole, see ante § 334.

Construction of charge according to evidence and issues, see ante § 335.

¶ 1632. Where the issue is distinctly set forth in the pleadings, and the evidence conforms to it, and the record does not show that the plaintiff took any ground inconsistent with the proofs, it is not to be assumed that the jury applied the language of the charge so as to make it cover anything foreign to the issue.—Pettibone v. Maclem, 45 Mich. 381.

¶ 1633. The Supreme Court presumes that the circuit judge can influence a jury in a trial before him; it being their duty to follow his instructions as to the law.—McDuff v. Detroit Evening Journal Co., 84 Mich. 1.

¶ 1634. The mortgagee of chattels took them on writ of replevin, and one of the defendants claimed that some of his separate property was included among them. The judge charged that plaintiff would have no right to take such goods if they had not been intermingled with the rest and if he knew of the separate ownership. The jury afterwards asked if they might give costs to defendant in finding for the plaintiff, and he said no. Held, that it was not to be presumed that they understood this as overruling his former instructions.—Pray v. Cadwell, 50 Mich. 222.

¶ 1635. In an action for the balance due on a land contract in which the defendant pleads recoupment and set-off for the failure of the vendor to convey as agreed, in the absence of any evidence of damages it will be presumed that the jury followed the instructions of the court and gave no damages as recoupment.—McLeod v. Hunt, 128 Mich. 124.

¶ 1636. It cannot be presumed that the jury disregarded an unambiguous proviso by which an instruction was qualified twice in the charge merely because in another portion of the charge the proviso was omitted in a similar context.—Lillibridge v. Walsh, 104 Mich. 153.

¶ 1637. It is presumable that the refusal of a request without explanation will lead

the jury to suppose that it was wrong in law.—Battishill v. Humphreys, 64 Mich. 494.

¶ 1638. It cannot be assumed that the jury was misled into ignoring a charge on contributory negligence because it was not repeated in connection with a proper charge on negligence.—Alberts v. Village of Vernon, 96 Mich. 549.

§ 380. ——As to effect of conflict or ambiguity in charge.

¶ 1639. When conflicting charges are given, one of which is erroneous, it is to be presumed that the jury may have followed that which was erroneous; and the judgment will be reversed.—Grand Rapids & I. R. Co. v. Monroe, 47 Mich. 152; Lamb v. Township of Clam Lake, 175 Mich. 77; People v. Eggleston, 186 Mich. 510; Williams v. Bailey, 186 Mich. 677; In re Bailey's Estate, Id.; Rathbone v. Detroit United Ry., 187 Mich. 586; (Bird, J., dissenting); In re Foerster's Estate, 193 Mich. 440; Gumtow v. Janke, Id.; Bayne v. Everham, 197 Mich. 181.

¶ 1640. Judgment must be reversed where a general verdict has been rendered upon a charge embracing an unsound theory, and where it is uncertain whether the error did or did not affect the result.—Warner v. Beebe, 47 Mich. 435.

¶ 1641. On review of a verdict for a defendant in an action for a breach of warranty of sale, it will be presumed that the jury may have followed an erroneous charge requiring the plaintiff to prove each and every claim as to the warranty, and the error is not cured by the rest of the charge.—Eaton v. Hope, 177 Mich. 411.

¶ 1642. Where portions of an instruction, as to the degree of proof required to establish a defense of wilful burning in an action on fire insurances, are conflicting, one portion correctly requiring only a preponderance of evidence, and another portion requiring more than that, it will be presumed that the jury may have followed the portion that was erroneous.—Silverstone v. London Assur. Corporation, 176 Mich. 525.

¶ 1643. In an action by an infant for personal injuries sustained, an instruction that plaintiff is entitled to recover damages for his decreased earning capacity if the jury find from the evidence, and from their observation of his injury, that during plaintiff's lifetime his earning capacity will be decreased by reason of the injury, does not contain error prejudicial to defendant in that it permits the jury to award damages to plaintiff's earning capacity for the period intervening between the trial and the time when plaintiff should reach the age of twenty-one, where, in other parts of the charge, the jury are told that plaintiff could not recover for his lost time while ill, and that his time, during a period in which he could not get work after the accident, belonged to his father, and where the record is such as to authorize the conclusion that court, counsel, and jurors must all have understood that recovery for decreased earning capacity must commence when the plaintiff became his own master.—Braasch v. Michigan Stove Co., 153 Mich. 652.

§ 381. ——As to effect of oral charge or modification.

¶ 1644. Where the bill of exceptions recites the judge's oral explanation of his written charge and shows that it neither could nor did modify the effect of any of the charge, there is no error.—O'Donnell v. Segar, 25 Mich. 367.

¶ 1645. Where the bill of exceptions recites that "the court otherwise orally explained some of the written charges given, but in no way changed or modified their legal effect," and does not state what the explanation was, it must be held erroneous under Laws 1869, p. 114 (How. St., § 6484), which requires the charge to be in writing and provides that the court shall in no case orally qualify, modify or in any manner explain the written charge.—O'Donnell v. Segar, 25 Mich. 367.

§ 382. Presumptions as to verdict and findings.

As to directed verdicts, see post §§ 386-388.
Implied findings, see post § 383.
Rules for reviewing chancery findings, see post XII, E, 1.
Construction of the findings and verdict, see ante §§ 336, 337.
Sufficiency of bill or case to admit of review, see ante § 189.
Remand for want of findings, see post §§ 505-507.

¶ 1646. No presumption in favor of the correctness of the determination of the circuit judge on disputed questions of fact in a chancery case can attach upon appeal, when it appears that such decision was based in part upon inadmissible testimony.—Bailey v. Holden, 113 Mich. 402.

¶ 1647. Findings are not open to dispute; but additional facts cannot be presumed, and must be regarded as not having occurred.—Mitchell v. Chambers, 43 Mich. 150.

¶ 1648. When a special finding by the circuit judge appears in the record, it will be presumed, in the absence of any showing to the contrary, that it was made upon request; and such finding will be taken as part of the record.—Delashman v. Berry, 20 Mich. 292.

¶ 1649. Where the record is silent as to whether or not a written demand for special findings of fact and law was made as required by Circuit Court Rule 26, but such finding appears in the record, it will be presumed in the absence of any showing to the contrary that it was made upon request.—Thurber v. Aldrich, 167 Mich. 656.

¶ 1650. When requested in writing, the court sitting without a jury is required to specify the facts found and his conclusions of law thereon, and where the record fails to disclose any written request therefor, but findings have been filed, they will be presumed to have been made upon request and have the same effect as if requested.—White v. United States Gypsum Co., 168 Mich. 238.

¶ 1651. Where, upon a trial without a jury, the court erroneously excludes evidence, and then, though requested to make special findings of fact and law, makes only general findings and no findings at law, it cannot be presumed that other testimony would not have changed the result, or that no prejudice resulted from the failure to find more specifically the facts and law.—Ross v. Miner, 64 Mich. 204.

¶ 1652. Where the findings of fact support the judgment, and the testimony as to certain matters covered by proposed amendments is conflicting, it will be presumed that the court refused the amendments because they were not warranted by the testimony.—Crockett v. Bearce, 104 Mich. 257.

¶ 1653. The Supreme Court will not presume a plaintiff to be a bona fide holder of a promissory note sued on, where the fact is not found and is clearly inconsistent with the facts that are found.—Peabody v. McAvoy, 23 Mich. 526.

¶ 1654. Where, in accordance with the defendant's request the court charged that plaintiff could not recover if the jury found that he was guilty of contributory negligence in attempting to travel along a public highway, riding in the buggy, driving a horse, and leading two colts behind by a halter and permitting another to follow over which he had no control, verdict following for plaintiff, must be presumed to have been on a finding that plaintiff was without fault which contributed to the injury.—Knowles v. Mulder, 74 Mich. 202.

§ 383. ——Facts implied from facts found.

See also ante ¶ 1417.

Presumption as to proofs sustaining result, see ante §§ 373-378.

Supplying findings by inference, see also ante § 336.

What facts are concluded by the verdict or findings on review, see post § 451.

¶ 1655. Where the trial court finds as a fact that a claim against the estate of a deceased person was duly allowed by the commissioners on claims, it will be presumed that it also found that the claim was properly presented.—In re Nuckols, 103 Mich. 297.

¶ 1656. A question submitted to the jury as to whether a plaintiff holder of a draft is a bona fide holder, will be held to have been answered in the negative, in an action on such instrument where the verdict is for the defendant who accepted the draft.—Texarkana Nat. Bank v. Stillwell & Co., 121 Mich. 154.

§ 384. ——As to basis or character of verdict.

That jury followed instructions, see ante §§ 379-381.

Presumption as to harm from improper argument, see ante § 359.

Construction of general verdict on diverse counts or issues, see ante § 337.

¶ 1657. In the absence of evidence to the contrary, it must be presumed that the verdict of a jury was reached in a proper manner.—Richardson v. Detroit & M. Ry. Co., 182 Mich. 206.

¶ 1658. It cannot be assumed on error that the jury disregarded the proofs and acted on something else.—Wilcox v. Laflin & Rand Powder Co., 44 Mich. 35.

¶ 1659. The fact that the amount of a verdict differs from that claimed by either party, does not necessarily show that the result was not the deliberate conclusion of the jury, instead of a compromise.—Kinsey v. Dickinson, 175 Mich. 1.

¶ 1660. Where the finding was general, and it cannot be said that it did not wholly depend upon the wrongful exclusion of certain evidence, the judgment was reversed although there was other evidence that might have tended to support it.—Chapman v. Craig, 37 Mich. 370.

¶ 1661. Where it cannot be said as matter of law that a verdict on common counts is not based on a special agreement of which evidence has been given, a court of review must treat such agreement as in the case and as a basis for the verdict even though a special count resting upon it has been abandoned.—Thomas v. Caulkett, 57 Mich. 392.

¶ 1662. The reviewing court cannot assume without proof that the jury were prejudiced against the defendant because it was a corporation or because it was a foreign insurance corporation.—Goodwin v. Union Ins. Co. of Philadelphia, 168 Mich. 41.

¶ 1663. Where the record does not show how a jury made up its award of damages, but the evidence would warrant the award as made, it will not be presumed that the jury included any improper item.—Sandler v. Bresnaham, 53 Mich. 567.

¶ 1664. In the absence of any objection that damages were not apportioned, as they should have been, for nonjoinder of a plaintiff in trespass, the Supreme Court cannot presume that they were not.—Achey v. Hull, 7 Mich. 423.

§ 385. ——As to adequacy or excessiveness of award.

Rules as to adequacy or excessiveness of award tested by evidence of damages, see Damages, IX, XI.

Rules as to amount recoverable under terms of contract or according to reasonable worth or value, see Contracts, VI, E; Implied Contracts; Values.

¶ 1665. It must be presumed on review that if exorbitant damages were given the lower court, on application, would have granted relief.—Briggs v. Milburn, 40 Mich. 512.

¶ 1666. Though the Supreme Court cannot disturb a verdict simply because it is for a large sum yet the amount may be taken into consideration as bearing upon the question whether the jury awarded punitive damages under an erroneous charge.—Stuyvesant v. Wilcox, 92 Mich. 233.

§ 386. Presumption on directed verdict.

Showing in record necessary to review, see ante § 188.

Shifting ground for direction to avoid error, see ante ¶ 1494.

¶ 1667. A consideration of the testimony in the light most favorable to the plaintiff in error is involved in the review of a judgment on a directed verdict.—O'Neill v. Northern Assur. Co., 145 Mich. 516; Barschow v. Lake Shore & M. S. R. Co., 147 Mich. 226; Steering Wheel Co. v. Fee Electric Car Co., 174 Mich. 512; Anderson v. Kendrick, 199 Mich. 240; In re Hewitt's Estate, Id.

¶ 1668. Where a verdict is directed for defendants, the evidence must on appeal be viewed most favorably to the plaintiff.—Brown v. Pontiac, O. & N. R. Co., 133 Mich. 371; Thurston v. Detroit United Ry., 137 Mich. 231; Lewis v. City of Marshall, 146 Mich. 389; Roy v. Bordas, 161 Mich. 567; Putnam v. Detroit United Ry., 164 Mich. 342; Orso v. Great Lakes Engineering Works, 164 Mich. 568; Burton v. Brunswick-Balke-Collender Co., 166 Mich. 45; Johnson v. Burke, 167 Mich. 349; Dillon v. Craig, 168 Mich. 216; Johnson v. Union Carbide Co., 169 Mich. 651; Leary v. Houghton County Traction Co., 171 Mich. 365; McIntire v. Car, 171 Mich. 647; Sloan v. Detroit United Ry., 172 Mich. 68; Risbridger v. Michigan Cent. R. Co., 188 Mich. 672; Baucino v. Fitzpatrick, 186 Mich. 1; Weitzel v. Detroit United Ry., 186 Mich. 7, 9 N. C. C. A. 407.

¶ 1669. A directed verdict for defendant is tested on error by the criterion whether after considering all the testimony in the case in favor of plaintiff as true, giving it the most favorable construction possible, it fails to make a prima facie case for him.—Robinson v. Ward, 141 Mich. 1; Haak v. Kellogg, 146 Mich. 541; Opsomere v. Opsomere, 162 Mich. 65.

¶ 1670. The rule that when an appeal is taken from a judgment based on a directed verdict the testimony will be read most favorably to the appellant, does not apply where the position assumed by counsel for appellant was that in any event the court should dispose of the case one way or the other.—Griffin v. Marlette State Bank, 150 Mich. 499.

¶ 1671. Where the court denied plaintiff's offer to discontinue, and directed a verdict for defendant, and plaintiff, on writ of error, seeks reversal of the judgment and a new trial, the Supreme Court will consider the case as one pending, and determine the question whether there was error in directing a verdict.—Foss v. Brown, 151 Mich. 119.

¶ 1672. Where a verdict is directed the party maintaining it in the Supreme Court can rely only on the undisputed testimony.—Parsons v. Frost, 55 Mich. 230.

¶ 1673. Where a verdict is directed for a defendant on the ground that no evidence of liability is presented by plaintiff, the question before the reviewing court is whether there was any evidence to go to the jury, taking the most favorable view of claimant's evidence and bearing in mind that the weight of the evidence was for the jury.—In re Reid's Estate, 170 Mich. 476.

¶ 1674. The Supreme Court, in determining whether in a suit for personal injuries on account of defendant's negligence a directed verdict should have been granted, cannot go into the weight of the evidence in the case, but must decide whether, giving plaintiff's testimony the strongest probative force it is entitled to, the court can say it was not sufficient to require the submission to the jury of the question of defendant's negligence.—Prisel v. Coney, 168 Mich. 602.

¶ 1675. In determining whether a case has been properly taken from the jury, such evi-

dence as has been disregarded must be assumed to be true.—Scandinavian Beneficial & Social Soc. of Ishpeming v. Eggan, 59 Mich. 65.

¶ 1676. Where in a suit in tort a trial court directs a verdict for defendant, the Supreme Court, in reviewing the correctness of such direction, must accept as true the facts and circumstances of the case as presented by plaintiff's evidence, together with all legitimate inferences to be drawn therefrom.—Inglis v. Millersburg Driving Ass'n, 169 Mich. 311.

¶ 1677. Where the trial court directs a verdict for a plaintiff, the Supreme Court, in determining whether there was any testimony tending to support defendant's claim, must give to the testimony in his favor its greatest probative force.—Stearns Salt & Lumber Co. v. Newberg, 170 Mich. 324.

¶ 1678. In determining on error whether a case should have been taken from the jury, the testimony should be construed as liberally in favor of the plaintiff as is reasonably possible.—Hook v. Soloman, 194 Mich. 517.

¶ 1679. On reviewing a judgment entered on a directed verdict, proof given by the unsuccessful party will be given its greatest probative value.—Bertha v. Regal Motor Car Co., 180 Mich. 51.

¶ 1680. A verdict directed by the court will be presumed to be sustained by the evidence where the record does not purport to contain all the testimony.—Metz v. People's Savings Bank, 129 Mich. 320.

¶ 1681. Although a verdict for the defendant in an action on a life insurance policy should have been directed had all testimony on the part of defendant been taken as true, the court could not hold that the jury should have been so instructed, where the record did not contain all the evidence and in view of the statement that there was testimony in rebuttal of that of the defendant.—Malicki v. Guaranty Fund Life Soc., 119 Mich. 151.

¶ 1682. It is presumed in support of a ruling directing a verdict or the rejection of evidence that the party who had offered the evidence did not suggest, on its rejection, that he had any further proof.—Sherwood v. Landon, 57 Mich. 219.

¶ 1683. Where the bill of exceptions does not purport to contain all of the testimony, it will not be presumed, for the purpose of sustaining the action of the trial court in directing a verdict for defendant, that there was error in the admission of a bill of sale offered by plaintiff in proof of his title, because such instrument was not authenticated by proof of its execution, and that it was thereafter disregarded by the court for that reason.—Hoffman v. Pack, Woods & Co., 114 Mich. 1.

¶ 1684. A contention that a verdict for defendant should have been directed on the evidence will not be upheld where the defendant's brief contends that evidence has been omitted from the record but comparison with the original record discloses no such omission and the record does not show all testimony to be included.—Burt v. Greene, 125 Mich. 328.

§ 387. ——Assumption of truth of evidence.

¶ 1685. Defendant is entitled in a case where a verdict is directed against it, to have the evidence presented in its behalf considered by the Supreme Court as true.—Chase v. Michigan United Rys. Co., 165 Mich. 493.

¶ 1686. Where, after the court had declared his intention of directing a verdict for defendant upon plaintiff's statement of the case, counsel for plaintiff offered to prove by a witness already sworn the facts alleged in the declaration, and his offer was refused, the material facts alleged in the declaration must be taken as established.—Barto v. Detroit Iron & Steel Co., 155 Mich. 94.

¶ 1687. After the trial judge had indicated his intention to direct a verdict for defendant upon the statement of the case by counsel for plaintiff, counsel for plaintiff endeavored to make an additional statement which would enable the court to properly understand the facts which he had misunderstood; but the court would not permit an interruption, and told plaintiff's counsel that he could make his statement to the stenographer when the court had delivered his charge. Held, that under this ruling, the statement should receive the same consideration as though made before the conclusion of the charge.—Barto v. Detroit Iron & Steel Co., 155 Mich. 94.

¶ 1688. Where a verdict rendered for a defendant is based upon a legal proposition all issues in the case upon which the plaintiff offered evidence except such propositions and those which this one determines by necessary inference must be treated on error as if they had been decided in plaintiff's favor.—Hume v. Grand Trunk Western Ry. Co., 192 Mich. 225.

§ 388. ——Restriction to evidence considered below.

¶ 1689. Where the trial court has assumed from defective proof, a certain set of facts, and directed a verdict, the decision of a reviewing court will be determined on the same

facts, although it would have been the duty of the court below to admit supplemental evidence, had the defect in the proof given been pointed out.—Welton v. Township of Crystal, 152 Mich. 486.

¶ 1690. In assumpsit to recover for services rendered to defendant, the trial court, erroneously holding that the agreement between the parties, by which plaintiff was to receive a share of the profits, constituted them partners, directed a verdict for defendant. It was contended upon error that as plaintiff failed to show what the profits were, he was not damaged by the ruling. The Supreme Court, however, hesitating to determine the case upon the ground of absence of proof of a particular fact where the question was not passed upon in the lower court, and did not appear to have been presented there, ordered a reversal for the error noted. Stockman v. Michell, 109 Mich. 348.

§ 389. Presumptions as to propriety of new trial.

Sufficiency of bill or case to admit of review, see ante § 191.
Review of discretion of lower court, see post § 413.

¶ 1691. In reviewing the refusal of the trial judge to grant a new trial, the Supreme Court is bound to bring to the support of the decision of the trial judge all reasonable presumptions which arise from his superior opportunity to determine the credibility of witnesses.—Line v. Grand Rapids & I. R. Co., 143 Mich. 163.

¶ 1692. The Supreme Court in reviewing the refusal of a trial court in refusing a new trial is bound to recognize the principles which have always governed trial courts in determining whether or not verdicts should be set aside, and is bound to bring to the support of the decision of the trial judge all reasonable presumptions which arise from his superior opportunity to determine the credibility of witnesses.—Dupuis v. Saginaw Valley Traction Co., 146 Mich. 151.

¶ 1693. Where the bill of exceptions is not certified as containing all the evidence, a statement made by the trial judge giving his reasons for refusing a new trial, will be taken as true where the appellant has not disputed it.—Schultz v. Guldenstein, 144 Mich. 636.

¶ 1694. Under Comp. L. 1897, § 10504, it is the manifest duty of the Supreme Court to overrule a decision of the trial court refusing to set aside a verdict because contrary to the weight of the evidence, where it is apparent from the record, notwithstanding every reasonable presumption in support of such decision, that the trial court erred.—Hintz v. Michigan Cent. R. Co., 132 Mich. 305.

¶ 1695. Where the evidence is convincing that there was no mistake in making a payment of money and in returning part of it thereafter, except in calculating the amount, and the evidence that the repayment was by way of a compromise was meagre, while the apparent miscarriage of justice was strong, the presumption in favor of the action of the trial court in denying a new trial will not prevail.—Stowell v. Ames, 148 Mich. 439.

¶ 1696. In reviewing denial of a new trial it must be assumed that a party's attorney on suggestion made by the court, would have offered to prove, either by statement or by interrogating a witness, facts within the knowledge of a party which were made the basis of motion for a new trial; and where he did not so offer that the facts did not exist.—Moore v. Harneck, 200 Mich. 642.

§ 390. Presumption as to assessment of damages.

¶ 1697. The assessment of damages on a penal bond under R. S. 1838, was considered as made by the court, and properly appears to have been so made in the judgment record, although the journal entry, from which such record was made up, showed that the damages were referred to and assessed by the clerk as might be done by order of court under the statute, if the damages were undisputed.—Prentiss v. Spalding, 2 D. 84.

¶ 1698. Where it was recited in the judgment entry under the statutes, in a case not proper for a reference to the clerk, that judgment was rendered upon the clerk's assessment of damages, but the prior order of reference to assess was to the court, as it should have been, it was held that the court could not make any presumption, against the recital in the judgment, based upon such prior order, that the court actually assessed the damages; but the judgment imports absolute verity.—O'Flynn v. Holmes, 8 Mich. 95.

¶ 1699. In the absence of anything to the contrary in the judgment entry on default after a proper reference to the court to assess the damages, it is presumed that the assessment recited was made by the court and was properly made.—Howard v. Tomlinson, 27 Mich. 168.

§ 391. Presumption as to allowance of costs.

¶ 1700. Where it does not appear affirmatively from the record that the plaintiff's claim was established at more than $100 and was reduced by set-off, the judgment for costs for the defendant will not be reversed.—Bellows v. Crane Lumber Co., 126 Mich. 476.

§ 392. Presumptions as to vacation of judgment or decree.

¶ 1701. The court of appeal must accept the statement of the trial court as to its reasons for making an order vacating a decree pro confesso, even though such statement is denied by counsel, in the absence of an official record showing all that transpired upon the argument of the motion.—Hews v. Hews, 145 Mich. 247.

§ 393. Presumptions on penal and forfeiture judgments.

¶ 1702. A verdict and judgment enforcing a forfeiture cannot be supported by presuming anything that does not appear on the record.—Miller v. Havens, 51 Mich. 482.

D. RULINGS BELOW BASED ON DISCRETION.

§ 394. In general.

[Note. The propriety, occasion or ground for a given action, order or ruling by the trial court, when the matter rests in its discretion, is something pertaining to the specific subject rather than to appeal or error; and therefore the specific topics dealing with such action, order or ruling should be consulted. E. g., discretion to allow or deny continuance or new trial, see Continuance; New Trial. The matter collected here treats of the review of discretionary orders rather than of the propriety of making them.]

Discretion in respect to extension of time to settle bill or case, see ante § 97.

Right to have appeal or error from discretionary orders, see ante § 51.

Appealability of refusal to punish for contempt, see ante § 17, ¶ 73.

Review of particular discretionary orders, see post §§ 395-418.

Review of findings made on motions and offers, see post §§ 460, 461.

Trial de novo in appeals, see post XII, H.

Abuse of discretion, see post §§ 419, 420.

Appeal from probate decree, see Probate Courts, III.

¶ 1703. Error cannot be assigned upon a discretionary ruling or decision of the circuit court.—Dibble v. Rogers, 2 Mich. 404; Chaffee v. Soldan, 5 Mich. 242; Ripley v. Davis, 15 Mich. 75; Pearsons v. Eaton, 18 Mich. 79; Michigan Cent. R. Co. v. Anderson, 20 Mich. 244; Davis v. Bush, 28 Mich. 432.

¶ 1704. The Supreme Court will not review mere questions of practice below, especially if they do not plainly involve an abuse of discretion.—Mann v. Tyler, 56 Mich. 564.

§ 395. Change of venue or refusal of it.

¶ 1705. A motion to change venue is discretionary, and not subject to review on error.—Greeley v. Stilson, 27 Mich. 153.

¶ 1706. The allowance of a motion for a change of venue is a matter within the discretion of the trial court, and his action will not be disturbed unless a plain abuse of discretion is shown.—Silverstone v. London Assur. Corporation, 176 Mich. 525.

§ 396. Continuance or refusal of it.

See also post ¶ 1789.

¶ 1707. The discretion of the court below in granting or refusing continuances will not be reviewed unless a clear abuse thereof appears.—Bussey v. Bussey, 71 Mich. 504.

¶ 1708. The discretion of the circuit court in denying a postponement of trial is not reviewable unless abused.—Winklemeir v. Daiber, 92 Mich. 621.

§ 397. Leave to plead.

¶ 1709. An order allowing leave to plead over, when a demurrer is overruled, and the conditions on which such order is granted, are discretionary, and cannot be reviewed on error.—Tefft v. McNoah, 9 Mich. 201.

¶ 1710. Leave to file a bill of review being within the fair exercise of discretion a refusal will not be reviewed if fairly exercised.—Farmer's Bank v. Quick, 71 Mich. 534.

§ 398. ——Supplemental pleadings; pleas puis darrein.

Abuse of discretion, see post § 419, ¶ 1782.

¶ 1711. The discretion of a trial court in excluding a plea puis darrein will not be reviewed unless it has been abused; and where defendant, after learning the facts on which to base it, has delayed to file it for a long time, and until after the case has come to trial and been submitted by the plaintiff, it is not clear that the discretion has been abused.—Souvais v. Leavitt, 53 Mich. 577.

§ 399. ——Pleadings on appeal from justice.

¶ 1712. Refusal of leave to deny the execution of a note on affidavit after appeal from a justice is discretionary, and is not reviewable on error.—Chicago & N. E. R. Co. v. Edson, 41 Mich. 673.

§ 400. Ruling on motion to elect.

¶ 1713. The refusal to compel plaintiff to elect between the counts of the declaration is not reviewable where there is no misjoinder.—Cook v. Perry, 43 Mich. 623.

§ 401. Allowance or denial of amendment.

Abuse of discretion, see post § 419, ¶ 1781.

¶ 1714. The discretion of a trial judge in allowing or refusing to allow amendments to pleadings will not be reviewed if it is not abused.—Browne v. Moore, 32 Mich. 25.

People ex rel. King v. Wayne Circuit Judge, 41 Mich. 727; Pangborn v. Continental Ins. Co., 67 Mich. 683.

¶ 1715. Review may be had of a denial of leave to amend pleadings where such denial deprives a party of a meritorious defence to the whole action.—Pangborn v. Continental Ins. Co., 67 Mich. 683.

¶ 1716. The trial court exercises a discretion in denying a motion to amend a notice of special defence, and this will not be reviewed unless it has been abused.—Minnock v. Eureka Fire and Marine Ins. Co., 90 Mich. 236.

¶ 1717. Error cannot be assigned for allowing an amendment as to the name of the plaintiff.—Final v. Backus, 18 Mich. 218.

¶ 1718. A fair exercise of judicial discretion in granting an amendment on the trial to cure a clerical error in the declaration is not reviewable on error.—Borden v. Clark, 26 Mich. 410.

¶ 1719. Where the application to amend was made at the earliest opportunity after a new trial had been ordered on reversal by the Supreme Court, and where the effect of the denial deprived the party of a meritorious defence to plaintiff's entire claim, denial was reviewable.—Pangborn v. Continental Ins. Co., 67 Mich. 683.

¶ 1720. Denial of an application for an amendment, to permit defendant to interpose the defence of the statute of limitations, is not reviewable on error.—Ripley v. Davis, 15 Mich. 75; Marx v. Hilsendegen, 46 Mich. 336.

¶ 1721. The exercise by a trial court of its discretion to permit an amendment clearly allowable under the statute will not be reviewed on error.—Beneway v. Thorp, 77 Mich. 181.

¶ 1722. A refusal to permit defendant to amend his notice of set-off during the trial of an action on a promissory note, so as to add a further claim, is not ground for reversal of the judgment, the matter being entirely within the discretion of the court.—Rawlings v. Fisher, 110 Mich. 19.

¶ 1723. An application for leave to amend a plea of the general issue by giving notice of the statute of limitations is addressed to the discretion of the court and its denial will not be reviewed on error.—Shank v. Woodworth, 111 Mich. 642.

¶ 1724. The discretion of a circuit court judge in allowing an amendment to a declaration will not be reviewed on appeal except in clear cases of arbitrary and unjust ruling.—Lord v. National Protective Society, 134 Mich. 357.

¶ 1725. Permitting an amendment to a declaration at the trial which makes more specific the averment of care on the part of the plaintiff in an action for personal injuries is a question resting in the sound discretion of the trial court, and will not be disturbed in the absence of an abuse thereof.—Wright v. Crane, 142 Mich. 508.

¶ 1726. Granting or refusing leave at the close of the evidence, to amend a bill against a city treasurer to set aside a tax sale by virtue of a paving assessment, by alleging illegal provisions in the contract for paving, was discretionary, and the denial of leave was not interfered with on appeal.—Walker v. City of Detroit, 136 Mich. 6.

¶ 1727. The discretion of the lower court in allowing a tax-contestant to file, after the day fixed for the hearing of the auditor-general's petition, a supplemental list of lands that simply states more in detail the objections already filed, will not be reviewed.—Auditor-General v. Chandler, 108 Mich. 569.

§ 402. On motion for further return from justice.

¶ 1728. The refusal of a trial court to order a further return to a writ of certiorari issued to a justice is not assignable as error.—Mann v. Tyler, 56 Mich. 564.

§ 403. Dismissal or discontinuance of cause or parties.

¶ 1729. Error lies to review on exceptions the allowance by the circuit court of a discontinuance as to one defendant, which upon no fair hypothesis or reasonable intendment can be reconciled with justice.—Yawkey v. Richardson, 9 Mich. 529.

¶ 1730. If the circuit court, on appeal from an order of the probate court refusing a will to probate, can allow part of the proponents to renounce and be discharged in order to become witnesses, the power to do so is discretionary, and a refusal cannot be reviewed on error.—Beaubien v. Cicotte, 12 Mich. 459.

§ 404. ——Of appeal cause.

¶ 1731. An order dismissing an appeal case for want of payment of the entrance fee is not assignable as error.—Chaffee v. Soldan, 5 Mich. 242.

§ 405. Reception and order of proof.

¶ 1732. Rulings relating merely to the order of proof are not assignable for error, unless the discretion of the court has been plainly abused.—Dubois v. Campau, 24 Mich. 360; People v. Saunders, 25 Mich. 119; Morse

v. Hewett, 28 Mich. 481; Hutchins v. Kimmell, 31 Mich. 126; Hulbert v. Hammond, 41 Mich. 343; Hoffman v. Harrington, 44 Mich. 183; Chase v. Lee, 59 Mich. 237.

¶ 1733. Error cannot be assigned upon the admission or exclusion by the court of evidence in rebuttal which might have been introduced in chief.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99; Kempsey v. McGinniss, 21 Mich. 123; Danielson v. Dyckman, 26 Mich. 169; Brown v. Marshall, 47 Mich. 576; Beebe v. Koshnic, 55 Mich. 604; Torrent v. Damm, 66 Mich. 105.

¶ 1734. Objections relating merely to the order of proof are not considered.—City of Muskegon v. S. K. Martin Lumber Co., 86 Mich. 625; Torrent v. Damm, 66 Mich. 105.

§ 406. Regulating examination of witnesses.

¶ 1735. Where it is necessary to allow considerable latitude in examining witnesses, and the discretion of the trial judge is fairly exercised, his rulings in the admission or rejection of evidence will not be reviewed if they are not to the evident prejudice of the parties.—Fick v. Runnels, 48 Mich. 302.

¶ 1736. The trial court has a large discretion in permitting cross-examination of a witness with which in the absence of an abuse thereof the Supreme Court will not interfere.—Herbeck v. Germain, 144 Mich. 157.

¶ 1737. An objection that a question is leading will not generally be noticed.—Lyon v. Chamberlain, 41 Mich. 119.

¶ 1738. The objection that questions are leading will not generally be noticed even if properly brought before the reviewing court. —Church v. John Davis & Co., 93 Mich. 477.

¶ 1739. The discretion of the trial court in permitting a leading question was not interfered with in the absence of an abuse of such discretion.—Bellows v. Crane Lumber Co., 119 Mich. 424.

¶ 1740. The discretion of the trial court in determining the limit of inquiry on cross-examination as to the witness' past life will not be reviewed on error unless clearly abused.—Helwig v. Lascowski, 82 Mich. 619.

¶ 1741. The Supreme Court will not reverse on account of improper cross-examination, where the trial court has not abused his discretion in permitting such cross-examination.—Pelton v. Mayhew, 166 Mich. 546.

§ 407. Striking or excluding evidence.

¶ 1742. Where hearsay evidence has been admitted without objection and cross-examination has brought out further details in determining a motion to strike out such evidence the trial court is invested with a wide discretion, and his decision will not be disturbed by an appellate court in the absence of an abuse of the discretion.—McWilliams v. Lake Shore & M. S. R. Co., 146 Mich. 216.

§ 408. Reopening case and recalling witnesses.

Abuse of discretion, see also post § 419, ¶ 1780.

¶ 1743. The Supreme Court will not review the discretion of the trial court in admitting competent evidence for the plaintiff after the defendant had rested, even though it is not rebutting.—Somerville v. Richards, 37 Mich. 299.

¶ 1744. Error cannot be assigned for refusing to permit a witness to be called after the evidence has been closed.—Detroit & M. R. Co. v. Van Steinburg, 17 Mich. 99.

¶ 1745. Allowing or refusing to allow a witness to be recalled for the purpose of correcting his testimony is not assignable for error.—Michigan Cent. R. Co. v. Anderson, 20 Mich. 244.

¶ 1746. Refusing to open a submitted cause and to allow further proofs is not assignable as error.—Lee v. Hardgrave, 3 Mich. 77.

¶ 1747. The discretion of the circuit court to open a cause for further proofs at any time before decree will not be reviewed except in case of abuse; but it is an excess of power to open a case to let in proof of facts not set out in the pleadings, where the petition fails to point out what the testimony to be offered will show.—Wagar v. Bowley, 104 Mich. 38.

§ 409. Regulating argument and conduct of trial.

See also post ¶ 1784.

Presumption as to harm from allowing improper argument, see ante § 359.

¶ 1748. The judgment will not be reversed for an unfair opening statement except in a very plain case,—Porter v. Throop, 47 Mich. 313.

¶ 1749. The Supreme Court will not encroach, except in a very plain case, upon the province of the trial judge, whose duty it is to see that the fair limits of argument were not passed, and that a proper decorum is preserved by counsel.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 1750. The injury must be very apparent or the abuse very great before the Supreme Court will interfere with the exercise of

the discretion of the trial judge in regard to the language of counsel.—Lathrop v. Sinclair, 110 Mich. 329.

§ 410. Settlement of findings.

¶ 1751. Error is not assignable upon the action of the court below in requesting the attorney for the prevailing party to prepare a draft of proposed findings of fact where the court has determined in his own mind how he will decide the case.—Bateman v. Blaisdell, 83 Mich. 357.

§ 411. Provisional and interlocutory relief in equity.

¶ 1752. Courts hesitate to review the action of a trial court involving matters of discretion as in the granting or refusing of a writ of injunction, and will not do so unless it is necessary that justice be done.—Dodge v. Van Buren Circuit Judge, 118 Mich. 189.

¶ 1753. The removal of a receiver by a circuit judge, being within his discretion, will not be reversed on appeal where it is clear from the record that the receiver did not accomplish what he ought to and would have accomplished had he exercised the diligence of a prudent man in winding up a business of his own.—In re Angell, 131 Mich. 345.

§ 412. Divorce and alimony orders and decrees.

Discretion as to amount of alimony, see Divorce. X, D.

Discretion to reopen divorce decree and admit further proofs, see also Divorce, VII.

¶ 1754. There is no rule of court limiting or defining the circumstances under which the judge shall exercise his discretion for or against the application for alimony or expenses in a divorce suit pending; and there can be no review of his action in the premises unless there has been a gross abuse of that discretion (How. St., § 6235).—Ross v. Griffin, 53 Mich. 5.

§ 413. Grant or refusal of new trial.

Presumption on error as to propriety of new trial, see ante § 389.

Necessity of including in bill or case reasons given on new trial ruling, see ante § 191.

Abuse of discretion, see post § 420, and see generally New Trial.

As to rehearing in equity, see post § 414.

¶ 1755. Before Laws of 1893, Act No. 134, went into effect the Supreme Court could not interfere with the discretion of the circuit court in refusing a new trial in a civil case.—Brassel v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 5.

¶ 1756. Laws 1893, Act No. 134, providing in all cases thereafter taken to the Supreme Court for the review of the refusal by the trial judge to grant a motion for a new trial, does not apply when the motion was decided and the writ of error issued before the act took effect.—Gemberling v. Lazarus, 100 Mich. 324.

¶ 1757. The discretion of the circuit court in granting or refusing a new trial is not assignable error.—Dibble v. Rogers, 2 Mich. 404; Bourke v. James, 4 Mich. 336; Cuddy v. Major, 12 Mich. 368; Sleight v. Henning, 12 Mich. 371; Pennsylvania Min. Co. v. Brady, 14 Mich. 260; People ex rel. Aetna Live Stock Fire & Tornado Ins. Co. v. Wayne Circuit Judge, 20 Mich. 220; Johr v. People, 26 Mich. 427; Jones v. Hobson, 37 Mich. 36; People ex rel. Stork v. Detroit Superior Court Judge, 41 Mich. 5; Mahoney v. People, 43 Mich. 39; Toulman v. Swain, 47 Mich. 82; Hake v. Fuell, 50 Mich. 89; People v. Francis, 52 Mich. 575; Nelson v. Lumberman's Min. Co., 65 Mich. 288; Graham v. Myers, 67 Mich. 277; Wiest v. Luyendyk, 73 Mich. 661.

¶ 1758. An order granting a new trial is not subject to review, inasmuch as it cannot finally dispose of any rights, besides being usually discretionary.—People ex rel. Stork v. Detroit Superior Court Judge, 41 Mich. 5.

¶ 1759. The denial of a motion for new trial on the ground that one of the jurors had served upon a former trial of the same cause, being a question addressed to the discretion of the trial court, is not assignable for error.—Bourke v. James, 4 Mich. 336.

¶ 1760. A motion for a new trial based upon the disclosure of a sealed verdict by the jury before its return to the court is addressed to the judicial discretion of the trial court, whose ruling will not be disturbed on error.—Wiest v. Luyendyk, 73 Mich. 661.

¶ 1761. A new trial will not be granted where it does not appear that the trial court has abused its discretion in refusing to grant a new trial.—Minds v. Keyes, 189 Mich. 629.

¶ 1862. On a suit by a patron against an owner of a moving picture theater, the existence of handrails and of lights at the exit steps were material issues and witnesses on both sides testified as to their existence. The jury gave a verdict for the defendant and on a motion for a new trial depositions were presented tending to show that witnesses for the defense had testified falsely as to the existence of the handrails. Held, the discretion of the court in refusing the motion would not be disturbed since the jury could have believed defendant's testimony as to the lights and disregarded that as to the handrails.—Branch v. Klatt, 173 Mich. 31.

¶ 1763. The action of the circuit judge in denying a motion for a new trial, based upon the alleged excessive character of the verdict, will not be disturbed on error, where some of the evidence, which is very conflicting on the question of damages, fairly tends to support the verdict.—Meloche v. Chicago, M. & St. P. R. Co., 116 Mich. 69.

¶ 1764. A judgment will not be reversed for the failure of the court below to enforce the condition upon which it has denied a motion for a new trial. The denial was a matter of discretion.—Jones v. Hobson, 37 Mich. 36.

§ 414. Grant or refusal of rehearing.

¶ 1765. The discretionary power of the circuit court to grant a rehearing will not be interfered with on appeal unless it has been abused.—Barnes v. Kent Circuit Judge, 97 Mich. 212.

¶ 1766. The Supreme Court will not review the action of a trial court on a motion for a rehearing on the ground that the defendant was taken by surprise by the production of certain evidence and also on the ground of newly discovered evidence except when it appears clearly that there has been an abuse of discretion.—Saginaw Suburban R. Co. v. Connelly, 146 Mich. 395.

§ 415. Vacation of judgment or order.

¶ 1767. Error cannot be assigned on the decision of the court below of a motion, founded upon affidavits, to vacate a judgment; such motion being addressed merely to the sound discretion of the court.—Mayor, etc., of City of Detroit v. Jackson, 1 D. 106; Van Renselaer v. Whiting, 12 Mich. 449.

¶ 1768. Vacating a judgment of nonsuit or setting aside a default is not assignable as error.—Pearsons v. Eaton, 18 Mich. 79; Final v. Backus, 18 Mich. 218.

¶ 1769. Refusal to open a default is not reviewable, being a matter of discretion. —Voorhies v. Frisbie, 25 Mich. 476.

¶ 1770. The matter of setting aside a nonsuit is within the discretion of the trial court and an order setting aside a nonsuit on terms will be affirmed where it appears that the nonsuit was voluntarily submitted to because plaintiff had removed from the state without the knowledge of her counsel who supposed that he could find her at her usual place of abode and only learned differently after the jury was impaneled, the motion to set it aside having been made as soon as counsel learned of plaintiff's whereabouts. —Reaumè v. Wayne Circuit Judge, 130 Mich. 245.

¶ 1771. Except where there has been a clear abuse of discretion, the action of the circuit court in refusing to set aside an order pro confesso is not reviewable on appeal.—Mills v. McLeod, 94 Mich. 627.

§ 416. Requiring or denying security for costs.

¶ 1772. The Supreme Court will not review the discretion of the circuit court in making or denying an order for security for costs.—Goodenough v. Burton, 146 Mich. 50.

§ 417. Allowance of costs and expenses.

¶ 1773. Where the court below allowed upon proper petition, fees to one to whom an account was referred by order of court in another cause, nothing but an abuse of discretion will justify this court in interfering with such allowance.—Scott v. Bay City, 150 Mich. 694,

¶ 1774. Where the circuit judge fixes the costs in an appeal from a justice, the Supreme Court will not interfere.—Rock Island Plow Co. v. Smith, 162 Mich. 180.

§ 418. Allowances to personal representatives, trustees, etc.

¶ 1775. Where there are circumstances disclosed which call for the exercise, first by the probate court, and upon appeal by the circuit court, of the discretion which, with respect to the allowance of fees to administrators and others, is reposed in those courts, nothing but a manifest abuse of such discretion will be reviewed by the Supreme Court. —In re McNamara's Estate, 166 Mich. 451; McNamara v. Michigan Trust Co., Id.

¶ 1776. A finding by the circuit judge that an executor is not entitled to extra compensation under Comp. L. 1897, § 9438, providing for extra compensation where the settlement of an estate is unusually difficult, is within the discretion of the court and will not usually be disturbed.—In re Gallagher's Estate, 120 Mich. 365.

¶ 1777. A determination of the circuit court as to the compensation of a trustee, on a bill to foreclose a trust mortgage, will not be disturbed on appeal.—Michigan Trust Co. v. Lansing Lumber Co., 121 Mich. 438.

¶ 1778. The allowance or disallowance of compensation for a guardian is in the discretion of the trial court, and in the absence of evidence of a clear abuse it will not be disturbed.—In re Hoga's Estate, 134 Mich. 361.

§ 419. Abuse of discretion in general.

Abuse of discretion in granting or denying extension of time to appeal, see ante § 75.

In extending time for making and settlement of bill, see ante § 97.

Discretion to open divorce decrees, see also Divorce, VII.

¶ 1779. Where the disposition of a motion is within the discretion of the court, its ruling is not open to review on error, even when based upon an incorrect reason.—Polhemus v. Ann Arbor Savings Bank, 27 Mich. 44.

¶ 1780. Where the exercise of a court's discretion amounts to an abuse of it that is liable to affect the legal rights of a party, this court will review it, although the abuse resulted from accident, inadvertence or misconception. So held where counsel were allowed to open a case improperly.—Scripps v. Reilly, 35 Mich. 371.

¶ 1781. The refusal of the trial court to strike out the name of the receiver of a railroad and to substitute the name of the company as defendant where a cause of action arising previous to the appointment of the receiver is alleged, and process was served on an agent of the company, will be reviewed on writ of error, although a matter resting in the discretion of the trial court.—Daly v. Blair, 183 Mich. 351 (Ostrander, J., dissenting).

¶ 1782. The discretion of the trial court in excluding a plea puis darrein will not be reviewed unless it has been abused; and such abuse does not appear where there was a long delay in filing the plea and until a trial and submission thereon of plaintiff's case.—Souvais v. Leavitt, 53 Mich. 577.

¶ 1782a. An abuse of legal discretion—as in denying leave to file an affidavit of publication in attachment nunc pro tunc—does not consist in a failure to exercise discretionary power precisely as the Supreme Court might have done under like circumstances.—Savidge v. Ottawa Circuit Judge, 105 Mich. 257.

§ 420. ——In new trial rulings.

See also post § 448.

Presumption as to propriety, see ante § 389.

¶ 1783. Where a trial judge has denied a motion for a new trial, the upper court should not overturn his ruling except where, upon consideration of the facts upon which the trial judge acted, an unprejudiced person can say that there was no justification or excuse for the ruling made.—Cooper v. Carr, 161 Mich. 405.

¶ 1784. This court will not reverse a ruling of the court below refusing to grant a new trial sought on the ground that counsel for plaintiff made prejudicial and unwarranted statements unless it appears from the record that the court below, in denying a new trial, abused his discretion.—Jordan v. Le Messurier, 155 Mich. 188.

¶ 1785. When it is apparent from the record, notwithstanding all reasonable presumptions which arise from the superior opportunity of the trial judge to determine the credibility of witnesses, and notwithstanding the principles which have always governed trial courts in determining whether verdicts should be set aside or not, that yet the trial judge erred in refusing to set aside the verdict on the ground that it is against the weight of the testimony, the duty of this court to overrule that decision is manifest.—Bosek v. Detroit United Railway, 175 Mich. 8.

¶ 1786. Denial of a new trial asked for on the ground of newly discovered evidence that appears to have been mostly cumulative and not newly discovered will be sustained.—Cummins v. Baker, 141 Mich. 536.

¶ 1787. The refusal of the trial court to grant a new trial on the ground of newly-discovered evidence does not amount to abuse of discretion where he states that the evidence was cumulative and would not in his opinion change the result of the trial, and that the ends of justice did not require setting aside the judgment.—Holser v. Skae, 169 Mich. 484.

¶ 1788. On the authority of Hintz v. Michigan Cent. R. Co., 132 Mich. 305, the refusal of a new trial asked on the ground that the verdict was against the weight of evidence and excessive will be sustained, though the case is open to debate on both grounds.—Nestle v. City of Flint, 141 Mich. 153.

¶ 1789. The discretion of the court in refusing a new trial will not be interfered with where the motion was based on affidavits tending to show lack of time for defendant after notice from his attorneys to look up his witnesses and secure their attendance, there being also counter affidavits tending to show that the witnesses in question could have been obtained by due diligence.—Johnson v. Doon, 131 Mich. 452.

¶ 1790. A motion for a new trial, on the ground of newly discovered evidence showed that plaintiff made unsuccessful inquiries to discover the desired evidence and that he was misled concerning the testimony which one witness would give, in that upon close inquiry it was found he knew the facts only from hearsay. The witness was not sworn. the inference being that his want of knowledge was discovered before or during the trial. Held, that though the showing of diligence might have influenced the court to grant a continuance, and the showing of surprise might have secured an order permitting a voluntary non-suit with leave to set the same aside, neither showing appeals to a court of review on an application to reverse an order denying a new trial.—Roberts v. First Nat. Bank of Yale, 149 Mich. 507.

¶ 1791. Where there is a clear question of fact for the jury, the upper court will not reverse the ruling of the lower court denying a motion for a new trial made on the ground

that the verdict is against the evidence.—Jackson v. Detroit & M. Ry. Co., 161 Mich. 163.

¶ 1792. A decision of the trial court refusing to grant a new trial on the ground that the verdict is contrary to the great weight of the evidence, will not be overturned on appeal unless the case is a very clear one affording very strong evidence that the verdict is the result of bias or prejudice, since the trial judge has the advantage of having seen the witnesses, and noted their appearance on the stand.—Lovely v. Grand Rapids & I. Ry. Co., 187 Mich. 653.

¶ 1793. The refusal of a motion for a new trial on the ground that the verdict is against the great weight of evidence, will not be disturbed on appeal, although the plaintiff was contradicted in many essential particulars, where the circuit judge saw the witnesses, heard their testimony, and after a careful consideration of the case, refused the motion. Pub. Acts 1893, No. 134, providing for "incorporating the record of proceedings had on motions for new trial in bills of exceptions," is undoubtedly broad enough to warrant interference by the court on appeal, but the deliberate conclusion of the trial judge will not be overturned on a showing such as that first mentioned.—Brennan v. O'Brien, 121 Mich. 491.

¶ 1793a. Where in an action to recover money repaid in the mistaken belief that plaintiff had been overpaid by the defendant, the evidence is convincing that the defendant knew what interest he was buying, and that the plaintiff in returning the money was not mistaken about the price per acre or the interest sold, but about the proper mathematical calculation as to the amount, the evidence of anything in the nature of a compromise of differences being so meager, and that of miscarriage of justice so strong, the Supreme Court will overrule the decision of the trial court in denying a motion for a new trial and order such new trial.—Stowell v. Ames, 148 Mich. 439.

¶ 1794. Held, that an order of the trial court requiring the plaintiff to remit a portion of his judgment or submit to a new trial, would not be disturbed by the Supreme Court.—Snook v. Mt. Clemens Sugar Co., 186 Mich. 593.

E. VERDICTS AND FINDINGS ON THE EVIDENCE.

1. In Appeals.

§ 421. In general.

Duty to try cause de novo, see post XII, H.
Scope of review where no case is settled, see ante § 326.
Mode of preserving evidence for review, see ante VI, D.
Rules for review applicable on error, see post XII, E, 2.

¶ 1795. Unlike an appeal at law, an appeal in chancery subjects all questions of fact as well as law to review by the upper court.—State v. Venice of America Land Co., 160 Mich. 680.

§ 422. Force and effect of findings below.

Presumption as to correctness of conclusions of fact, see ante § 382.
Computation on which judgment is based, see also ante § 338, ¶ 1426.

¶ 1796. The decision of the circuit judge on the facts is entitled to great weight with the appellate court, he being supposed to have some better personal knowledge of the witnesses than is to be presumed in the appellate court; but the latter court has no right, if plainly convinced, to abdicate its own duty of determining every case upon its own view of the facts.—In re Wool, 36 Mich. 299.

¶ 1797. Before a reviewing court reverses a judgment on the facts alone, it ought to be fully persuaded that it must have reached a different conclusion, had it occupied the position of the court appealed from and been favored with all the advantages of that court for judging rightly.—Nicholas v. Nicholas, 50 Mich. 162.

¶ 1798. Where, in a foreclosure case, the equities between the parties rest entirely upon the decision of questions of fact which the circuit judge possessed superior advantages for determining, the decree will be affirmed.—Long v. Rogers, 59 Mich. 270.

¶ 1799. On an appeal from a decree compelling defendant to remove a dam built upon his land that deflected the natural course of surface water, weight will be given to the fact that on the law side two juries have found the dam to be an unlawful structure and to the conclusion of the circuit judge who has three times gone over the question.—Feldkamp v. Ernst, 177 Mich. 550.

¶ 1800. An appellate court will give great weight to the findings of the lower court inasmuch as it had better opportunities to determine the credibility of witnesses.—Leach v. Grube, 147 Mich. 348.

¶ 1801. On a bill filed against a debtor and his wife to subject to an assignment by him for the benefit of creditors, assets, as averred, for which the wife is a cover, the decree of the trial court should, on appeal, be affirmed, except as to items obviously erroneous.—Joslin v. Goebel, 90 Mich. 71.

§ 423. ——Where witnesses testified in open court.

Consideration on trial de novo, see post § 475.

¶ 1802. There can be no technical rules for determining the credit to be given to conflicting testimony. Every court must determine this according to its own impressions. And where the court below has seen or known the witnesses, that fact will weigh with the appellate court in solving doubts.—Wakeman v. Akey, 29 Mich. 308; Fender v. Powers, 67 Mich. 433; Dayton v. Dayton, 68 Mich. 437; McGonegal v. McGonegal, 46 Mich. 66; Ushaw v. Mallett, 64 Mich. 45.

¶ 1803. Where the testimony below was heard in open court so that the circuit judge could see the witnesses and test their veracity, great consideration will be given to his conclusion upon disputed facts, and such conclusion will, as a rule, be followed where the testimony is evenly balanced.—Earll v. Earll, 60 Mich. 30; Sweetzer v. Higby, 63 Mich. 13; Fender v. Powers, 67 Mich. 433; Dull v. Merrill, 69 Mich. 49; Croly v. Pollard, 71 Mich. 612; Harris v. Creveling, 80 Mich. 249; Phillips v. Phillips, 83 Mich. 259; Gilchrist v. Kelley, 85 Mich. 413; Essexville v. Emery, 90 Mich. 183; Strauss v. Parshall, 91 Mich. 475; Potter v. Woodruff, 92 Mich. 8; Reynolds v. Reynolds, 92 Mich. 104; Lilley v. Mutual Benefit Life Ins. Co., 92 Mich. 153; Lewis v. Noble, 93 Mich. 345; Ball v. Phenicie, 94 Mich. 355; Nichols v. Nichols, 94 Mich. 569; McGill v. Hawks, 95 Mich. 153; Warren v. Holbrook, 95 Mich. 185; Chick v. Sisson, 95 Mich. 412; Brennan v. Zehner, 57 Mich. 98; Kaeding v. Joachimsthal, 98 Mich. 78; Anderson v. Northern Nat. Bank, 98 Mich. 543; Child v. Emerson, 99 Mich. 38; Miller v. Miller, 100 Mich. 563; Benedict v. Roome, 106 Mich. 378; Richardson v. Medbury, 107 Mich. 176; Edwards v. Waghorn, 107 Mich. 679; Hughes v. Jones, 108 Mich. 378; Groesbeck v. Benedict, 109 Mich. 65; Michigan Land & Iron Co. v. Cleveland Sawmill & Lumber Co., 109 Mich. 164; Sowles v. Raymer, 110 Mich. 189; Pringle v. Wagnoer, 110 Mich. 612; Kirkland v. Kirkland, 111 Mich. 166; Loveridge v. Shurtz, 111 Mich. 618; Hammond v. Rathbone, 113 Mich. 499; Markillie v. Markillie, 115 Mich. 658; Union Nat. Bank v. Rich, 116 Mich. 414; Pioneer Iron Co. v. Negaunee, 116 Mich. 430; Heath v. Heath, 120 Mich. 310; Frisbee v. Stewart, 122 Mich. 538; Latham v. Savage, 166 Mich. 300; Morton v. DeYoung, 185 Mich. 94.

¶ 1804. Where the evidence—most of which was given by the parties and by defendant's attorney—was conflicting and was carefully examined by the circuit judge, who, from his acquaintance with the witnesses, had superior advantages for judging of their credibility, the Supreme Court did not disturb the decree.—Ushaw v. Mallett, 64 Mich. 45.

¶ 1805. In determining the sufficiency of evidence to support a finding of the trial court on conflicting evidence upon appeal much weight must be given to the fact that the trial judge had the advantage of seeing the witnesses upon the stand and hearing their testimony.—Grace Harbor Lumber Co. v. Ortman, 190 Mich. 429.

¶ 1806. In a doubtful case, the determination of the trial judge, who has the opportunity of seeing the witnesses, is entitled to some weight, particularly in a case where there is a direct issue of veracity, and where the appearance of the witnesses upon the stand furnishes such direct aid in determining the fact.—Ann Arbor Sav. Bank v. Ellison, 113 Mich. 557.

¶ 1807. Where questions of fact have been carefully considered by the circuit judge, who saw the witnesses and inspected the premises involved in the suit, his conclusion thereon will not be disturbed.—Brown v. Winslow, 95 Mich. 441.

¶ 1808. Great weight should be given to the findings of facts by the court below where he not only saw the witnesses and heard their testimony, but himself visited the premises in regard to extending a drain through which the suit arose.—Gillison v. Cressman, 100 Mich. 591.

¶ 1809. Where the Supreme Court can arrive at no decided conviction from the testimony which leads to a different conclusion from that reached by the court below, it is not inclined to disturb the decree, especially where the testimony was taken in open court.—Dayton v. Dayton, 68 Mich. 437.

¶ 1810. The judgment of the circuit judge discrediting the uncorroborated testimony—given in open court—of a witness who was the party in interest, and whose statements were inconsistent, was not disturbed on appeal.—Peck v. Cook, 95 Mich. 31.

¶ 1811. A finding by the circuit judge on testimony taken in open court that certain words omitted from one of the duplicates of a contract were omitted clerically by error will be given great weight on appeal.—Besser v. Wright, 125 Mich. 123.

¶ 1812. Where the trial judge who sees and hears the witnesses is convinced by their manner and deportment that the witnesses for the defendant are telling the truth, much weight should be given to the conclusion reached by him on appeal in determining whether plaintiff's claim has been established by a preponderance of evidence.—Barras v. Barras, 191 Mich. 473.

¶ 1813. Where the testimony in a chancery suit that involves only questions of fact is doubtful, conflicting and nearly evenly

balanced, and has been taken in open court so that there was an opportunity to weigh it in the light of the appearance, manner and deportment of the witnesses in giving it, the decree granted will not be reversed on appeal. —Green v. Langdon, 28 Mich. 221.

¶ 1814. The disposition of this court to be governed by the conclusions of a judge who has heard the witnesses examined in open court is fortified where the record tends to show that the demeanor of the witnesses was of some importance in determining what reliance should be placed upon their statements.—Bigbee v. Bigbee, 50 Mich. 467.

¶ 1815. The rule that a decree will not be reversed for mere preponderance of testimony where it was granted on proofs taken in open court so that the judge could observe the demeanor of witnesses does not apply where the proofs of the prevailing party alone show that it should not have been made. —Wooley v. Drew, 49 Mich. 290.

¶ 1816. The consideration to be given to the fact that the court below saw and heard the witnesses is eliminated where the conclusion was presumably reached upon all the testimony, including that of a witness whose testimony was clearly incompetent.—Sheldon v. Carr, 139 Mich. 654.

¶ 1817. In reviewing statutory proceedings in chancery to enforce a mechanic's lien in which the complainant obtained a verdict. the Supreme Court will not be disposed to disturb the result where the case depends mainly on the weight of oral testimony, and the testimony is irreconcilably opposed, and the trial court saw the witnesses examined. —Begin v. Henderson, 50 Mich. 468.

¶ 1818. A decree dismissing a bill filed to have a lease set aside and to restore a contract of sale that was destroyed at the time the lease was executed, affirmed on the proofs taken in open court.—Phillips v. Linn, 117 Mich. 426.

¶ 1819. Where a bill to set aside a deed is dismissed upon the pleadings and proof. the evidence is conflicting, the result depends upon the character of the witnesses as judged from their appearance. and the Supreme Court cannot say that there is a preponderance of evidence in favor of the complainant. the decree will be affirmed.—Peets v. Peets, 156 Mich. 87.

¶ 1820. In a bill by the administrator and his children. to set aside a conveyance of real estate by the deceased, on the ground of mental incompetency, the finding of fact of the trial court as to mental condition is not conclusive upon appeal, but is entitled to great weight, on account of the trial court's opportunity to see and hear the witnesses. —Troub v. Thorp, 152 Mich. 363.

¶ 1821. On the question of mental competency, where there is evidence pro and con, much weight should ordinarily be given to the conclusion reached by the trial judge, who has had the opportunity of seeing and hearing the witnesses.—Grand Lodge Ancient Order of United Workmen v. Brown, 160 Mich. 437.

¶ 1822. The Supreme Court will not overturn a chancery decree of the trial court setting aside conveyances on the ground of fraud where the question involved is one of fact and the trial court is greatly aided by seeing and hearing the witnesses, and where the trial court's view of the evidence is apparently correct.—Roewer v. Roewer. 165 Mich. 622.

§ 424. Evidence objected to below.

Depositions objected to below, see post § 425.
Presumption that improperly admitted evidence was ignored, see ante § 355.

¶ 1823. On appeal in chancery the Supreme Court will exclude from consideration all evidence that was validly objected to below as being equally known to a deceased opponent. (How. St., § 7545.)—Foster v. Hill, 55 Mich. 540.

§ 425. Written evidence; depositions.

Sufficiency of record showing as to evidence or documents, see ante § 187.

¶ 1824. Depositions to which valid objection has been made in a chancery suit will not be considered on appeal, even though a motion to suppress them was not acted on. —Edson v. Cumings, 52 Mich. 52.

¶ 1825. Where testimony has been taken, not in open court but before a commissioner, the court below cannot be regarded as having had any special advantage in determining the rights of the parties from the record.—Hodges v. Cook, 93 Mich. 577.

§ 426. Sufficiency of evidence in general.

[Note. Since the trial is de novo the sufficiency of the evidence in a general sense is the same as on the trial of the issues, and therefore the precedents are to be found in the specific topics treating of the equitable rights and remedies, e. g., Accounting Suits; Creditors' Suits; Foreclosure; Injunctions; Reformation; Rescission and Cancellation; Specific Performance; Mechanics' Liens; and the like.]

Illustrative cases in particular suits and on particular issues. see post §§ 429-435.

Conclusiveness of law of the case on retrial on same facts, see post § 555.

¶ 1826. A decree should not be reversed upon the mere tendency of evidence, without regard to its weight or nature.—Ruppe v. Steinbach, 48 Mich. 465.

¶ 1827. A decree is affirmed where no sufficient reason is seen to disturb the conclusion of the court below upon the preponderance of testimony.—Killam v. Axford, 39 Mich. 210.

¶ 1828. A decree may be affirmed where the appellate court is not satisfied that the trial judge was in error in his findings as to the preponderance of testimony.—Matteson v. Blackmer, 46 Mich. 398; Corrie v. Corrie, 46 Mich. 235.

¶ 1829. A decree will not be reversed on facts unless this court is convinced if it had been in place of lower court it must have decided differently.—Nicholas v. Nicholas, 50 Mich. 162; Warner v. Warner, 54 Mich. 492.

¶ 1830. Upon an appeal in a chancery case in which questions of fact were alone involved, it appearing that complainant had failed to establish some of the facts alleged in her bill, and that her conduct since the controversy arose had been wholly inconsistent with the claims made therein, a decree dismissing the bill was affirmed.—Stone v. Campbell, 110 Mich. 36.

¶ 1831. The Supreme Court on appeal will refuse to disturb a decree of the lower court dismissing a bill where there was evidence which if believed was sufficient to justify the decree.—Kimball v. Green, 148 Mich. 298.

¶ 1832. A chancellor's decree on testimony taken in open court, which was sufficient to sustain it, will be affirmed where the only question is one of fact.—Shaw v. Shaw, 124 Mich. 476.

¶ 1833. The question being one of fact only, the decree should be affirmed.—Nolan v. Nolan, 124 Mich. 581.

¶ 1834. Construction of reservation in deed to read crops "sown" in the fall of 1896 rather than "I own" at that time, affirmed. —Dean v. Andrews, 120 Mich. 492.

§ 427. ——Close or balanced cases.

¶ 1835. In cases where the question is close as to where the preponderance of evidence lies the Supreme Court will attach importance to the finding of the circuit judge. —Boam v. Greenman, 147 Mich. 106.

¶ 1836. Where the evidence is evenly balanced the finding of the circuit court will not be questioned.—Mason v. Kellogg, 38 Mich. 132.

¶ 1837. The conclusions of the trial judge as to the preponderance of evidence are entitled to respect where the testimony was taken out of court and is evenly balanced. —Sager v. Tupper, 42 Mich. 605.

¶ 1838. The opinion of the circuit court upon questions of fact ought not to be hastily rejected on review, if the showing itself rested upon the testimony of only one party and was not very decisive.—Griffin v. Nichols, 51 Mich. 575.

§ 428. ——Conflicting evidence.

¶ 1839. Where there is direct conflict in the testimony, the Supreme Court, being unacquainted with the witnesses, must consider corroborating circumstances, if any there be, in order to ascertain where the preponderance of evidence lies.—Donaldson v. Wilson, 79 Mich. 181.

¶ 1840. A finding by the circuit court on conflicting testimony taken in open court will not be reviewed.—Child v. Emerson, 99 Mich. 38.

¶ 1841. Where the testimony as to whether one member of a firm which assigned its claim to appellants had an interest in the fund whereof distribution was sought was conflicting, the finding of the circuit court upon testimony taken in open court, where there was a better opportunity to determine what weight should be given a witness, was sustained.—Bank of Montreal v. Potts Salt, etc., Co., 101 Mich. 546.

¶ 1842. The decree of the circuit judge, based upon the testimony of a few witnesses, who disagreed as to the facts, was not disturbed.—Kieldsen v. Blodgett, 113 Mich. 655.

¶ 1843. A finding of a circuit judge depending upon the credibility to be given to witnesses, the proofs of the parties being in direct conflict, will not be disturbed on appeal, the evidence being sufficient to sustain the finding.—Birdsall v. Birdsall, 118 Mich. 658.

¶ 1844. The finding of an irregularity in a decree by the tribunal which made the decree should not be reversed upon a question of fact where the testimony is conflicting.— Tromble v. Hoffman, 130 Mich. 676.

¶ 1845. Findings of fact by the circuit judge in a chancery case will not be reversed on appeal where based on the testimony of conplainant and of defendant which was in direct conflict.—Wolff v. Alpena Nat. Bank, 131 Mich. 634.

¶ 1846. Conflicting evidence reviewed and the complainant who took a deed in his own name is held to have purchased for himself and not as agent for the defendant.—Widner v. Christian, 128 Mich. 587.

¶ 1847. On conflicting evidence as to whether the mortgage in suit was given to secure a specific debt of a third person or was for general security of his debts, the question will be reviewed as one of fact.—Bullis v. State Bank of Deckerville, 148 Mich. 632.

§ 429. ——Accounting suits.

See also post ¶ 1881.

See generally Accounting Suits, §§ 9, 13; and cross-references there found.

¶ 1848. Complainant corporation, a creditor of defendant cycle company, obtained from it a transfer of certain contracts as security for its claim, and left them for collection in the hands of defendant's secretary. The cycle company thereafter gave a chattel mortgage to the codefendant manufacturing company, and assigned as further security several of the contracts in question. Complainant filed a bill for an accounting, alleging that such secretary, as its agent, and the defendant manufacturing company, had made collections upon its contracts, and a decree was rendered declaring complainant to have a first lien upon all the contracts originally transferred to it, and directing that defendants account to it for all moneys received by them upon such contracts. Held, that the decree was fully sustained by the evidence.—Peerless Mfg. Co. v. Detroit Cycle Co, 111 Mich. 135.

¶ 1849. Decree that the defendant in a bill for an accounting had turned over to complainant all the securities and moneys belonging to him, and dismissing the bill, will not be disturbed on a pure question of fact whether that had been done.—Voss v. Lippert, 124 Mich. 31.

¶ 1850. On appeal from a decree in accounting where the evidence in regard to an item is conflicting, the decision of the circuit court is sustained.—Gruett v. Dibble, 126 Mich. 623.

¶ 1851. A decree in a bill for an accounting between partners awarding the complainant the amount of his investment and interest less the money drawn out was sustained on conflicting evidence as peculiarly within the knowledge of the circuit judge and doing substantial justice, although complainant's rights seem doubtful.—Wolff v. Taylor, 127 Mich. 143.

¶ 1852. The trial court's finding, that there was a consummated partnership and not merely an executory agreement for a future partnership, will not be disturbed where after numerous conferences and correspondence looking to it there were acts done by complainant pursuant to the proposal to form the partnership, and he moved upon the land which was to be the subject of it, and thereon did various acts in promotion of the partnership enterprise of subdividing the land and selling it in lots, and did such acts in the firm name.—Chase v. Angell, 148 Mich. 1.

§ 430. ——Divorce cases.

See generally Divorce, V.

¶ 1853. The advantage possessed by a trial court over the appellate court in judging of the credibility of witnesses from their appearance on the stand is especially strong in a divorce suit in which both of the parties were examined in open court.—Cummings v. Cummings, 50 Mich. 305.

¶ 1853a. Where the circuit judge who entered the decree relative to the custody of the child of divorced parents was thoroughly familiar with the issues in litigation between the parents from time to time, and the testimony seems to warrant his finding, there is no disposition to disturb the decree on appeal.—Carpenter v. Carpenter, 171 Mich. 572.

¶ 1854. On appeal from a decree dismissing a bill for divorce the Supreme Court is not concluded by the opinion of disbelief, and the presumption in favor of the chancellor's decree from reviewing a case on its merits and reversing the decree and granting the divorce.—Rosecrance v. Rosecrance, 127 Mich. 322.

¶ 1855. A decree dismissing a bill for divorce on the ground of cruelty was reversed, where the court, although mindful that where the trial judge has seen and heard the witnesses, it gives him an advantage in determining their credibility and that the reviewing court ought not to lightly reverse a decree made under such conditions, was satisfied that the trial court reached a wrong conclusion.—White v. White, 135 Mich. 271.

¶ 1856. A decree dismissing a bill for divorce will not be disturbed where it was justified by the testimony.—Mead v. Mead, 131 Mich. 309.

¶ 1857. Conflicting and irreconcilable evidence of cruelty of both parties of a divorce suit, reviewed and held not to warrant interference with the decree of the circuit judge who heard all of the witnesses.—Donaldson v. Donaldson, 134 Mich. 289.

¶ 1858. A decree for complainant under a bill charging extreme cruelty was not dis-

turbed, where the testimony was taken in open court, and the decree was justified by the evidence under the rulings of the court in given cases.—Karreman v. Karreman, 122 Mich. 654.

¶ 1859. Testimony by the husband of the income from his business and the value of the business and of his residence, without bringing out the value of other property which it may be inferred he owns, is not sufficient to sustain the correctness of a decree for alimony on defendant's wife's appeal from denial of a rehearing, she having been represented by a neglectful guardian ad litem. —Frieseke v. Frieseke, 138 Mich. 458.

§431. ——Foreclosure and redemption suits.

On bill to reform or to decree deed a mortgage, see post § 434.

See generally Foreclosure, II, C, V; Mortgages, IX.

¶ 1860. A decree for complainant in a bill to foreclose a mortgage will not be disturbed where the sole defense was forgery and the testimony was conflicting.—Jahn v. Fahey, 123 Mich. 695.

¶ 1861. In a suit to set aside a discharge of a mortgage and for foreclosure, a decree for defendant will be affirmed, there being conflicting evidence tending to support a decree denying the relief sought and the circuit judge having found that there was no fraud in obtaining the release.—Fix v. Soleau, 127 Mich. 72.

¶ 1862. Where the testimony as to whether some of the interest in a foreclosure decree was included in a mortgage to complainant by petitioner's wife, was, upon a petition to set aside sale, conflicting, the Supreme Court concluded that the circuit court must have been convinced that the claim was sufficiently well supported to call for a hearing of the question, and that a delay by petitioner in moving in the matter was excused.—Montague v. Haviland, 101 Mich. 80.

§ 432. ——Injunction suits.

See generally Injunctions, III.

¶ 1863. A decree refusing an injunction on conflicting evidence as to whether water was cast on complainant's land, was sustained.—Perry v. Reed, 147 Mich. 146.

§ 433. ——Mechanics' lien cases.

Effect of jury finding in mechanics' lien proceedings under statutory appeal, see ante ¶ 20.

See generally Mechanics' Liens, VIII, C.

¶ 1864. In a case on a bill to enforce a mechanic's lien where the questions raised were questions of fact, the conclusions of the trial judge were left undisturbed.—De-Graaf, Vrieling & Co. v. Mulick, 86 Mich. 234.

§ 434. ——Reformation and cancellation suits.

See generally Reformation, III; Rescission and Cancellation, VI.

¶ 1865. A decree dismissing, as not sustained by the proofs, a bill to correct the descriptions in a land contract, based upon defendant's alleged fraud in omitting therefrom certain lands agreed to be included in the sale, was affirmed.—Boyce v. Williams, 112 Mich. 544.

¶ 1866. A decree reforming a mortgage so as to include land claimed to have been omitted through fraud of the mortgagor, will be affirmed where the question involved is one of fact, and the claim is sustained by the evidence.—Jacobson v. Ismond, 120 Mich. 350.

¶ 1867. A decree dismissing a bill for the reformation of a contract by reducing the amount, and to enjoin an action at law for recovery thereon, will not be disturbed where it depends upon the credit to be given witnesses whose testimony is in direct conflict, there being nothing unreasonable in the contract and nothing in the surrounding circumstances from which it could reasonably be inferred that complainant had a preponderance of the evidence.—Andrus v. Scudder, 120 Mich. 502.

¶ 1868. A decree for the reformation of a deed so as to exclude therefrom seven feet extending into a warehouse will be affirmed where based upon conflicting testimony as to whether it was intended to include the seven feet in question, the answer depending upon the credibility to be given to witnesses.—Scheurmann v. Styninger, 130 Mich. 468.

¶ 1869. A decree for complainant, in a bill to have a deed to timber lands declared a mortgage was sustained where the defendant denied plaintiff's statement of the transaction, where the circumstances tended to support complainant's testimony.—Bigelow v. Thompson, 133 Mich. 334.

¶ 1870. Where, upon a bill to procure the discharge of a mortgage given to secure the payment of part of the contract price for the construction of a dwelling-house on the mortgaged premises, the testimony as to whether the contract had been agreed to be canceled and abandoned by the parties was conflicting, the finding upon such question of fact by the circuit judge whose opportunity to judge of the witnesses' credibility

was better, will not be disturbed upon appeal.—Blagborne v. Hunger, 101 Mich. 375.

¶ 1871. Where, in a husband's suit to set aside a deed to his wife, he testified that it was delivered on Sunday, and she testified that it was delivered on Saturday, findings of the lower court against complainant will not be disturbed.—Phillips v. Phillips, 83 Mich. 259.

¶ 1872. A decree for defendant in an action to set aside a mortgage on account of the incapacity of the mortgagor and because its contents were not explained to him or to his wife at the time it was executed, will not be set aside where it appears that it resulted beneficially to mortgagor and his family, and also that he understood the transaction.—Lee v. Fiero, 120 Mich. 430.

¶ 1873. Decree setting aside a deed on the ground of incompetency and undue influence will be reversed on evidence showing the grantor was not insane, incompetent or subject to undue influence when the deed was made.—Smith v. Cuddy, 127 Mich. 664.

¶ 1874. In a suit to cancel certain deeds on the ground of undue influence, misunderstanding and no delivery, the testimony of the complainant seeming more free from bitterness, the decree will be sustained in the face of contradictory testimony by the defendant and two other witnesses, and the failure of the complainant to establish ignorance of the contents of the deeds.—Douglass v. Longor, 138 Mich. 69.

¶ 1875. On a bill to set aside and annul a deed where the sole question on the evidence was as to the competency of the grantor to execute the deed, a decision of the circuit judge that he was not is affirmed.—Benson v. Raymond, 142 Mich. 357.

¶ 1876. Complainants filed a bill to set aside certain conveyances on the ground that they were obtained by fraud and duress. Proofs were taken in open court, and the material testimony was in direct conflict. Held, that a decree in favor of complainants would not be disturbed.—Hughes v. Jones, 108 Mich. 378.

¶ 1877. Where, in a suit in equity by a purchaser of a vessel to set aside the contract and to recover money paid thereunder on the ground of false and fraudulent misrepresentation of defendant vendor, the fact as to the making of such representations is not established by the evidence, the Supreme Court will sustain the decree of the circuit court in favor of the defendant.—Dorrington v. Carpenter, 171 Mich. 652.

¶ 1878. A decree setting aside a conveyance because in fraud of creditors, will not be disturbed where the evidence is conflicting and it does not appear that the decree is not fairly sustained by the evidence.—Smead v. Rogers, 120 Mich. 441.

¶ 1879. A decree dismissing a bill to set aside an assignment of a land contract on the ground that it was a homestead, affirmed where the evidence not only failed to show that it was a homestead but showed by a preponderance of the evidence that it was not a homestead.—Newbro v. Friar, 131 Mich. 368.

¶ 1880. On a bill filed to protect a homestead interest in land claimed by defendant under a deed purporting to be executed by complainants, and delivered to him for a third person, a finding by the court below that the name of the original grantee had been erased and another substituted, after delivery of the deed, will not be disturbed on appeal where the evidence is conflicting.—Guilfoyle v. Hanson, 151 Mich. 114.

§ 435. ——Specific performance.

See generally Specific Performance, IV.

¶ 1881. A decree on a bill for specific performance and accounting finding that the property (a manufacturing plant and patents and contracts incident thereto) was not capable of physical division, will be sustained where the record contains evidence supporting such a finding, though there is no direct evidence of it.—Bolton v. Chope, 119 Mich. 33.

¶ 1882. On a bill to compel specific performance of a contract alleged to have been made between a father and daughter, whereby the latter was to live on the farm upon shares during his lifetime, and on his death it should become hers, a decree dismissing the bill will not be disturbed on appeal where based upon conflicting evidence.—Harvey v. Zimmer, 147 Mich. 371.

¶ 1883. On a bill to re-establish a deed, the preponderance of evidence showing that an agreement was made as stated in the bill, and that in pursuance thereof a deed was executed and delivered to the complainant with the intention to vest the title of the land in controversy to him, a decree accordingly will be sustained.—Blackford v. Olmstead, 147 Mich. 56.

¶ 1884. A decree for complainant in a suit for specific performance of a land contract was affirmed where the controversy was one of fact, and depending upon the credibility of witnesses, the single issue being whether defendant's signature to the contract was obtained by fraud.—Harris v. Brandenburg, 139 Mich. 382.

§ 436. Findings on reference.

¶ 1885. A referee's finding upon an accounting will not be disturbed on appeal except when the court is fully satisfied that he has made a mistake.—Crawford v. Osmun, 90 Mich. 77.

¶ 1886. In an accounting suit a charge disallowed by the referees because not satisfied that it was a proper one, rather than because it did not represent material supplies, should be allowed on appeal when appearing from the record to have been justified by the facts and circumstances.—Young v. Barras, 74 Mich. 343.

§ 437. Confirmation orders.

¶ 1887. An order confirming the report of commissioners in partition of real estate, will be affirmed where it appears to be based upon sound considerations and upon the testimony and the judgment of the commissioners as to the value of the land, the timber and the improvements.—Austin v. Austin, 132 Mich. 453.

2. On Writ of Error or Case Made.

§ 438. Review of evidence in general.

[Note. It is not intended to collate here any holdings that the evidence in the case was or was not sufficient to prove a given issue. All such matter is substantive in quality and will be treated in the specific topic dealing with the issue in question.

Whether the court on review will go into the determination below will often depend on whether it was on a question of law or fact, and this is a matter that pertains to the specific topic involved and is there treated. Thus for example the question whether a contract was legal or illegal in its object may be one of fact, if the terms of the contract are not disclosed by a writing or if the illegality exists in matters extraneous to the contract. See Contracts, X; Gambling Contracts.]

Differing rules of review in chancery causes, see ante XII, E, 1.

On case made, see post § 463.

Scope of review of findings and judgment where no exceptions are taken, see ante § 321.

Decision on facts without passing on unnecessary law questions, or on law without passing on facts, see ante §§ 261-266.

Mode of preserving evidence for review, see ante VI, D.

Review of the verdict on the evidence as impairment of constitutional right of trial by jury, see Constitutional Law, VIII.

Of verdicts and awards in condemnation or highway proceedings, see Eminent Domain, VIII; Highways, II, B.

On error in forcible entry proceedings, see Forcible Entry, II.

¶ 1888. The Supreme Court cannot weigh the evidence or draw conclusions from facts; it cannot review law cases upon the facts.—Compton v. Blair, 27 Mich. 397; Elliott v. Van Buren, 33 Mich. 49; Webber v. Donnelly, 33 Mich. 469; Grand Rapids & I. R. Co. v. Judson, 34 Mich. 506; Young v. Taylor, 36 Mich. 25; Gano v. Heath, 36 Mich. 441; Thatcher v. St. Andrew's Church Wardens, etc., of Ann Arbor, 37 Mich. 264; Bodine v. Simmons, 38 Mich. 682; Payment v. Church, 38 Mich. 776; Tuxbury v. French, 39 Mich. 190; Ellis v. Spaulding, 39 Mich. 366; Weirich v. Cook, 39 Mich. 134; Miller v. Petrie, 40 Mich. 657; Underhill v. Muskegon Booming Co., 40 Mich. 660; Locke v. Tuttle, 41 Mich. 407; Ortman v. Merchants' Bank of Canada, 41 Mich. 482; Stockle v. Silsbee, 41 Mich. 615; Johnson v. Crispell, 43 Mich. 261; DeMill v. Moffat, 45 Mich. 410; Gates v. Fisk, 45 Mich. 522; Kent Furniture Mfg. Co. v. Ransom, 46 Mich. 416; Chatterton v. Parrott, 46 Mich. 432; Rider v. Kern, 46 Mich. 455; Hicks v. Lyle, 46 Mich. 488; Cuddy v. Horn, 46 Mich. 596; Marcott v. Marquette H. & O. R. Co., 47 Mich. 1; Green v. Gill, 47 Mich. 86; Kane v. Stowe, 50 Mich. 317; Peoples v. Evening News Ass'n, 51 Mich. 11; McGraw v. Germania Fire Ins. Co., 54 Mich. 145; Parsons v. Clark, 59 Mich. 414; Robinson v. Smith, 63 Mich. 350; Krolik v. Graham, 64 Mich. 226; Nelson v. Lumberman's Mining Co., 65 Mich. 288; Kryger v. Andrews, 65 Mich. 405; Beal v. Polhemus, 67 Mich. 130; Witheral v. Muskegon Booming Co., 68 Mich. 48; Burch v. Woodworth, 68 Mich. 519; Morgan v. Botsford, 82 Mich. 153.

¶ 1889. This court has no authority to review a case at law upon the facts and decide from the record whether the plaintiff has made out such a case as would entitle him to go to the jury, and if he has, whether the defendant has met it by so unquestionable a defence as to leave the jury no discretion to do anything but give him a verdict.—DeMill v. Moffat, 45 Mich. 410.

¶ 1890. The Supreme Court on error cannot correct mistakes of fact.—McDuff v. Detroit Evening Journal Co., 84 Mich. 1; Warner v. Mason, 50 Mich. 53.

¶ 1891. The Supreme Court cannot, in law cases, draw conclusions of fact unless they are so inevitable as to amount to conclusions of law; but the conclusions meant are ultimate, and not merely subordinate conclusions.—Yelverton v. Steele, 40 Mich. 538.

§ 439. ——Under the statutes.

¶ 1892. The Michigan Supreme Court, by force of the statute, is bound to consider the testimony and determine whether the ver-

dict of the jury is against the weight of the evidence in passing on the question whether a motion for a new trial demanded on that ground was properly denied.—In re McIntyre's Estate, 160 Mich. 117; Ewing v. Lamphere, Id.

¶ 1893. Under the statute requiring the Supreme Court to review verdicts as being against the evidence, it cannot content itself with the mere determination that there is a conflict of evidence, and that the jury is as well qualified to judge of the facts and the credibility of testimony as itself, or that the trial judge has approved the verdict, or expressed his own belief that the verdict is not against the weight of evidence, and thereupon affirmed the denial of a motion for a new trial; but it must examine the testimony and determine for itself whether or not the verdict is so plainly against justice as to call for a new trial.—Krouse v. Detroit United Ry., 166 Mich. 147.

¶ 1894. The Supreme Court will not pass upon the merits in an action at law involving the question of fraud, except where the question is raised on a motion for a new trial, or where from the whole evidence, it can show that there is no evidence tending to prove fraud, or that the evidence is as consistent with the absence as with the presence of a fraudulent motive.—Brucker v. Manistee & G. R. R. Co., 166 Mich. 330.

¶ 1895. In an action by a contractor against the lessor and lessee of property to recover for electrical work done on the leased premises, evidence held sufficient to sustain a finding that the work was done by the direction of a manager of the lessor and to warrant a review of such findings under Circuit Court Rule 26, providing that findings of fact by the trial court shall be treated as on special verdict, and Pub. Acts 1915, No. 314, § 15, providing that where cases are tried by the court, exceptions may be filed to the findings of fact in that such findings are against the clear weight of evidence, and error may be assigned to such exceptions and upon appeal they may be reviewed by the Supreme Court.—Oudersluys v. Carstens, 194 Mich. 521.

§ 440. Findings, instructions and exceptions as basis for review.

The doctrine that there must be a reduction of the evidence to findings and an exception to the findings in order to present a reviewable question of law on the propriety or correctness of the findings upon the evidence, and if necessary a request to find, is treated in Saving Questions for Review.

Omission to find or want of specific written findings, see post §§ 455, 456.

The necessity of a charge or of a request to charge in order to raise the question whether the evidence is such as may be submitted to the jury is also treated in Saving Questions for Review, but the topic Instructions should be consulted on the general law of instructions and requests for instructions.

The necessity and sufficiency of the incorporation of the findings or the charge and the evidence in the record in order to review them is treated ante XI, B.

Testing facts according to instructions, see post § 450.

Scope of review as dependent on completeness or sufficiency of the bill or case, see ante XII, B, 3.

§ 441. Review of findings or verdict in general.

Findings on appeal or certiorari to circuit, see post §§ 458, 459.

Referee's findings, see post § 462.

Sufficiency of showing of the evidence in the bill or case, see ante § 186 et seq.

Presumption as to proofs or want of proofs where record does not purport to be full, see ante §§ 373-378.

Assigning error in verdict or findings, see ante § 207.

¶ 1896. On error the Supreme Court reviews the action of the court below on questions of law only, but examines its conclusions on questions of fact for the purpose of determining such questions of law as arise on them.—In re Mower's Appeal, 48 Mich. 441.

¶ 1897. A judgment for plaintiff should be reversed if any substantial part of the cause of action is unsupported by proof.—Chicago & C. S. R. Co. v. Peters, 45 Mich. 636.

§ 442. ——Findings by court without jury.

Findings of fact on motion or offer of evidence, see post §§ 460, 461.

Judgment on claim against assignor for creditors as common law judgment conclusive on facts, see ante ¶ 19.

Presumption as to there having been proofs to sustain findings, and that they were sufficient, see ante §§ 375, 378.

Presumption on trial by court that improper evidence was ignored, see ante § 355.

¶ 1898. Where there is a finding of facts by the circuit judge, the evidence can be examined on error only so far as to see whether it tends to support the finding.—Tillman v. Fuller, 13 Mich. 113; Compton v. Blair, 27 Mich. 397; Robinson v. Smith, 68 Mich. 350.

¶ 1899. Findings of fact by the circuit court in a trial without jury are in the nature of a special verdict, and are not reviewable if there is any evidence in the record

tending to support them; the Supreme Court on error will not weigh the evidence, and will only consider whether there is any to support the findings.—Ball v. Busch, 64 Mich. 336; Beal v. Polhemus, 67 Mich. 130; Montague v. Dougan, 68 Mich. 98; Drake v. Lake Shore & M. S. R. Co., 69 Mich. 168; Warren v. Gutches, 71 Mich. 407; Delta Lumber Co. v. Williams, 73 Mich. 86; True Printing & Engraving Co. v. Perkins, 73 Mich. 624; Thompson v. Homan, 77 Mich. 134; Baker v. Baird, 79 Mich. 255; Morgan v. Botsford, 82 Mich. 153; Noah v. Pierce, 85 Mich. 70; Dietz v. Bignall, 86 Mich. 292; Snody v. Shier, 88 Mich. 304; Lobdell v. Baldwin, 93 Mich. 569; Hecock v. Van Dusen, 96 Mich. 573.

¶ 1900. A finding of facts by the court sitting without a jury can be examined only so far as to see whether the legal conclusions and judgment are warranted by the facts found.—Tillman v. Fuller, 13 Mich. 113.

¶ 1901. The conclusions of a trial judge upon a question of fact must stand where the record does not show them to be manifestly wrong, and so opposed to other findings as to be erroneous in law.—In re Mower's Appeal, 48 Mich. 441.

¶ 1902. Where the circuit judge has found certain facts and certifies that the record contains all the testimony, it is not the legal duty of this court to examine the record and find the proper facts; but when a fact is found by the court which the appellant insists is not supported by any evidence, then this court will examine the testimony to determine whether there is any evidence to sustain the finding.—McFarlan v. McFarlan, 155 Mich. 652.

¶ 1903. A finding of fact by the court will not be disturbed on error except where there is a total want of evidence to support it, or it is contrary to the undisputed evidence.—First National Bank v. Walker, 115 Mich. 434.

¶ 1904. It is only when there is a total want of evidence to support a court's findings of fact made under Circuit Court Rule 26, subdiv. d, or when the findings are contrary to the undisputed evidence, that they will be disturbed.—In re Hoffman's Estate, 183 Mich. 67.

¶ 1905. A finding of fact made by a court sitting without a jury will not be disturbed on appeal, except when clearly erroneous, or when it appears that the court misunderstood the evidence or was improperly influenced.—Knowlson v. Friar, 184 Mich. 464.

§ 443. Conclusiveness and effect of verdict.

See also post §§ 444-449.

Facts as to which judgment is res adjudicata because established by verdict or findings, see Former Adjudication.

¶ 1906. A jury's verdict or finding is conclusive as to facts if there was any evidence, however slight, to justify it; and it cannot be reviewed.—Filer v. Jenks, 38 Mich. 585; Conely v. McDonald, 40 Mich. 150; Briggs v. Milburn, 40 Mich. 512; Roger Williams Ins. Co. v. Carrington, 43 Mich. 252; Tyler v. Smith, 46 Mich. 292; Leonard v. Beaudry, 80 Mich. 163; Stevens v. Pendleton, 94 Mich. 405; Crockett v. Bearce, 104 Mich. 257; Boyle v. Walsh, 105 Mich. 237; Painter v. Ledyard, 109 Mich. 568; Fuller v. Ehle, 116 Mich. 13; Childs v. Nordella, 116 Mich. 511; English v. Yore, 123 Mich. 701; Donovan v. Dalber, 124 Mich. 49; Mulvey v. Stevenson, 138 Mich. 63.

¶ 1907. A verdict will be sustained where there was evidence sufficient to go to the jury.—D. M. Osborne & Co. v. Waterloo, 138 Mich. 588.

¶ 1908. Where there is a scintilla of evidence the verdict will not be disturbed.—Freedman v. Campfield, 92 Mich. 118; Ferris v. McQueen, 94 Mich. 367.

¶ 1909. The conclusion of a jury upon a question of fact fairly submitted to it on competent evidence is final.—Filer v. Jenks, 38 Mich. 585; Whenting v. Torrent, 75 Mich. 309; Littleson v. Martindale, 111 Mich. 675.

¶ 1910. If the Supreme Court sees from the case as made that there is no evidence tending to support any particular point essential to support a judgment, they will reverse it.—Walrath v. Campbell, 28 Mich. 111.

¶ 1911. The finding of a jury will be set aside if there is no evidence to support it.—Turner v. Phoenix Ins. Co. of Hartford, 55 Mich. 236.

¶ 1912. Where there was evidence tending to show a promise made by an authorized agent of defendant to pay plaintiff a given sum for his services, and the facts have been properly submitted to the jury, who have found for plaintiff, their verdict is final.—Wyman v. Crowley, 33 Mich. 84.

¶ 1913. Where there is sufficient evidence to go to the jury upon the making of the agreement as claimed by plaintiff, and upon his performance thereof, the verdict cannot be disturbed on error.—Montross v. Eddy, 94 Mich. 100.

¶ 1914. A refusal to grant a new trial will not be disturbed on appeal where there was a sharp conflict of testimony and the

case was submitted to the jury under a clear and careful charge, and there was testimony which justified the verdict rendered.—Loeser v. Jorgenson, 137 Mich. 220.

¶ 1915. A verdict cannot be disturbed where the issue is purely of fact and is submitted upon the theory of each party in a proper charge.—Buttrick v. United States Fish Freezing Co., 52 Mich. 172; Linsell v. Linsell, 143 Mich. 358.

¶ 1916. Where there is some evidence to support the findings of fact, judgment will not be reversed unless the conclusions of law are erroneous.—Brown v. Doren, 76 Mich. 482.

¶ 1917. Where the main question is one of fact, the jury's finding cannot be disturbed unless the trial court was at fault in its rulings or instructions.—Hart Mfg. Co. v. Mann's Boudoir Car Co., 65 Mich. 564.

¶ 1918. The conclusion of the jury upon a question proper for it to pass upon, and under a correct charge, cannot be reviewed upon error.—Fire Ins. Assoc. v. Wickham, 141 U. S. 564, 35 L. ed. 860, 12 Sup. Ct. Rep. 84.

¶ 1919. The Supreme Court will not notice evidence where the verdict below shows that the jury must have found against it.—Chicago & N. W. Ry. Co. v. Bayfield, 37 Mich. 205.

¶ 1920. One who submits a special question to the jury is bound by an adverse finding.—Stevens v. Rose, 69 Mich. 259.

¶ 1921. Whether a defendant in contracting for the printing of a record bound himself or his client was held as a question of fact conclusively settled by the jury's finding against defendant.—Wolf v. Irwin, 84 Mich. 344.

¶ 1922. A judgment for defendant in an action to recover an alleged balance of a loan was affirmed; there being testimony in the case which, if believed, would sustain the jury's finding that the claim in suit had been included in a settlement between the parties.—Kunst v. Ringold, 116 Mich. 88.

¶ 1923. Findings of fact in an action in replevin will not be disturbed when there is not only testimony to sustain the findings, but a clear weight of testimony in favor of such findings.—Condon v. Bailey, 121 Mich. 570.

¶ 1924. The question of contributory negligence in fact having been fully and thoroughly submitted to the jury will not be discussed on appeal.—Wellihan v. National Wheel Co., 128 Mich. 1.

¶ 1925. In an action to try the title to a public office, the finding of the jury in response to a special question if the ballots counted at the recount were the same ballots as were voted at the election, is conclusive where the issue was properly presented to the jury.—Attorney General, ex rel. Garthe v. Campbell, 132 Mich. 82.

§ 444. ——Of finding by court without jury.

See also post § 445.
Of referee's findings, see post § 462.

¶ 1926. The finding of the court on a trial without a jury is conclusive as to facts where there is any evidence, legally admitted, tending to support it; and it will not be reviewed.—Sweetzer v. Mead, 5 Mich. 107; Ortman v. Wilson, 23 Mich. 269; Peabody v. McAvoy, 23 Mich. 526; Compton v. Blair, 27 Mich. 397; Shotwell v. Harrison, 30 Mich. 179; Hubbardston Lumber Co. v. Bates, 31 Mich. 158; Todd v. Davis, 32 Mich. 160; Webber v. Donnelly, 33 Mich. 469; Gillam v. Boynton, 36 Mich. 236; Gano v. Heath, 36 Mich. 441; Thatcher v. St. Andrew's Church Wardens, etc., of Ann Arbor, 37 Mich. 264; Sly v. Freeman, 38 Mich. 689; Johnson v. Crispell, 43 Mich. 261; Farrington v. Sexton, 43 Mich. 454; Green v. Gill, 47 Mich. 86; Kane v. Stowe, 50 Mich. 317; Kundinger v. Detroit, G. H. & M. R. Co., 51 Mich. 185; Neumann v. Calumet & Hecla Min. Co., 57 Mich. 97; Ball v. Busch, 64 Mich. 336; Montague v. Dougan, 68 Mich. 98; In re Corby's Estate, 154 Mich. 353; Buckhout v. Browne, 160 Mich. 460; Skeels v. Snow, 162 Mich. 561; Nelson v. Stewart, 174 Mich. 127; Edgerly v. Ladies of Modern Maccabees, 175 Mich. 28; Scofield v. Farmer, 125 Mich. 470; Newman v. Baker, 131 Mich. 89; Hoffman v. Silverthorn, 137 Mich. 60; Walton v. Ryan, 141 Mich. 502; Cummings v. Baker, 141 Mich. 536; Chadwick v. Phoenix Accident & Sick Benefit Ass'n, 143 Mich. 481; Maher v. McKnight, 145 Mich. 381.

¶ 1927. A finding of facts is conclusive if there is evidence in the case tending to sustain it in its entirety; and if there is an absolute want of evidence to sustain any material part of the findings, it is, to that extent, of no force.—Hilsendegen v. Scheich, 55 Mich. 468.

¶ 1928. A finding of fact by the trial court sitting without a jury will not be disturbed where there is a scintilla of testimony to support it.—Barnes v. Brown, 95 Mich. 576.

¶ 1929. A finding of facts by the court sitting without a jury is to be treated as a special verdict, and is conclusive if there is evidence sustaining it, and the evidence

introduced has not been excepted to.—Lovell v. Willard, 28 Mich. 346; Darling Milling Co. v. Chapman, 131 Mich. 684; Mastenbrook v. United States Acc. Ass'n, 154 Mich. 16; People v. Spencer, 199 Mich. 395; Talge Mahogany Co. v. Lindner Interior Mfg. Co., 179 Mich. 606.

¶ 1930. After a trial by the court, where the evidence is all given in the record, and exception is taken and error assigned for lack of evidence to support particular findings, such findings must be held erroneous, and not binding so far as there is no evidence to sustain them or any material part of them.—Hubbardston Lumber Co. v. Bates, 31 Mich. 158,

¶ 1931. Where the Supreme Court is of opinion that on the various points covered by a judge's finding there was evidence upon which he might have reached his conclusions, the judgment based upon it is affirmed.—Clapp v. Born, 41 Mich. 152.

¶ 1932. Findings of fact by a judge take the place of a verdict by a jury, and if there is testimony upon which to base the findings, such testimony will not be reviewed on appeal.—Congdon v. Bailey, 121 Mich. 570.

¶ 1933. The finding of the circuit judge, as to payments made, computations of interest, and all other questions of fact, are conclusive on error provided no rule of law be violated in arriving at such conclusion.—Bateman v. Blake, 81 Mich. 227.

¶ 1934. The findings of fact by a trial court in an action by an attorney against a county for compensation for services rendered must be accepted by the Supreme Court as conclusive if there is any evidence tending to sustain them.—Powers v. Calhoun County, 172 Mich. 670.

¶ 1935. In an action to recover taxes paid under protest, tried by the court without a jury, the questions of fact were not reviewed, where there was testimony upon which to base findings in favor of defendant.—Aurora Iron Min. Co. v. City of Ironwood, 119 Mich. 325.

¶ 1936. On writ of error the Supreme Court will not review the findings of fact and substitute its own judgment for that of the circuit judge where there is evidence tending to support such findings.—Burgess v. Stribling, 134 Mich. 33.

¶ 1937. On review the Supreme Court cannot draw inferences from the testimony contrary to the facts found by the court below.—Bateman v. Blaisdell, 83 Mich. 357.

¶ 1938. Findings of fact by the court in a trial without a jury under C. C. Rule 26, are conclusive on error unless there is a total lack of evidence, or where the finding is contrary to the undisputed evidence in the case.—Crusoe Bros. Co. v. Kudner, 136 Mich. 583.

§ 445. ——Weight and credibility of evidence.

See also ante § 444.

Presumption as to weight and sufficiency of evidence, see ante § 378.

Reversal on weight of or insufficiency of evidence, see post §§ 452-454.

Review of discretion as to new trial where evidence is conflicting, see also ante § 413.

¶ 1939. The conclusions of the court below on a trial without a jury as to the weight and bearing of the evidence are not reviewable.—Green v. Gill, 47 Mich. 86; Parsons v. Clark, 59 Mich. 414; Beal v. Polhemus, 67 Mich. 130.

¶ 1940. The Supreme Court in law cases cannot consider the weight of the testimony or the credibility of the witnesses; all matters of fact are within the jury's province.—Franks v. Stevens, 82 Mich. 192.

¶ 1941. Where there is some testimony to sustain a finding of fact the weight of it cannot be considered on error.—Cole v. Shaw, 103 Mich. 505.

¶ 1942. The Supreme Court will not review the conclusions of a jury upon the weight of testimony, in a case at law, if there was any evidence to be submitted to the jury, even if it were only circumstantial.—Peoples v. Evening News Ass'n, 51 Mich. 11.

¶ 1943. Where the conclusions of a jury upon contradictory testimony depend upon their convictions as to the credibility of witnesses, the Supreme Court will not review them nor sustain an assignment of error based on the refusal to charge that the verdict should have been for the other party.—Dustin v. Radford, 57 Mich. 163.

¶ 1944. An appellate court cannot consider an assignment of error that the jury had found for plaintiff, or that their finding was against the weight of evidence.—Barton v. Gray, 57 Mich. 622.

¶ 1945. A verdict supported by admissible testimony in a case fairly submitted to the jury cannot be reviewed by the Supreme Court to see whether the jury acted judiciously in determining which witnesses should be believed and which should not.—Balch v. Grand Rapids & I. R. R. Co., 78 Mich. 654.

¶ 1946. A judgment is not reversed on the ground that the jury should have discredited the testimony, other testimony being more probable.—Balch v. Grand Rapids & I. R. R. Co., 78 Mich. 654.

¶ 1947. Where there is testimony tending to support findings of fact, the Supreme Court will not go into the testimony for the purpose of ascertaining whether or not it would have reached the same result upon the facts. —Lamoreaux v. Creveling, 103 Mich. 501.

¶ 1948. The court of appeal will not try the facts, whatever its opinion as to the credibility or weight of the testimony given. —Metropolitan Lumber Co. v. McColeman, 140 Mich. 333.

¶ 1949. Where a case turns entirely upon the credibility of the witnesses, and mainly upon that of the parties, and where no error appears in the charge in the admission of testimony, judgment will be affirmed.—Kenan v. Cummins, 88 Mich. 43.

¶ 1950. Where there was any evidence tending to sustain the verdict of the jury, the Supreme Court cannot consider whether that evidence was sufficient in amount or character.—In re Stebbins' Estate, 94 Mich. 304.

¶ 1951. A verdict will not be set aside because the defendant's testimony is corroborated as against the plaintiff's unsupported testimony.—Stevens v. Michigan Soap Works, 134 Mich. 350.

¶ 1952. The finding of a trial judge, sitting without a jury, is conclusive as to the credibility of a witness and the effect of his evidence.—Hyler v. Nolan, 45 Mich. 357.

¶ 1953. Findings of fact in assumpsit tried without a jury, for work and labor performed, will not be disturbed on appeal where there was evidence to support, or tending to support, such findings; since the weight of the evidence was for the trial judge to determine.—Thompson v. Homan, 77 Mich. 134.

¶ 1954. The weight and credibility of testimony tending to show on a plea in abatement that person on whom summons was served was the agent of defendant corporation, is for the trial judge, and not reviewable on error.—Vorheis v. People's Mut. Benefit Soc., 86 Mich. 31.

§ 446. ——On conflicting or disputed evidence.

In chancery cases, see ante § 428.

Reversal because against weight of evidence though conflicting, see post §§ 452-454.

¶ 1955. The decision of the jury on a conflict of evidence will not be disturbed on review.—Somers v. Losey, 48 Mich. 294; Myron v. Michigan Cent. R. Co., 61 Mich. 387; Whentling v. Torrent, 75 Mich. 309; Wolf v. Irwin, 84 Mich. 344; Converse v. Wallace, 125 Mich. 272; Crosson v. Vogt, 130 Mich. 482; Cronenwett v. United States Health & Accident Ins. Co., 140 Mich. 522.

¶ 1956. Where there is a decided or sharp conflict in the evidence, the verdict will not be set aside on appeal as against the weight of the evidence.—McDonnell v. Central Drug Co., 170 Mich. 291; Vincent v. Heenan, 194 Mich. 316; Chapman v. Ann Arbor R. Co., 196 Mich. 671; Johnston v. Cornelius, 200 Mich. 209.

¶ 1957. A law case cannot be reversed upon disputed facts, though the impression made by them upon the Supreme Court differs from that made upon the jury.—Busch v. Wilcox, 82 Mich. 336, affirming on rehearing, 82 Mich. 315; Rajnowski v. Detroit, B. C. & A. R. Co., 74 Mich. 15; Finkbinder v. Ernst, 135 Mich. 226.

¶ 1958. The special finding of a jury upon a point where the testimony conflicts is not reviewable by the Supreme Court.—Dehring v. Comstock, 78 Mich. 153.

¶ 1959. A verdict for the plaintiff suing on a contract of sale of a stock of goods sold orally according to his testimony and partly delivered is conclusive that there was a contract of sale, as against testimony of the defendant that there was no contract but merely an agreement to buy, if the goods were as represented, and that there was no delivery of any part of them; and the review is not affected by the statute of frauds, since as found the contract was valid by delivery.—Wilcox v. Young, 66 Mich. 687.

¶ 1960. A finding on conflicting evidence that a building is part of the realty will be affirmed.—Sowles v. Raymer, 110 Mich. 189.

¶ 1961. In an action against alleged partners, the reviewing court will not reverse on the ground that the trial court assumed the written contract to contain the whole agreement where the evidence of surrounding circumstances is conflicting on that question.—Robson v. Price, 134 Mich. 371.

¶ 1962. A verdict as to the actual balance due plaintiff for personal services, in an action under the log-lien law, is final, since it is a question of fact, even though the evidence was indefinite, or disputed.—Van Slyck v. Arseneau, 140 Mich. 154.

¶ 1963. A verdict of the jury, in ejectment, as to whether a boundary fence had been moved or not, is conclusive, even though the testimony is conflicting.—Spacek v. Schaub, 140 Mich. 212.

¶ 1964. Plaintiff and defendant made an oral contract for the sale of a boat. In a suit for breach of it, plaintiff and defendant gave contradictory testimony as to the time of payment. Held, the finding of the jury on this point was final.—Baker v. Temple, 160 Mich. 318.

¶ 1965. A son made a claim for services against his father's estate in addition to similar claims as evidenced by notes. The evidence of what the labor was worth and whether it was performed before or after the making of the notes was conflicting, and the court limited the recovery to labor after the date of the note. Held, the merits of the claim being its only issue, it was a question settled by the jury.—Abel v. Roosenraad, 173 Mich. 93.

¶ 1966. In a suit for personal injury the Supreme Court will not substitute its opinion for that of the jury deciding for the plaintiff where there is testimony to support plaintiff's theories as to the nature and extent of his injuries, and where there is no demonstrable scientific infirmity in the views expressed by the physicians called as plaintiff's witnesses, although plaintiff and some of his medical witnesses did not agree in all particulars as to the nature of said injury.—Wilkens v. Detroit United Ry., 169 Mich. 437.

¶ 1967. A verdict for the plaintiff in an action for damages for the defective construction of a building will not be disturbed as against the weight of evidence on error where there was testimony, which, if believed, would have warranted a larger verdict, and a careful inspection of the premises was made by the jury after hearing all the evidence.—Gutov v. Clark, 190 Mich. 381.

¶ 1968. Upon a question of fact where the evidence is conflicting the finding of the trial court sitting without a jury is conclusive.—Schuler v. Eckert, 90 Mich. 165; Village of Essexville v. Emery, 90 Mich. 183; Jacobia v. Terry, 92 Mich. 275; Hanish v. Kennedy, 106 Mich. 455; Morse v. Blanchard, 117 Mich. 87; Fairfield v. Hart, 139 Mich. 136; Smith v. Smith, 144 Mich. 139.

¶ 1969. Where in a suit in assumpsit for rent before the trial court sitting without a jury, the evidence is disputed and there is evidence to support the finding of facts made by said court, the Supreme Court will not disturb these findings and the judgment necessarily resulting therefrom.—Hindman v. Friedrich, 163 Mich. 655.

¶ 1970. Plaintiff attorney did certain legal work in connection with the prospective sale of lands belonging to his client. There was evidence that plaintiff was to have in addition a certain fee if he and the defendant succeeded in selling the land at a fixed price. Plaintiff attempted to prove that he was entitled to the fee, even though the sale was not consummated, since defendant had prevented its consummation. Held, the findings of fact by the court sitting as a jury under this conflicting evidence, and its decision that plaintiff was not entitled to fee unless the deal was actually consummated, would not be disturbed on appeal.—Skeels v. Snow, 162 Mich. 561.

§ 447. ——Amount or propriety of verdict.

¶ 1971. The amount or propriety of a verdict cannot be reviewed if there is any evidence to uphold it. Relief for errors of the jury should be sought below by moving for a new trial.—Niagara Fire Ins. Co. v. De-Graff, 12 Mich. 124; Elliott v. Van Buren, 33 Mich. 49; Youmans v. Heartt, 34 Mich. 397; Briggs v. Milburn, 40 Mich. 512; Nicholson v. Dyer, 45 Mich. 610; De Mill v. Moffat, 49 Mich. 125; Baylis v. Stout, 49 Mich. 215; Warner v. Mason, 50 Mich. 53; Beauchamp v. Saginaw Min. Co., 50 Mich. 163.

¶ 1972. If the case is a proper one for exemplary damages, and it does not appear that the court's charge or rulings were misleading, the remedy for an award claimed to be excessive is by application below for new trial; the Supreme Court is not concerned with the amount.—Brushaber v. Stegemann, 22 Mich. 266; Welch v. Ware, 32 Mich. 77; Briggs v. Milburn, 40 Mich. 512; and see Dalman v. Koning, 54 Mich. 320.

¶ 1973. The Supreme Court on error has no concern with a claim that the verdict below was excessive.—Richmond v. Chicago & W. M. R. Co., 87 Mich. 374.

¶ 1974. Whether damages found by a jury are excessive or not does not present a question of law, and in case no improper testimony affecting the subject of damages has been admitted, and the court has given to the jury proper instructions to guide them in reaching a conclusion, the amount of damages awarded is beyond the reach of writ of error.—Hunn v. Michigan Cent. R. Co., 78 Mich. 513.

¶ 1975. The court rarely interferes with the damages given by the jury in an action of seduction.—Bennett v. Beam, 42 Mich. 346.

¶ 1976. Where in an action for services it is claimed on error that the items allowed were excessive, such items will not be reviewed where the allowance was sustained by the evidence.—Wright v. St. Louis Sugar Co., 146 Mich. 555.

¶ 1977. A verdict for damages in an action for breach of contract in constructing a building in a defective manner will not be disturbed as excessive where there is testimony, which, if believed, would have warranted a larger verdict than the one rendered, and the jury, after hearing the evidence, inspected the premises carefully.—Gutov v. Clark, 190 Mich. 881.

¶ 1978. Record in its entirety held to show the jury were not influenced or actuated by malign or improper motives in arriving at their verdict as to amount of plaintiff's damages, in an action to recover damages for personal injuries.—Griggs v. Saginaw & F. Ry. Co., 196 Mich. 258.

§ 448. ——Where trial judge passed on verdict.

Presumptions as to evidence and truth of it on review of directed verdict, see ante §§ 386-388.

¶ 1979. A verdict must be clearly against the weight of the evidence to require the Supreme Court to overrule the decision of the circuit judge, refusing a new trial.—Gardiner v. Courtright, 165 Mich. 54; Reed v. McCready, 170 Mich. 532.

¶ 1980. The fact that a circuit judge, in refusing a new trial to a defendant in a personal injury suit, indicates an opinion that the verdict is not according to the weight of the evidence, is not controlling upon the Supreme Court.—Krouse v. Detroit United Ry., 170 Mich. 438.

¶ 1981. Where in an action at law the trial court, on refusing a motion for a new trial, states that in his opinion the verdict is not against the evidence, the Supreme Court will not reverse the judgment unless it clearly appears from the record that the trial judge was in error.—Pelton v. Mayhew, 166 Mich. 546.

¶ 1982. The Supreme Court, after having found the plaintiff in a personal injury suit guilty of contributory negligence, will not sustain the judgment in his favor on the ground that the defendant might have avoided the accident after discovering plaintiff's negligence, where the trial court has expressed the opinion that the verdict is against the weight of the evidence.—Cardinal v. Houghton County St. Ry. Co., 165 Mich. 155.

¶ 1983. A verdict will not be disturbed as unsupported by the evidence unless it is against the overwhelming weight of the evidence, especially where the trial court, on a motion for a new trial, rules that the verdict shall not be disturbed.—Cornell v. Fidler, 194 Mich. 509.

§ 449. ——Where previous trials had same result.

Conclusiveness of law of the case, retrial on same facts, see post § 555.

Final judgment without new trial where different result is improbable, see post § 510.

¶ 1984. In an action involving the title to certain railroad ties, where the verdict in favor of plaintiff has twice been set aside, the court is justified in refusing to set aside a third similar verdict where there is substantial evidence to support it.—Hyde v. Haak, 132 Mich. 364.

¶ 1985. Judgment upon a third trial of the case was affirmed, it appearing that there was evidence to justify the verdict and that the jury were properly instructed on the only question argued in the brief.—Page Woven Wire Fence Co. v. Pool, 139 Mich. 706.

¶ 1986. Where in a suit for personal injuries plaintiff's version of the accident is contradicted by four disinterested witnesses, and is sustained by her own testimony and that of another disinterested witness, and three juries all found in plaintiff's favor, a verdict in her favor is not so manifestly against the weight of the evidence as to require the Supreme Court to reverse the ruling of the trial court denying a fourth trial to defendant.—Krouse v. Detroit United Ry., 170 Mich. 438.

§ 450. Instructions or theory as test of sufficiency.

¶ 1987. The court of appeal, in an action for personal injury, is not called upon to consider whether there was evidence of gross negligence as properly defined, but whether there was evidence of gross negligence as defined by the trial court, where the court adopted the definition requested by the appealing defendant.—Ladd v. Germain, 145 Mich. 225.

§ 451. Facts concluded by verdict or finding.

Construction of verdict as to facts found and implied, see ante § 383, and see also Verdicts and Findings.

¶ 1988. A verdict is conclusive as to the fact necessary to be found in order to support the plaintiff's claim.—Boglarsky v. Singer Mfg. Co., 65 Mich. 510.

¶ 1989. Facts cannot be considered established by the finding of a jury, if the finding was based on an improper premise of other facts.—Fairbanks v. Bennett, 52 Mich. 61.

¶ 1990. Where special damages are claimed, and the case is submitted under such instructions as would require the jury to return a verdict therefor if there were

any, a verdict for defendant determines that none was suffered.—Clark v. Wiles, 54 Mich. 328.

¶ 1991. The finding of the circuit judge, upon a trial by the court without a jury, is conclusive upon every question of fact specifically passed upon.—Tower v. Detroit, L. & L. M. R. Co., 34 Mich. 328.

¶ 1992. A transfer of land cannot be treated in the Supreme Court as by way of security if the jury below has found it to be a sale.—Stanley v. Nye, 54 Mich. 277.

¶ 1993. Where, in an action of trespass for an alleged unlawful entry into leased premises by the wife and sons of the landlord, the question whether or not the oral lease under which plaintiff's husband held had terminated at the time of the entry is submitted to the jury, their finding will not be disturbed on error.—Brown v. McKimmie, 102 Mich. 35.

¶ 1994. It cannot be said on error that there was a misjoinder by reason of the fact that one of coplaintiffs had parted with his claim against the defendant to the other coplaintiff, and that plaintiff's claims were several, where those facts were properly submitted to the jury on evidence and found against the contention.—Forbes v. Forbes, 112 Mich. 630.

¶ 1995. In mandamus to compel a drain commissioner to issue orders of payment for work on drains, a finding of fact that the drains were accepted as completed and the issuance of the mandate will justify the conclusion that the court found that the drains were completed according to contract and the finding of fact cannot be reviewed.—Heineman v. Sullivan, 127 Mich. 682.

§ 452. Ground for disturbance or reversal.

See also post §§ 453, 454.
Questions open on review of verdicts and findings, see ante §§ 438-442.
Rules as to force and effect of verdicts and findings on the facts, see ante §§ 443-451.
Sufficiency as law of the the case on second review, see post § 465 et seq.

¶ 1996. Although there may be a conflict of evidence, a judgment may be reversed where the verdict is clearly against the weight of the evidence.—Woods v. Palmer, 151 Mich. 30.

¶ 1997. A trial court's finding of facts will be reversed only when entirely unsupported by evidence.—First Nat. Bank of Allegan v. Grand Rapids & I. Ry. Co., 195 Mich. 1.

¶ 1998. A judgment will be reversed and a new trial ordered where the verdict was clearly against the weight of evidence.—County of Montmorency v. Putnam, 144 Mich. 135.

¶ 1999. Where the main question is one of fact, the jury's finding cannot be disturbed unless the trial court was at fault in its rulings or instructions.—Hart Mfg. Co. v. Mann's Boudoir Car Co., 65 Mich. 564.

¶ 2000. A verdict not supported by any evidence must be set aside; so held where the issue involved was fraud on the wife's part in taking a bill of sale in her own name, and where there was no evidence warranting the submission of the question of fraud to the jury.—Clark v. Phelps, 76 Mich. 564.

¶ 2001. Judgment in trespass quare clausum fregit was set aside on the evidence where it was apparent that other controversies depended upon the one in question, and that important attainable evidence as to boundaries had not been introduced.—Kilgannon v. Jenkinson, 57 Mich. 325.

¶ 2002. Whether a verdict in a suit under the Survival Act (Comp. L. 1897, § 10117) for injuries resulting in the death of a child of five years is excessive or not presents a question of fact and not of law, and the reviewing court will not disturb the verdict of the jury except where the damages are so clearly excessive as to show they were the result of partiality or prejudice.—Love v. Detroit, J. & C. R. Co., 170 Mich. 1.

¶ 2003. A verdict cannot be disturbed solely on the ground that its amount is greater than the Supreme Court thinks should have been given, unless the amount is such as to shock the common sense of mankind.—Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146.

¶ 2004. The weight of evidence is for the trial court; the Supreme Court cannot disturb any of his findings of fact unless the record shows an absolute want of testimony to support them.—Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168.

§ 453. ——Contrary to or against weight of evidence.

See also ante § 452, post § 454.

¶ 2005. A verdict will not be set aside as against the weight of evidence unless clearly against the overwhelming weight of evidence.—Druck v. Antrim Lime Co., 177 Mich. 364; McGary v. Buick Motor Co., 182 Mich. 345; Darling v. Grand Rapids, G. H. & M. Ry. Co., 184 Mich. 607; McGavock v. Ducharme, 192 Mich. 98.

¶ 2006. This court will reverse a case upon the question of the weight of evidence only when the verdict is clearly against the overwhelming weight.—Fike v. Pere Marquette R. Co., 174 Mich. 167.

¶ 2007. The Supreme Court will not reverse a verdict in favor of plaintiff in a personal injury suit simply because its members might, if jurors, incline to a different verdict.—Krouse v. Detroit United Ry., 170 Mich. 438; Faulkner v. Parish Mfg. Co., 201 Mich. 182.

¶ 2008. The Supreme Court will only interfere when a verdict for plaintiff in a personal injury suit is so manifestly contrary to the overwhelming weight of the evidence, and so palpably wrong, as to force the conviction that it was the result of either passion or prejudice or a dense incapacity to analyze the testimony and discern the truth. —Krouse v. Detroit United Ry., 170 Mich. 438.

¶ 2009. A judgment for plaintiff will not be disturbed by this court because the testimony seems to preponderate in favor of defendant; the testimony on the part of defendant must be conclusive of the matter to justify a reversal.—Muir v. Kalamazoo Corset Co., 155 Mich. 624.

¶ 2010. Where from the record it appears that the instructions were proper, that the trial was fair, well conducted, and impartial, and it does not appear that the verdict was against the overwhelming weight of evidence, the verdict will not be set aside.—Tyler v. Wright, 171 Mich. 579.

¶ 2011. Where the verdict rendered is clearly against the weight of the evidence by every permissible assumption of fact, judgment will be reversed and a new trial ordered.—Farrell v. Jerry Madden Shingle Co., 148 Mich. 275.

¶ 2012. A verdict should not be held to be against the weight of evidence where the testimony as to the essential facts is sharply conflicting.—Hydrex Silent Exhaust Works v. Seager Engine Works, 189 Mich. 431.

¶ 2013. Where there is evidence in a suit on an insurance policy which, if believed by the jury, would furnish a basis for the verdict returned by them, the court will not disturb their verdict as being against the evidence.—Goodwin v. Union Ins. Co. of Philadelphia, 163 Mich. 41.

¶ 2014. Where the differences between the parties to a personal injury action is supported by affirmative testimony, which, if believed by the jury, would sustain a verdict for the plaintiff, the court will not set the verdict aside as against the weight of the evidence, where to do so they must enter upon the province of the jury in determining controverted questions of fact.—Mollanen v. Washington Iron Co., 176 Mich. 505.

¶ 2015. Where it was questionable whether the defendant should have been permitted to amend his plea of the general issue with notice of set-off so as to give notice of accord and satisfaction, and there was a dispute of the fact that a check was tendered or taken in settlement, and the court submitted the question to the jury, instructing them as requested by defendant, the determination of the jury was not so clearly against the weight of the evidence as to justify the court in disturbing a verdict for the plaintiff.—Quinlan v. Heyboer, 171 Mich. 228.

¶ 2016. Where in a suit for injuries the plaintiff's evidence, given solely by himself, as to defendant's negligence, is flatly contradicted by many disinterested and unimpeached witnesses, and by the physical circumstances and conditions, so as to make it appear that the verdict in his favor is clearly against the weight of the evidence, the Supreme Court will reverse the judgment.—Bernard v. Grand Rapids Paper Box Co., 170 Mich. 238.

¶ 2017. In an action by an indemnitee to recover from the indemnitor for a loss sustained on a construction bond, findings of fact as to a waiver of a provision that suits should be begun in a certain time will not be reviewed unless there is a total want of evidence or the finding is contrary to the undisputed evidence.—Fidelity & Deposit Co. of Maryland v. Hibbler, 177 Mich. 490.

¶ 2018. In an action against a corporation to recover the value of property turned over to the corporation in payment for stock in the corporation as reorganized because of fraud on the part of agents and directors in misrepresenting the amount of debts and the ability of the directorate to procure funds when the cash was exhausted, held that the findings of the trial court in favor of defendant were not clearly against the weight of evidence so as to warrant a reversal under Comp. Laws 1915, § 12587.—Woodward v. Huron Implement Co., 200 Mich. 523.

¶ 2019. The Supreme Court cannot interfere with the findings of fact unless a conclusion contrary to that drawn by the trial judge must necessarily be drawn from the evidence.—Bates v. Herrick, 82 Mich. 295.

§ 454. ——Insufficiency to go to jury.

See also ante §§ 452, 453.
Law of the case on second review, see post § 465.

¶ 2020. The Supreme Court will not hold that the determination of questions of fact was improperly left to the jury except where there is absolutely no evidence to sustain the findings.—Baumier v. Antiau, 79 Mich. 509.

§ 455. Refusal or omission to find facts.

Impropriety of findings in appellate judgment, see post §§ 489, 490.

¶ 2021. In an action tried without a jury it is for the trial judge, and not for the Supreme Court, to hear argument as to the force of the evidence, and as to inferences and presumptions, and to draw therefrom and state the necessary conclusions of fact.—Berrien County Treasurer v. Bunbury, 45 Mich. 79.

¶ 2022. In a case tried by a judge without a jury it is for the trial judge himself, and not for the Supreme Court, to decide what conclusions the evidence will warrant.—Butts v. Davis, 50 Mich. 310.

¶ 2023. The findings of fact made by the court on a trial without jury cannot be supplemented by the testimony, and the Supreme Court cannot go beyond them.—Ionia, E. & B. Mut. Fire Ins. Co. v. Otto, 97 Mich. 522.

¶ 2024. The failure of a circuit judge to make certain findings of facts, cannot be reviewed when the testimony to support such findings was not undisputed.—Williams v. Merritt, 152 Mich. 621.

¶ 2025. Where a case is tried by the court, it is the exclusive province of the judge to pass upon the testimony, and to draw inferences therefrom, and when findings of fact proposed by a party are refused, such refusal is not subject to review in this court.—Hogle v. Meyering, 161 Mich. 472.

¶ 2026. The refusal of a court sitting without a jury to allow amendments to findings of fact is not a subject of review in the upper court, where the findings are supported by the evidence.—McBroom v. Cheboygan Brewing & Malting Co., 162 Mich. 323; Beal v. Polhemus, 67 Mich. 130.

§ 456. ——Findings not written and specific.

¶ 2027. Where a cause is tried by the court without a jury and no special finding made, the general finding is in substance the same as a general verdict, and objections based on the effect which ought to have been given by the court on the trial to certain evidence will not be considered on error where no exception has been taken to the finding.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

¶ 2028. Where a case is tried by the court without a jury, and no written finding of facts and law is requested, the Supreme Court cannot analyze the process by which the trial court arrived at its conclusion, to ascertain whether such conclusion contains items not warranted by the testimony.—Keystone Lumber & Salt Mfg. Co. v. Jenkinson, 69 Mich. 220.

¶ 2029. Where there are no findings of fact or law, the court cannot, on error, examine the testimony to see whether it supports the judgment reached by the trial court without a jury.—McDonnell v. Union Trust Co., 139 Mich. 386.

§ 457. Inconsistent or repugnant findings.

¶ 2030. The Supreme Court will not inquire into apparent inconsistencies in a finding of facts where the final result supports the judgment and no exceptions are taken.—Leitelt v. Parker, 48 Mich. 297.

§ 458. Findings on appeal or certiorari from justice.

¶ 2031. The Supreme Court, upon a writ of error in cases taken to the Circuit Court on certiorari, can correct errors of law only; disputed questions of fact cannot be reviewed.—Miller v. Chaffee, 1 Mich. 257; Higley v. Lant, 3 Mich. 612; Webber v. Hanke, 4 Mich. 198; Elliott v. Whitmore, 5 Mich. 532; Bromley v. People, 7 Mich. 472; Cicotte v. Morse, 8 Mich. 424.

¶ 2032. On error in cases removed to the circuit from justice's court by certiorari, the Supreme Court will reverse the justice's judgment if there is no evidence legally tending to prove any essential fact.—Cicotte v. Morse, 8 Mich. 424.

¶ 2033. The Supreme Court cannot, on error bringing up a judgment on certiorari reversing that of a justice, consider the objection that the evidence did not warrant the justice's judgment if there was any proof bearing on the issues.—Hollenburg v. Shuffert, 47 Mich. 126.

¶ 2034. On error to the circuit from a judgment on certiorari to a justice of the peace, the findings of the justice on contradictory evidence cannot be reviewed, nor could the circuit court have weighed it.—Goodman v. Shipley, 105 Mich. 439.

§ 459. ——On appeal from probate.

¶ 2035. Where under the Judicature Act, Pub. Acts 1915, No. 314, Chap. XVIII. § 15, upon trial by the court of a proceeding for the allowance of a claim against an estate, exceptions are duly filed by the claimant to each of the findings of fact made by the court on

the specific ground that such findings were against the clear weight of the evidence, the Supreme Court will only reverse the case on the question of the weight of the evidence when the verdict is against the overwhelming weight of evidence.—In re Cutter's Estate, 194 Mich. 34.

¶ 2036. The finding of the circuit court on appeal from the probate court as to what is a reasonable compensation for extraordinary services rendered by an executor is open to review in the Supreme Court.—Wisner v. Mabley's Estate, 74 Mich. 143.

¶ 2037. On writ of error to the circuit court in an appeal from an order of the probate court allowing the final account of administrators the findings of fact of the circuit court will not be reviewed where there is evidence to support them.—Gee v. Hasbrouck, 128 Mich. 509.

¶ 2038. Findings of fact by the trial judge in an accounting by an executor where based on conflicting evidence are conclusive on appeal.—Webb v. Peck, 131 Mich. 579.

¶ 2039. Verdict in a will contest will not be set aside where their is evidence tending to show undue influence on which it might be founded.—Sullivan v. Foley, 112 Mich. 1.

¶ 2040. In a will contest on the ground of mental incompetency, the Supreme Court will not disturb a verdict where the evidence is conflicting, where the trial court refused to disturb the verdict, where the verdict is not clearly against the weight of the evidence, and where there is no indication of passion or prejudice upon the part of the jury.—In re Hoyles' Estate, 162 Mich. 275.

¶ 2041. A finding by the circuit court in a trial without a jury and upon appeal from the probate court in proceedings upon petition to probate a will, that a certain section of the will was obliterated by the testator with the intention of revoking it, will not be disturbed upon review if there is any evidence to sustain it.—In re Fox's Estate, 192 Mich. 699.

¶ 2042. The Supreme Court will only consider questions of law in reviewing on error the proceedings had at the circuit on appeal from a probate order appointing a guardian for an incompetent. The sufficiency of the evidence to show incompetency is not such a question.—Norton v. Sherman, 58 Mich. 549.

¶ 2043. The decision of the trial court upon disputed facts will not be reviewed by the Supreme Court on appeal from the circuit court, to which an appeal was taken from the probate court, nor will testimony be reviewed as upon an appeal in chancery.—In re Bristol, 199 Mich. 453.

§ 460. Decision of fact on offer of evidence.

Presumptions as to foundation having been laid, see ante § 371.

¶ 2044. Where testimony fairly tends to show facts entitling documents to be admitted in evidence, the Supreme Court will not review the conclusion of the trial judge as to its weight.—Ortmann v. Merchants' Bank of Canada, 41 Mich. 482.

¶ 2045. The Supreme Court will not be disposed to review evidence to show what efforts were made to secure the attendance of a subscribing witness, if they were diligent and satisfactory to the trial court.—McMillan v. Larned, 41 Mich. 521.

¶ 2046. A decision of the trial court as to the sufficiency of a notice to take depositions is reviewable on appeal where there are no circumstances better known to the trial judge than to the appellate court.—McCall Co. v. Jacobson, 139 Mich. 455.

§ 461. Decisions of fact on motions.

¶ 2047. The Supreme Court will not review the conclusions of a justice upon the sufficiency of evidence to sustain an affidavit for a warrant under the fraudulent debtor's act.—Willison v. Desenberg, 41 Mich. 156.

§ 462. Findings on reference.

¶ 2048. A referee's findings of fact are conclusive, and are not reviewable on error.—St. Denis v. Saunders, 36 Mich. 369; O'Connor v. Beckwith, 41 Mich. 657; McHugh v. Curtis, 48 Mich. 262.

¶ 2049. A referee's finding cannot be disturbed unless in violation of some rule of law.—Nutting v. Burked, 48 Mich. 241.

¶ 2050. A referee's finding that parties were not partners can only be disturbed if the facts found by him necessarily created a partnership. And if there was no partnership in fact, the effect of the apparent indications, if warranting any inference, would raise one of fact, and where the referee has drawn his own inferences of fact they cannot be disturbed on review.—St. Denis v. Saunders, 36 Mich. 369.

¶ 2051. The Supreme Court will accept the conclusions of a referee who acts without a jury and presents a case that could only be decided in one way unless he discredited the witnesses.—McKeown v. Harvey, 40 Mich. 226.

¶ 2052. Judgment on the report of a referee will not be disturbed where there was more than a mere scintilla of evidence to support his findings and he considered it sufficient.—Botsford v. Sweet, 49 Mich. 120.

¶ 2053. Where an administrator excepted to a referee's finding in favor of a claim against the estate, and afterwards acquiesced in the decision of the circuit judge confirming the finding but overruling the conclusion of law, it was held that on error brought by the claimant he could not contest the findings of fact.—O'Connor v. Beckwith, 41 Mich. 657.

§ 463. Review on case made.

Sufficiency of record showing of the evidence, see ante § 196.

¶ 2054. Since the statute of 1867 (How. St., § 6488) a case cannot be reviewed on the facts; yet any question of law presented by a case may be reviewed, and other matter disregarded as surplusage, although the case appears to have been settled with a view to a review of the facts as well as the law.—In re Wisner's Estate, 20 Mich. 128.

¶ 2055. The office of a case made is no broader than that of a writ of error and bill of exceptions; it cannot be made available to secure a review of questions of fact.—Earle v. Westchester Fire Ins. Co., 29 Mich. 414.

¶ 2056. If the case is made after verdict by jury and judgment thereon, the Supreme Court cannot review the facts, but only the rulings and decision of the circuit court.—Peck v. Snyder, 13 Mich. 21.

¶ 2057. On case made the evidence cannot be weighed; nor can the facts be reviewed except to ascertain whether the evidence supports the judgment.—Walrath v. Campbell, 28 Mich. 111; Tuzbury v. French, 39 Mich. 190; Cragin v. Gardner, 64 Mich. 399.

¶ 2058. The finding of facts cannot be disturbed on case made except where there is a total want of evidence to support it, or where the finding is contrary to the undisputed evidence.—Cragin v. Gardner, 64 Mich. 399.

F. ERRORS NOT AFFECTING THE JUDGMENT.

§ 464. In general.

Generally speaking an error will not work a reversal if it was trivial in its effect on the appellant party or harmless to him, or if it was cured or neutralized by something else in the case or in the outcome, or if it was favorable to him. See Harmless Error.

To be regarded as harmless it must appear to be so on the record, or the record must give rise to a presumption that it was harmless. See ante, this topic, XII, C.

The scope of review will not be extended to unnecessary or harmless errors. See ante XII, A.

Generally the defendant in error or the appellee will not be heard to urge error against the judgment. As to him the failure to appeal accepts the judgment and the error being waived does not affect it. See ante XI, D.

Exclusion from consideration of errors affecting nonappellant parties, see ante §§ 265, 315.

Questions become moot and unnecessary questions, see ante XII, A.

Technical errors on matters of practice, see also ante § 291.

Necessity of pointing out where error was committed, see ante § 235.

¶ 2059. A charge in favor of the party excepting will not be reviewed on error, whether right or wrong.—Brigham v. Gurney, 1 Mich. 349.

¶ 2060. The Supreme Court will not usually consider exceptions taken by the prevailing party.—Toledo & A. A. R. Co. v. Johnson, 49 Mich. 148.

¶ 2061. Assignments of error will not be considered if the instructions on which they are based were rendered immaterial by the verdict of the jury.—Kramer v. Gustin, 53 Mich. 291.

¶ 2062. Requests to charge and refusals thereof need not be noticed by the Supreme Court where they were based on hypotheses contrary to the jury's findings.—Anderson v. Thunder Bay River Boom Co., 57 Mich. 216.

¶ 2063. Where a charge first lays down specific propositions, apparently to guide the jury, and closes by requiring them to find for a specified party, and this instruction is obeyed, assignments of error relating to the specific propositions which were superseded and rendered immaterial by the final ruling are not considered.—Johnson v. Ballou, 25 Mich. 460.

¶ 2064. Where no damages are claimed or awarded on the trial under a notice of recoupment that is claimed to be too defective to admit of recouping damages thereunder, it is unnecessary to consider the question raised by such claim.—Schuler v. Eckert, 90 Mich. 165.

¶ 2065. When, in a suit against an administrator and his sureties upon his bond given on the sale of real estate, the legitimate, uncontradicted evidence in the case justifies the court in finding that defendants are liable

upon the bond for the amount received upon such sale, it becomes unnecessary to inquire whether other evidence tending to establish plaintiff's case was admissible or not, as at most, the admission of it was error without injury.—Durfee, Wayne Probate Judge v. Joslyn, 101 Mich. 551.

¶ 2066. On error by plaintiff to judgment in replevin to recover a horse alleged to have been sold to the defendant's vendor and mortgaged to the original owner a special finding on conflicting evidence and not excepted to, that the horse in question is not the one mortgaged to the plaintiff, is conclusive and precludes consideration of errors on other points thus made immaterial.—Stewart v. Bowerman, 129 Mich. 163.

¶ 2067. The question of whether waiver of the privilege of an attorney, if any existed, was sufficient to render his evidence admissible, will not be considered where the fact to which he testified was sufficiently established by other competent evidence.—Price v. Hagle, 171 Mich. 455.

¶ 2068. Where a bill is brought by the wife to set aside deeds because of fraud and undue influence on the part of the husband, the reviewing court will not pass upon the question as to whether or not a deposition of the wife should have been admitted when it appears that such deposition could not change the determination of the case.—Steketee v. Newkirk, 173 Mich. 222.

G. FORMER DECISION AS LAW OF THE CASE ON SECOND REVIEW.

§ 465. In general.

See also post § 466.
On retrial, see post XV.
Affirmance on law of the case, see post § 482.
Declination of questions settled on former appeal, see ante § 270.
Matters precluded because open on former appeal, see also ante ¶ 1286.
Effect of division of opinion, see post XIII, D.
[Note. The doctrine of estoppel and bar by judgment is distinct from the doctrine of adherence to the law of the case in that the estoppel is conclusive as to matters of fact and the former decision as to the law to be applied. Ordinarily the doctrine of estoppel by judgment is invoked in distinct or collateral litigation. See Former Adjudication.]

¶ 2068a. In a review upon error after a second trial in ejectment, the Supreme Court is bound by its decision rendered upon the same question in the former review of the same case.—Hickox v. Chicago & C. S. R. Co., 94 Mich. 237; People's Savings Bank v. Eberts, 96 Mich. 396; Gamble v. Gates, 97 Mich. 465; Sanborn v. Detroit, B. C. & A. R. Co., 99 Mich. 1; Wayne Probate Judge v. Joslyn, 101 Mich. 551; Filer v. Smith, 102 Mich. 98; Fenton v. Miller, 108 Mich. 246; Pierce v. Underwood, 112 Mich. 186; Tolman Co. v. Reed, 115 Mich. 71; Breitenwischer v. Clough, 116 Mich. 340.

¶ 2069. The decision upon a former appeal of the same case, is binding as the law of the case on questions submitted and decided at that time.—Quirk v. Rapid Ry. Co., 137 Mich. 493; Curtiss v. Curtiss, 143 Mich. 676; Culver v. South Haven & E. R. Co., 144 Mich. 254; Jolman v. Alberts, 192 Mich. 25; City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 192 Mich. 65; Saginaw Milling Co. v. Schram, 196 Mich. 773.

¶ 2069a. In reviewing upon error a second trial of a cause, the court will not change its former decision rendered on substantially the same state of facts, on the ground that it was misled upon the former hearing; counsel should have asked for a rehearing.—Damon v. DeBar, 94 Mich. 594.

¶ 2069b. Where, upon an appeal from a decree entered on demurrer to a bill in chancery, the statute under which the proceedings were brought is held constitutional, such decision becomes the law of the case, and the question will not be reviewed on appeal from a decree upon the merits.—Brown v. Pontiac Min. Co., 109 Mich. 535.

¶ 2070. The opinion upon a former appeal of the same case becomes the law of the case upon a second appeal in the absence of anything to change the facts upon which the former opinion was based.—Pollock v. German Fire Ins. Co., 132 Mich. 225.

¶ 2071. A decision in a former review, that the case should have been submitted to the jury, is binding in a subsequent review, where the evidence in legal effect, is the same.—Anderson Carriage Co. v. Pungs, 140 Mich. 437; Rouse v. Blair, 196 Mich. 176.

¶ 2072. It cannot be said on a second trial after a holding that there was enough to go to the jury, whose finding was sustained, that substantially the same facts could not go to the jury.—Cook v. Hopkins, 68 Mich. 514.

¶ 2073. The former decision is the law of the case upon a second appeal after a case has been reversed and retried, where the record shows that the evidence, as well as the witnesses, was the same as at the first trial and there is no claim that the record differs in any way from that upon the former appeal.—Fitzgerald v. City of Benton Harbor, 132 Mich. 645.

¶ 2073a. If counsel desire a reargument of a question disposed of on hearing, they

should move for a rehearing, as on a second hearing upon the same state of facts the question so decided is res judicata.—McDonald v. McKinnon, 104 Mich. 428.

¶ 2073b. Where, on the hearing in the Supreme Court of an appeal in condemnation proceedings, the award of damages, which alone is appealed from, is set aside, and the question of damages ordered submitted to a new jury, and the parties enter upon a new trial without a motion for a rehearing, they adopt the decision on said appeal as the law of the case, and the questions then decided are therefore res judicata.—Fort St. Union Depot Co. v. Backus, 103 Mich. 556; affirmed in 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445.

¶ 2074. Where the Supreme Court has ruled on questions of law presented to it upon appeal, a dissatisfied party should question such rulings by a motion for rehearing, and he is not entitled to question them on an appeal taken upon the second trial.—Woods v. White Star Line, 165 Mich. 73.

¶ 2075. A prior decision is conclusive of the same question on a subsequent appeal and is the law of the case, unless the prior decision was erroneous.—Gourlay v. Ins. Co. of North America, 189 Mich. 384.

¶ 2076. A former decision that an appeal bond in chancery does not secure the payment of a decree which is otherwise secured, even if wrong, will not be overruled so as to impose upon those who became sureties in reliance thereon, obligations never voluntarily incurred and from which they had a right to suppose themselves exempted, the rule of stare decisis applying in such case.—Reid v. Wayne Circuit Judge, 132 Mich. 406.

¶ 2077. A defense substantially the same as that made on an earlier trial is controlled thereby.—Breitenwischer v. Clough, 116 Mich. 340.

¶ 2078. The holding upon a former appeal, as to whether the case should have gone to the jury upon certain issues, is controlling at the second trial.—Hall v. Murdock, 119 Mich. 389.

¶ 2079. Where the same subject-matter comes in question in a second action in a court of last resort, said court is bound by its own former decision.—Le Roy v. Collins, 165 Mich. 380.

¶ 2080. Where on a former appeal it was held that ouster was admitted by the plea and notice, it is not open to question when the case is again before the Supreme Court.—Carpenter v. Carpenter, 126 Mich. 217.

¶ 2081. Rulings upon a former trial that the questions whether the claimant failed to show that the money in question was claimant's money, and whether claimant's claim was barred by the statute of limitations, depended upon questions of fact, and that proper instructions had been given, furnished the law of the case for a second trial.—Shouldice v. McLeod's Estate, 135 Mich. 337.

¶ 2082. In a previous hearing by the Supreme Court of a suit on an insurance policy, plaintiff insured contended that a certain bill of sale was not received in evidence by the trial court. The Supreme Court passed on the question and ordered that the said bill of sale be added to the record. Upon a second hearing of the case by the Supreme Court, held, the question as to whether the bill of sale was in evidence was not open, as it had been decided by the previous ruling.—Suchocki v. Calumet Ins. Co., 159 Mich. 121.

¶ 2082a. Where, after the reversal of a judgment in an action for negligent injury on the ground of the contributory negligence of the father of the decedent, the case is again tried, and on a second writ of error the evidence of such negligence is the same as that given on the former trial, the question will be treated as res judicata.—Apsey v. Detroit, L. & N. R. Co., 104 Mich. 646.

¶ 2083. Where, in an action for personal injuries, the testimony on the second trial was substantially the same as on a former trial, the holding of the Supreme Court on a former appeal, that there was sufficient evidence to justify the submission of the question of the defendant's negligence to the jury, was adhered to on a subsequent appeal.—Foley v. Detroit & M. Ry. Co., 193 Mich. 233.

¶ 2084. A previous determination by the Supreme Court that the evidence sustained a defense of the statute of limitations, is conclusive on a second appeal.—Myers v. Erwin, 180 Mich. 469.

§ 466. Similarity of questions or evidence.

See also post § 557.

Leave to amend involving same points covered by affirmance of judgment on demurrer, see also ante ¶ 1085.

Findings in commitment proceedings as binding Supreme Court on original habeas corpus to test commitment, see Former Adjudication, III.

¶ 2085. On a retrial after reversing a judgment on verdict directed for defendant, the former decision will rule the case, where the issues of fact are not eliminated though the trial judge rejected some evidence formerly admitted for plaintiff and new evidence was put in for defendant resulting in verdict on the facts for plaintiff.—Barr v. Guelph Patent Cask Co., 133 Mich. 322.

¶ 2086. Where a judgment for plaintiff on the first trial of a personal injury case was reversed, and on the second trial the only material difference was that certain facts which appeared by inference in the first record were clearly established in the second trial, the judgment for defendant was affirmed.—Welliban v. National Wheel Co., 136 Mich. 233.

¶ 2087. The decision on a former appeal controls the case where the defendant in ejectment, after affirmance of judgment for the plaintiff, takes a new trial under the statute, and the evidence on the second trial differs only in respect to a misdescription of the land in one of the deeds, and the question whether such mistake can be shown in an ejectment suit is not raised at the second trial.—Nowlen v. Hall, 149 Mich. 360.

¶ 2088. A reversal of a judgment in assumpsit based on a breach of contract on the ground that there was no contract relation is not res adjudicata in an action for fraud and deceit in the same transaction proved on the retrial, treating the fraud as waived to sue in assumpsit.—Hallett v. Gordon, 128 Mich. 364.

¶ 2089. In a personal injury action the testimony is substantially the same as that presented on the first trial so as to render the determination on a former appeal that the evidence made a question for the jury the law of the case on the second trial, where the defendant offered no evidence on the first trial and called a large number of witnesses to establish its defense on the second trial and their testimony, if believed, would have warranted a judgment for defendant, but it related to questions within the realm of fact.—Rouse v. Blair, 198 Mich. 176.

¶ 2090. The construction placed upon a lost contract by the Supreme Court is the law of the case on a new trial, although the written agreement is then produced, where it did not materially differ from the contract proven on the first trial.—Wenzel v. Kleruj, 184 Mich. 284.

¶ 2091. The holding on a former review that the testimony of a bank officer was consistent with a want of bona fides, and therefore did not overcome the presumption that the bank took municipal bonds with notice that they were bonus bonds without consideration, is the law of the case on a subsequent writ of error where such officer's testimony appears in the record as a transcript from the former trial, he being since deceased.—Thompson v. Village of Mecosta, 141 Mich. 175.

¶ 2092. Where the Supreme Court has affirmed a conviction for the violation of a city ordinance and sustained the validity of the ordinance, the question as to whether the city had the right to pass the ordinance must be considered as settled when raised by the same person on appeal from a later conviction.—People v. Gardner, 143 Mich. 104.

¶ 2093. In an action to recover on a fire insurance policy where plaintiffs were mortgagees and where on a former appeal a demurrer to the declaration was overruled, defendant cannot on a subsequent appeal make the point that the "loss payable" clause in the policy under which plaintiffs claim brings a new insured into the contract without consideration moving to defendant, the point being ruled by the decision on the prior appeal.—Gourlay v. Ins. Co. of North America, 189 Mich. 384.

§ 467. Instructions and rulings in conformity to former opinion.

See also post § 482.
As proper form on retrial, see post § 556.

¶ 2094. Where on a new trial, the court below repeats a charge approved by the Supreme Court on the appeal from the first trial, the ruling is conclusive, and the question will not be reopened in the Supreme Court on the second appeal.—Pierce v. C. H. Bidwell Thresher Co., 158 Mich. 356.

¶ 2095. The Supreme Court ruled on certain questions in a case, and granted a new trial. The lower court proceeded in strict accordance with these rulings and instructions. Held, that upon an appeal from the new trial, the Supreme Court would not reopen its rulings on the previous appeal.—Haas v. Malto-Grapo Co., 158 Mich. 508.

¶ 2096. A decision upon a direct appeal that the evidence was sufficient to warrant a submission of certain questions to the jury, is conclusive upon a second appeal, where the record does not differ materially from the former record.—O'Dell v. Goff, 153 Mich. 643.

¶ 2097. Upon the second trial of an action on a policy of insurance, the evidence does not differ from that of the former trial. Held, that a decision by this court in the former trial to the effect that the case should be submitted to the jury is res adjudicata.—O'Neill v. Northern Assur. Co. of London, England, 155 Mich. 564.

¶ 2098. Where the Supreme Court on a former appeal holds that the plaintiff has a sufficient case to go to the jury, the defendant is concluded by this decision on a second trial where the facts established are substantially the same.—Ruttle v. What Cheer Coal Mining Co., 161 Mich. 150.

§ 468. Change of theory on second trial.

Adherence to decision on application for rehearing unless mistake or oversight appears, see post § 538.

¶ 2099. Plaintiff, who throughout two trials, professing on examination by his own counsel to state full details of the transaction in suit, has claimed on the theory of a particular contract, is estopped on a third trial from relying, under the same pleading and bill of particulars, upon a wholly inconsistent contract then newly put forth as just remembered.—Hamilton v. Frothingham, 71 Mich. 616.

¶ 2100. A defendant is not precluded from denying the existence of an agreement relied upon by plaintiff by the fact that, upon a former trial, he defended solely upon the ground that plaintiff was estopped to assert such agreement, which defense, upon error, was held to be ineffectual.—Ladd v. Brown, 108 Mich. 105.

¶ 2101. On the first trial of an action for commissions on the sale of a boat, counsel, on being asked to elect between alleged inconsistent items of the bill of particulars, claiming commissions for finding a purchaser in the D. company, for making a sale to the D. company, and for finding a customer in the S. company, respectively, stated that the items set out were all parts of one transaction; that plaintiff found a purchaser in the S. company, and made a sale to the D. company. He elected to recover upon finding a purchaser and making a sale to the D. company. Upon a second trial, counsel claimed on a transaction in which the D. company was the nominal, and the S. company the real, purchaser. Held, not a change of theory.—Humphrey v. Eddy Transp. Co., 115 Mich. 420.

¶ 2102. Recovery is properly permitted upon a new theory on a retrial after reversal of a case, when supportable on the proofs, the record in both trials showing similar testimony.—Cooley v. Kinney, 119 Mich. 377.

¶ 2103. Upon a second appeal, after a second trial of an action to recover for personal injuries, a theory of the case not even suggested at either trial or upon the former appeal, will not be considered.—Quirk v. Rapid Ry. Co., 137 Mich. 493.

§ 469. Jurisdictional objections.

¶ 2104. The determination on an appeal from an order overruling a demurrer, of objections going to the jurisdiction of a court of equity over the subject-matter, is conclusive on a subsequent appeal from a decision on the merits.—Olson v. Williams, 185 Mich. 294.

¶ 2105. A determination on an appeal from an order overruling a demurrer, that grounds for equitable relief were disclosed by a bill of complaint, is conclusive on a subsequent appeal from a decision on the merits.—Olson v. Williams, 185 Mich. 294.

§ 470. Objections not passed on before.

Practice of passing on points without discussion unless important or instructive, see post § 487.

Decision based on stated grounds, see also post § 557.

Based on other reason, see post § 471.

¶ 2106. One is not precluded from insisting on an objection based on an error that appeared on a former appeal of the same case, but was not noticed, as the decree below was reversed without hearing the appeal on its merits, and on the ground that the decree had been taken before the case was ready for a hearing on the merits.—Hardwick v. Bassett, 29 Mich. 17.

¶ 2106a. The decision on a former writ of error that the contract of guaranty sued on was valid, is not binding as the law of the case on a second writ, where no contention was made on the first trial that the guaranty was an Illinois contract governed by the law of Illinois, but such contention was made and sustained on the second trial; and under the changed facts the decision of the Illinois court of last resort that a similar contract is invalid as a guaranty will be followed.—John A. Tolman Co. v. Reed, 115 Mich. 71.

¶ 2107. Where the record shows that in a former suit between the same parties that the only question passed upon at the first trial is that the plaintiff was incompetent to disaffirm her contract as an infant to settle her previous suit, her right to repudiate the contract and maintain a suit after she became of age cannot be said to have been adjudicated.—Lansing v. Michigan Cent. R. Co., 143 Mich. 48.

¶ 2107a. A decision on prior appeal that the circuit court "found against all claims of the plaintiff, and we think correctly" is conclusive on all points ruled by the circuit, though but one point was specifically discussed; and on a second appeal will be followed as the facts and law of the case whether right or wrong if they are identical. —Hall v. City of Kalamazoo, 141 Mich. 503.

§ 471. Objections based on different reasons.

Not passed on before, see ante § 470.

¶ 2108. Where in a suit to recover for personal services, the defendant's contention on appeal that plaintiff could not submit his case on the theory of an implied contract,

is overruled, the defendant cannot raise the same point on a second appeal, though urging different reasons for his contention.—Ruttle v. What Cheer Coal Mining Co., 161 Mich. 150.

¶ 2109. The Supreme Court will not consider the same record a second time in view of a new set of objections.—Monger v. New Era Ass'n, 171 Mich. 614.

H. TRIAL DE NOVO.

§ 472. Scope and nature in general.

Mode of preserving evidence for review, see ante VI, D.
Review of the findings, see generally ante XII, E, 1.
Decree on appeal, see post § 493.
Sufficiency of evidence in particular suits, see ante XII, E, 1,

¶ 2110. On appeals in equity the court inquires into the facts and forms its own conclusions.—McCullough v. Day, 45 Mich. 554.

¶ 2111. Each case is dealt with de novo according to the justice and equity upon the whole record.—Goodrich v. Smith, 87 Mich. 1.

¶ 2112. Where an appeal lies it brings the case up for review, with all matters of discretion open for consideration in the appellate court, precisely as they were in the court below.—Detroit Fire & Marine Ins. Co. v. Renz, 33 Mich. 298.

¶ 2113. When a chancery case reaches the Supreme Court it is heard de novo.—Latham v. Savage, 166 Mich, 300.

¶ 2114. Cases in equity are heard in the Supreme Court de novo, and the appeal suspends all proceedings under which a sale in foreclosure could be made until the final decree in the Supreme Court.—Gillam v. Foster, 124 Mich. 685.

¶ 2115. Chancery cases on appeal to the Michigan Supreme Court are heard de novo, said court making its own decree.—Kelly v. Gaukler, 164 Mich. 519.

§ 473. On appeal from intermediate decree.

¶ 2116. Where a bill for the partition of real estate was filed and defendants filed two cross-bills for an accounting for any sums due to them from the rents and profits collected by a deceased cotenant, of whom complainant and one of the defendants were the sole heirs, and an appeal was taken from an order denying motions to dismiss the cross-bills on the ground that the defendants' claims, if any, were against the estate of such deceased cotenant and could only be allowed by the commissioner of claims appointed by the probate court, held that the question could not be decided on the record as presented, and that the case should be heard upon its merits so that a complete record might be presented of the facts upon which chancery jurisdiction was sought.—Comstock v. Deane, 197 Mich. 388.

§ 474. Evidence considered or rejected.

¶ 2117. It is the duty of the Supreme Court in considering a chancery appeal to examine all of the evidence.—L. Starks Co. v. Eppink, 185 Mich. 233.

¶ 2118. On appeal the trial is de novo and the appellate court is expected to have the benefit of all offered testimony.—Merson v. Merson, 101 Mich. 55.

¶ 2119. Where the conclusions of the trial judge in an equity case were based upon incompetent testimony to an extent not clearly disclosed, held that it became the duty of the appellate court to eliminate such testimony, and, independently of any presumption which might otherwise arise from the trial court's determination, pass upon the significance of the documentary evidence to which such testimony related in the light of properly proven surrounding facts and circumstances.—Maginn v. Cashin, 196 Mich. 221.

§ 475. Testimony taken in open court below.

Weight and effect of trial judge's conclusions, see ante § 423.

¶ 2120. In a chancery case where the question is a doubtful one, the Supreme Court will give great weight to the finding of the lower court upon questions of fact where the witnesses are examined in open court, but nevertheless the case will be examined de novo, and if satisfied that an error has been made, it will be reversed.—Lowry v. Paw Paw Sav. Bank, 132 Mich. 228.

¶ 2121. The fact that the trial court in determining the credibility of a witness, had the advantage of seeing and hearing him give his testimony, does not relieve the Supreme Court of the duty of exercising its own judgment in passing on the evidence on an appeal.—Heaton v. Heaton, 186 Mich. 87.

¶ 2122. On appeal the court is not relieved of the duty of exercising its own judgment in passing on the evidence, by reason of the fact that the trial court had the advantage of seeing and hearing the witnesses when their testimony was given.—Emery v. Emery, 181 Mich. 146.

¶ 2123. While it is the duty of the Supreme Court upon appeal to hear a case de novo and pass upon the facts, yet the fact that the trial court has heard the testimony of the witnesses in open court is an element which may be considered in reviewing conflicting testimony.—Murray v. Keeley Institute of Western Michigan, 190 Mich. 295.

XIII. DECISION AND JUDGMENT ON REVIEW.

A. GENERAL NATURE, FORM AND EFFECT.

§ 476. In general; affirmance or reversal.

The ordinary ground for reversal is error in the trial or the verdict or judgment. The existence of such error and the saving of the question and presentation of it to the reviewing court involves such a variety of subjects that it is impossible to bring under a heading "grounds for reversal" more than a misleading fraction of the matter which might answer to it. If an error was concededly committed and the question is whether it was harmless or prejudicial, the matter is treated in Harmless Error. If it is contended that there was error because incompetent or irrelevant evidence was introduced, the question then becomes one of the admissibility of evidence, and is treated in Evidence or in those portions of the specific topics which treat of the relevancy of evidence, e. g., Contracts, X; Damages, XI; etc. And so if the propriety of an instruction is questioned, the matter should be sought for in Instructions or in the portion of the specific topic treating of instructions. General matters of trial practice are treated in Argument of Counsel; Trial; Examination of Witnesses; Verdicts and Findings. Matters of pleading are treated in Equity, VII; Pleading.

Propriety of remand to trial court or of final judgment above, see generally post XIII, B.

Modification with final judgment as modified, see post XIII, C.

Character of judgment on case made, see post § 517.

Form of judgment on abatement or for want of jurisdiction, see post § 492.

Dismissal or affirmance without consideration of the cause, see post §§ 477-481.

Affirmance on condition of security, correction or reduction of recovery, see post § 483-485.

¶ 2124. Where all the facts and documents that could have been relied on below are before the appellate court, the want of a notice of hearing below will not be ground for reversal; it will only raise a question which may be adjusted by award of costs.—Munch v. Shabel, 37 Mich. 166.

¶ 2125. Although no argument is made in appellee's brief to support rulings at the trial admitting testimony, charge by the court, or the theory upon which the issue of fact was submitted to the jury, the judgment must be sustained if no error occurred at the trial. —International Text-Book Co. v. Marvin, 166 Mich. 660.

§ 477. Dismissal or other judgment without review.

The cause on appeal or error may be disposed of by the Supreme Court on motion pending review by a dismissal or by affirmance for want of sufficient steps to bring it properly before the reviewing court, or for violation of the practice or rules thereof. Where some obstacle has arisen to a proper review there may be a reversal and remand for new trial without review on the merits. All such disposals of the cause before final hearing and submission without any review or without coming to a hearing for review are treated ante X.

Disposal of cause for want of jurisdiction without consideration of other questions, see ante § 262.

Dismissals in chancery generally, see Equity, X.

§ 478. ——Want of proper record or procedure.

See also ante § 476.

¶ 2126. The court will not disturb a decree dismissing a bill where documents on which the rights of the parties depend are not set out in the record or proofs.—McCulloch v. Barnebee, 43 Mich. 622.

¶ 2127. The court refused to affirm a judgment merely because the bill of exceptions failed to include the assignments of error, as required by a recently amended rule (Former Sup. Ct. Rule 12), where error was manifest, and nothing would be gained by remanding the record for correction at appellant's expense.—Conely v. Dudley, 111 Mich. 122.

§ 479. Affirmance for want of parties.

Remand for revivors, see post § 515.

¶ 2128. Where complainants' appeal from a decree dismissing their bill is dismissed on motion as to a necessary defendant for want of notice of settlement of case, etc., such dismissal affirms the decree below as to him, and necessitates a dismissal on the hearing of the bill as to the remanding defendants for want of proper parties.—Banks v. African M. E. Church, 81 Mich. 371.

§ 480. Affirmance for want of reviewable question.

Affirmance of correct result where erroneous reasons are assigned below, see Harmless Error.

¶ 2129. A judgment will not be reversed for an error not legitimately before this court.—Achey v. Hull, 7 Mich. 423.

¶ 2130. If no error appears in the record of a case brought into this court by writ of error without exceptions, the judgment below will be affirmed.—Stendell v. Noak, 19 Mich. 391.

¶ 2131. Judgment is affirmed where no question is presented which the court can consider.—Irwin v. Schlief, 48 Mich. 237.

¶ 2132. Where the Supreme Court is unable to discover any ruling or any instruction by the trial judge that is clearly erroneous, or any failure to submit the issues fairly to the jury, the judgment will be affirmed with costs.—Forsyth v. Prentis, 48 Mich. 268.

¶ 2133. A judgment will be affirmed where no errors appear of record and where the evidence sustained the verdict on which the judgment is based.—Rumney v. Webster, 56 Mich. 195.

¶ 2134. Where no exceptions are taken to the findings of fact or conclusions of law, and where there is no assignment of error that the facts found do not support the judgment, the judgment must be affirmed.—Cook v. Burnett, 83 Mich. 251.

¶ 2135. Where the evidence to support the findings of fact is ample, and where no claim is made that such findings do not support the conclusion of law, the judgment is affirmed.—Gould v. Doty, 104 Mich. 261.

¶ 2136. A judgment for plaintiff in an action for malicious prosecution was affirmed where the record did not disclose prejudicial error.—Brouso v. Gentle, 116 Mich. 83.

¶ 2137. The reviewing court will not disturb a judgment where it cannot say that the findings of the trial court were not supported by the evidence and where such findings of facts support the judgment rendered.—Holcomb v. Sayers, 173 Mich. 238.

¶ 2138. On case made after judgment, the judgment being correct upon the facts, was affirmed, there being no exceptions of law.—Boullion v. Litchfield, 14 Mich. 299.

§ 481. Affirmance for want of substantial grievance or damages.

¶ 2139. A judgment for defendant in an action wherein a judgment for plaintiff for nominal damages would not have carried costs will not be reversed for failure to award such damages.—Stevens v. Yale, 113 Mich. 680.

¶ 2140. Where defendant concedes the amount that the verdict should be in case one is recovered by plaintiff, he cannot urge on appeal that since he offered no proof of damages a verdict could have been directed in plaintiff's favor for nominal damages only, and for that reason a judgment for defendant should not be reversed.—International Text-Book Co. v. Marvin, 166 Mich. 660.

§ 482. Affirmance on law of the case.

¶ 2141. Where a case has been retried in accordance with the directions given on error, the judgment so obtained will be affirmed on a second writ of error.—Burtraw v. Clark, 107 Mich. 333.

¶ 2142. Where, after a careful review of the assignments of error in relation to the admission of evidence and to the instructions, it appeared that the case was fairly tried and submitted to the jury in accordance with the rules laid down in a former opinion of the Supreme Court in the same case, the judgment was affirmed.—City Bank v. Dill, 102 Mich. 305.

¶ 2143. A judgment will not be reversed upon a second writ of error for alleged error in giving or refusing instructions, where the testimony was the same upon both trials, and the cause was submitted to the jury in accordance with the opinion on the former writ of error.—Burgess v. Isherwood, 111 Mich. 220.

§ 483. Affirmance on conditions.

¶ 2144. Where the plaintiff, in an action against a township for personal injuries received through the negligence of the township in not keeping a bridge in repair, secured a judgment in the circuit court, which was reversed by the Supreme Court, an order for a new trial was granted only on condition that the township be secured for the expense of further defending the action, in case of another adverse judgment, by a bond for $500.—Abernathy v. Township of Van Buren, How. N. P. 148.

§ 484. ——Consent to correction.

Correction of judgment by remission of part, see also post § 485.

¶ 2145. A judgment in ejectment, under Comp. L. 1897, § 10973, in which the verdict was defective for the reason that the jury

failed to state particularly the description of the parcel claimed by each defendant, was affirmed on condition that plaintiff consent to a correction of the verdict and judgment in that regard.—Townsend v. Kreigh, 133 Mich. 243.

§ 485. ——Remission of excessive part of recovery.

See also post ¶ 2204.
Reduction and affirmance, see post § 524.
Correction on record without reversal, see post § 526.
Remission pending error or appeal as waiver of right to complain, see ante § 228.
Remission as curing error, see Harmless Error.
Remission to avoid new trial, see New Trial.

¶ 2146. A judgment will be affirmed where the amount thereof is excessive, upon remission of the excess.—Cox v. Holkeboer, 200 Mich. 86.

¶ 2147. Where it appeared that an erroneous claim was included in a verdict, the court required the amount of such claim to be remitted on penalty of reversal.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

¶ 2147a. Where, in second suit for the negligent killing of plaintiff's intestate, plaintiff's counsel in his argument states that the killing was so criminally negligent as to amount to murder, and such statement is unwarranted by the evidence, the Supreme Court attributing an excessive verdict to such argument and there being no other error, affirmed the judgment on condition of reduction to a reasonable award.—McDonnell v. Central Drug Co., 170 Mich. 291.

¶ 2148. Where, in an action to recover the balance of $145 due on a contract, the defendant filed a counter claim for $129.80, and there was evidence to sustain the allowance of defendant's claim in full, and the jury returned a verdict for $2.14 for defendant, held that any error of the court in requiring a remittitur of $20 by subtracting the sum of $125 from $145 and of the jury in returning a verdict for the defendant, the latter not having appealed, did not, under Pub. Acts 1915, No. 89, and Pub. Acts 1915, No. 314, Chap. L, § 28, result in a miscarriage of justice except as to the excess sum allowed defendant and that the case should be affirmed on condition that defendant file a remittitur of the $2.14.—Sparks v. Lord, 198 Mich. 415.

¶ 2149. Where transfers of real property have been shown by the erroneous admission of parol testimony and the value of such property included in the damages awarded, the judgment must be reversed unless plaintiff remits therefrom the amount thus included.—McDonald v. Smith, 139 Mich. 211.

¶ 2150. Where in a suit on a policy of insurance plaintiff recovers more than he is entitled to by law under the terms of the policy, the upper court, where the proper amount due plaintiff is clearly ascertained, may enter an order requiring plaintiff either to remit the excess or to submit to a new trial.—Allen v. Patrons' Mut. Fire Ins. Co. of Michigan, Ltd., 165 Mich. 18.

¶ 2151. Where a verdict was directed by the court, in an action for a penalty, for the maximum sum allowed by statute, whereas the amount was for the jury to determine within such limit, plaintiff, being entitled under the proofs to a verdict for at least six cents, was allowed to remit all above six cents, and the judgment, so modified, was affirmed.—Hines v. Darling, 99 Mich. 47.

¶ 2152. Where a judgment on appeal from justice's court against the appellant and his surety is erroneous solely because it exceeds the penalty of the appeal bond, the judgment will be modified as to the surety by rejecting such excess, and will be affirmed as modified.—Vreeland v. Loeckner, 99 Mich. 93.

¶ 2153. Where the extent to which a verdict has been increased by interest erroneously included therein is ascertainable by computation, plaintiff will be allowed to remit such excess, and the judgment, thus modified, will be affirmed.—Bresnahan v. Nugent, 97 Mich. 359.

¶ 2154. Defendants who were personally liable for a foreclosure deficiency were, on their appeal from an order denying their petition for leave to file a bill of review, granted such leave unless complainant should remit certain interest erroneously included in the amount for which a decree was granted.—Murray v. Ingersoll, 100 Mich. 286.

§ 486. Affirmance or reversal in whole or in part.

Remand leaving questions open or with directions, see post §§ 512-516.
Construction of cost award on cross appeals, see also post ¶ 2402.
Construction as to joint or several liability for costs adjudged on affirmance as to one party, see post ¶ 2407.
Affirmance of decree of divorce as to both parties, where reversal as to one is impossible for want of appeal, see also Divorce, VII.

¶ 2155. Where a judgment is severable, it may be reversed in part and affirmed in part; but where it is an entirety against several parties, whether in tort or assumpsit, if reversed as to one it must be as to all.—Powers v. Irish, 23 Mich. 429; Matteson v. Nathanson, 38 Mich. 377.

¶ 2156. Where two causes of action for separate injuries are joined in one declaration and one is erroneously submitted to the jury, the error requires a reversal of the entire case.—Charters v. Industrial Works, 179 Mich. 1.

¶ 2157. Where there was no dispute as to the facts, and the judgment was correct except as to the amount of damages, it was affirmed to the proper amount with costs of the circuit to the plaintiff below, and reversed as to the excess with costs of the Supreme Court to the plaintiff in error.—Johnston v. Whittemore, 27 Mich. 463.

¶ 2158. Where a judgment is rendered in trespass against joint defendants and only one brings error, it may be set aside as to the plaintiff in error, when it would have been sustained as to the other defendant.—Sutherland v. Ingalls, 63 Mich. 620.

¶ 2159. Where, in a statutory action of trespass for cutting and removing timber, the only error was the admission of an oral agreement inconsistent with a written one but bearing on the good faith of the trespasser, the judgment against defendant was reversed only so far as to set aside the award of treble damages.—Skeels v. Starrett, 57 Mich. 350.

¶ 2160. Judgment in a contractor's favor for labor and materials furnished in building a house may stand as a personal obligation though reversed in so far as it gives a lien (the lien-law having been held invalid); the merits of the claim against defendant having been adjudicated upon a common-law issue, and each party having had his day in court.—Snell v. Race, 78 Mich. 334; Koepke v. Dyer, 80 Mich. 311; Kirkwood v. Hoxie, 95 Mich. 62.

¶ 2161. In an action of assumpsit for the unpaid balance of shoes sold where the defense was that they were not equal to sample and of an inferior quality, where the jury undertook to give the ownership of 28 pairs of shoes to the plaintiff, and determined the amount of the defendants' indebtedness after making such deduction, that part of the judgment giving the plaintiff possession of the shoes cannot be treated as surplusage and the balance of the verdict permitted to stand, because the money part of the judgment would not have been rendered if the jury understood that they had no authority to decide who was entitled to the possession of the shoes.—J. Richardson & Co. v. Noble, 143 Mich. 546.

¶ 2162. On a bill by a creditor of a corporation to cancel two mortgages, one of which was given by the corporation to a stockholder and assigned to another person, and the other to such other person as security for the payment of a bond given as guaranty for the payment of other indebtedness to a bank, held that that part of the decree which found the amount due to such holder of the mortgages because of a payment on the bond should be affirmed; the other being reversed because he had notice of equities.—Osborn v. Detroit Kraut Co., 193 Mich. 664.

¶ 2163. If, in a suit brought to set aside as fraudulent a chattel mortgage executed by an insolvent debtor in anticipation of an assignment of his property for the benefit of creditors, the assignor could, because of the irregularity of an appointment of a receiver at chambers, ignore subsequent court orders adjudging that he had in his possession certain goods which passed by the assignment, and which should have been delivered either to the assignee or to the receiver, in so far as they required him to deliver said goods to the receiver; yet, so far as the action of the court went in determining the fact of the possession of the goods by the assignor, the orders were valid, and should be sustained on appeal, if the evidence warranted the conclusion of the circuit judge upon the question of fact.—Burnham v. Dillon, 100 Mich. 359, on rehearing of 100 Mich. 352.

§ 487. Opinion or discussion of questions.

Construction of opinion in applying law of the case, see ante XII, G, post XV.

Construction of opinion on retrial, see also post § 463.

Divisions of opinion, effect as judgment, see post XIII, D.

Points not discussed as grounds for rehearing, see post § 540.

Dissenting opinion in quorum decision as ground for rehearing, see post § 544.

Passing questions because unnecessary to decision on appeal, see ante §§ 261-266.

Use and force as precedent in other cases, see Courts, IV.

As law of the case, see ante XII, G, post § 553 et seq.

Rendition and filing of decision, see Jud. Act. Chap. I, § 30; Comp. L. 1915, § 12035.

¶ 2164. It has been the practice of the Supreme Court not to discuss in the opinion every claim made by counsel, but it is intended to discuss every question that may turn the case one way or the other or which may be of interest to the profession.—Detroit National Bank v. Blodgett, 115 Mich. 160.

¶ 2165. In the absence of error the court will not discuss points raised unless such discussion would be of benefit to the profession in the trial of future cases.—Pichler v. DeHate, 125 Mich. 247.

¶ 2166. The Supreme Court will omit discussion of points not changing the decision and of little value to the profession.—Waterbury v. O'Brien, 125 Mich. 534.

¶ 2167. A decree granting specific performance of a contract and declaring a deed void, the question being one of fact and involving no legal principle or question of interest or benefit to the profession, affirmed without discussion.—Seventh Day Church of God v. Conference of Church of God, 130 Mich. 367.

¶ 2168. The judgment below was affirmed without discussion where no material error was found in the record and the questions were of no general interest.—Campbell v. Pratt, 108 Mich. 545.

¶ 2169. A decree dismissing a bill for divorce was reversed, the court being of the view that complainant had made out her case and that the defense failed to show adultery on her part, but as the case turned solely upon a question of fact a lengthy opinion was not reported where it could be of no value as a precedent.—Knickerbocker v. Knickerbocker, 135 Mich. 102.

§ 488. ——Statement of facts and syllabi.

¶ 2170. The Supreme Court will make no statement of fact where appellant, in disregard of Sup. Ct. Rule 40, has made none in his brief.—Cronenwett v. United States Health & Acc. Ins. Co., 140 Mich. 522.

¶ 2170a. The preparation of headnotes for the opinions is a constitutional duty of the reporter of the Supreme Court, and cannot be legislatively imposed on the judges thereof. See Letter From the Judges to the Governor (In re Headnotes), 43 Mich. 641.

§ 489. Findings of fact.

See also post § 490.
Remand for want of sufficient findings, see post §§ 505-507.
Necessity of remand because essential facts or damages are not ascertainable, see post XIII, B.
Review of omission or want of specific findings, see ante §§ 455, 456.
Conclusiveness and effect of findings below, see ante §§ 443-449.

¶ 2171. The Supreme Court does not make findings of fact.—Edgerly v. Ladies of Modern Maccabees, 175 Mich. 28.

¶ 2172. The Supreme Court cannot find the facts in a case tried by the court without a jury; but those not supported by the evidence may be rejected.—Wilson v. Sauble, 181 Mich. 406.

§ 490. Additional, amended or supplementary findings.

¶ 2173. The Supreme Court cannot supplement the finding of the trial court on the weight of evidence.—Johnson v. Crispell, 48 Mich. 261.

¶ 2174. The Supreme Court cannot change a finding of fact.—Kane v. Stowe, 50 Mich. 317.

¶ 2175. Where proceedings to confirm the report of a referee are brought up on error, the Supreme Court cannot interfere to determine the correctness of his finding of fact nor to require him to make his report more full and perfect.—Campau v. Brown, 48 Mich. 145.

¶ 2176. On a writ of error the appellate court cannot examine the evidence and make a finding contrary to that of the trial court. —In re Hoffman's Estate, 183 Mich. 67.

§ 491. Judgment on error or case made; amount of terms.

Remand or final judgment above, see post XIII, B.
Necessity of final judgment, see post § 517.
Final judgment in arbitration cases, see post § 519.
Rendition of judgment on appeal bond, see post § 573.
Order on rehearing, see post § 550.
Disposal of cause and remission on writ of error to judgment on arbitration, see Jud. Act, Chap. XLV, § 20; Comp. L. 1915, § 13665.
Judgment on case made, see Jud. Act, Chap. L, § 17; Comp. L. 1915, § 13752.
Final process on Supreme Court judgment or decree, see Sup. Ct. Rule 52.
Execution on appeal for balance over costs to adversary, see Jud. Act, Chap. XXIII, § 14; Comp. L. 1915, § 12829.

¶ 2177. Judgment on a finding against the plaintiff was reversed on error and judgment entered for the plaintiff with costs of both courts; but as no damages had been found, only nominal damages were held recoverable. —Toll v. Wright, 37 Mich. 93.

§ 492. Judgment on abatement or for want of jurisdiction.

¶ 2178. Where the Supreme Court held that they had no jurisdiction to entertain a complainant's appeal to grant the special relief sought, they dismissed the appeal with costs, without affirming the decree below, which was in his favor.—Attorney General ex rel. Lockwood v. Moliter, 26 Mich. 444.

¶ 2179. On an appeal from a decree of divorce granted to a deceased complainant, the survivor's claim for divorce cannot be considered, and a mere reversal will be ordered. Wilson v. Wilson, 73 Mich. 620.

¶ 2180. A judgment on a treasurer's bond sued originally in justice's court was reversed on error because not within the jurisdiction of such court, but without prejudice to the bringing of another action in the proper forum.—Township of Richland v. Cliff, 131 Mich. 628.

¶ 2181. Plaintiff recovered a judgment against the warden of a reformatory for breach of a convict labor contract. Defendant appealed same by writ of error. Meanwhile the legislature passed Act. No. 219, Sess. Laws 1911, repealing Comp. Laws 1897, § 2091, which latter act authorized said suit. The attorney general moved before the Supreme Court to arrest further proceedings under said judgment and to dismiss said cause of action on the ground that said repeal deprived the Supreme Court of jurisdiction. Held, the Supreme Court could go no further than to arrest all further proceedings and dismiss the writ of error; it could not consistently dismiss said case because deprived of jurisdiction and at the same time exercise jurisdiction in passing upon the force of the judgment previously rendered in the same case in the trial court.—McDowell v. Warden of Michigan Reformatory at Ionia, 169 Mich. 332.

§ 493. Decree in chancery cases.

As to nonappellants, see post § 495.
Without prejudice to other suits, see post § 494.
Trial and decree de novo on appeal, see ante XII, H.
Final judgment on appeal or remand to lower court for retrial, see post XIII, B.
Necessity of remand because of incomplete record, pleadings or proofs, see post XIII, B.
Reservation of questions, see post § 497.
Retention of all or part of cause, see post § 496.
Modification on appeal, see post XIII, C.
Order on rehearing, see post § 550.
Rendition of judgment on bond, see post § 573.
Construction of reserved questions and directions, directory provisions, see post § 563.
In chancery appeals, see Jud. Act, Chap. L, § 25; Comp. L. 1915, § 13760.
Decree in judgment creditors' proceedings, plenary power of Supreme Court, see Jud. Act, Chap. XXXIV, § 14; Comp. L. 1915, § 13391.

¶ 2182. Every question is heard on appeal as if it had not been heard before, and the order made is such as should have been made below.—Haines v. Haines, 35 Mich. 138.

¶ 2183. A court of review is bound on appeal to exercise its own discretion upon the matters brought before it; and it would be a misuse of discretion to refuse to correct an evil where no one has acted or can lawfully act in reliance upon it.—Johnson v. Shepard, 35 Mich. 115.

¶ 2184. An order will not be disturbed on appeal unless it satisfactorily appears that correction is required.—Haines v. Haines, 35 Mich. 138.

¶ 2185. A decree should not be reversed unless the appellate court is satisfied that it is wrong.—Sager v. Tupper, 42 Mich. 605.

§ 494. Decree without prejudice to other proceedings.

Where jurisdiction is lacking, see also ante ¶ 2180.
Amendment to dispose of cause without prejudice, see post ¶ 2323.

¶ 2186. The Supreme Court in dismissing a bill will do so without prejudice to further proceedings on the part of the complainant not inconsistent with its decision, where the legal questions presented had not theretofore been passed upon and there was much weighty authority in favor of complainant's contention which had been adopted by the circuit court in determining the law.—Nester v. Sullivan, 147 Mich. 493.

¶ 2187. A decree dismissing a tax title owner's suit to quiet title as against the owner who claimed that he was prevented from paying by the collector's misinformation, though reversible at complainant's instance because of the error of the trial court in allowing a collateral attack on the tax decree, will be reversed with leave to defendants to institute proceedings under the statute within a stated time, they having shown equity and having made their claims by collateral attack while that was not yet settled by the decisions of the Supreme Court.—Kneeland v. Hyman, 118 Mich. 56.

¶ 2188. Where a bill of complaint for an accounting of alleged partnership money is erroneously framed on the theory that a general partnership for engaging in real estate business existed, when it should have been framed on the theory of joint adventures, a decree granting relief to complainant should be reversed and a decree dismissing the bill without prejudice to complainant to institute proceedings for relief on the theory of joint adventure should be rendered.—Bush v. Haire, 197 Mich. 85.

¶ 2189. Dismissal of a bill for specific performance without prejudice to maintaining a new suit on a written contract was directed in the Supreme Court, where the bill was based solely on an oral contract, but the proof showed the existence of a written contract.—Levandowski v. Althouse, 136 Mich. 681.

§ 495. Decree as to nonappealing parties.

¶ 2190. Relief cannot be given on review to a party who does not complain of a judgment against him.—Ford v. Detroit Dry Dock Co., 50 Mich. 358.

¶ 2191. A defendant in error who has not himself brought a writ of error or assigned errors acquiesces in the judgment below and cannot ask to have it set aside or modified in his favor.—Guild v. Kidd, 48 Mich. 307.

¶ 2192. Where, in an appeal from a decree of the lower court dismissing a bill against several defendants, the appeal is not perfected as to one of the defendants, and the decision stands as to him, the upper court will not enter a decree in his favor.—Feuerstein v. Richter, 154 Mich. 312.

¶ 2193. A decree of the lower chancery court will not be modified in complainant's favor on an appeal by defendant where complainant does not appeal.—Herpel v. Herpel, 162 Mich. 606.

§ 496. Retention of all or part of cause.

Reserving questions, see post § 497.

¶ 2194. A bill by private individuals to restrain a railroad company from removing its tracks from the located line to the detriment of the community and themselves, they having contributed to a bonus to obtain such location, will not be retained by treating it as if the attorney general was a party plaintiff, and a rehearing allowed after decision on appeal adverse to such bill because he was not a party; where the record shows nothing indicative of his ever having been consulted about filing the bill and where nothing since hearing and before motion for rehearing has been done to cause him to intervene.—Henry v. Ann Arbor R. Co., 116 Mich. 314.

¶ 2195. On affirmance of a decree for a stockholder canceling stock sold by defendant corporation in fraud of his rights, a cross-bill by it for an accounting of credits taken on the corporate books for patents turned in by plaintiff should be retained as to that item, where it appears by a preponderance that the patents had already gone in against his original stock subscription.—Essex v. Essex, 141 Mich. 200.

§ 497. Reservation of questions.

Remand to lower court for further determination or with questions left open, see post §§ 512-516.

Retaining bill or part thereof, see ante § 496.

Leaving adjustment of interest to judgment below, see also post ¶ 2316.

Holding motion under advisement for inquiry of the facts below, see ante § 169, ¶ 724.

Construction of questions on retrial, see post § 563.

¶ 2196. Where, on a bill to redeem, redemption is allowed, and the case referred for an accounting with leave to take further testimony, the decree may be affirmed without a full examination of the transactions involved, until a later stage of the case, if it is clearly apparent from the record that complainant was entitled to the particular relief asked for.—Curtiss v. Sheldon, 47 Mich. 262.

¶ 2197. In a suit by an assignee to foreclose several mortgages and land contracts where some contracts have been mutually rescinded and one defendant, owner of some of the mortgaged premises, claims to be entitled to have the other mortgages and contracts first enforced, the case was remanded for the taking of further evidence as to the financial responsibility of the vendees and the consequent loss of security by the rescission of the contracts, before rendering decision on appeal.—Holliday v. Snow, 129 Mich. 494.

§ 498. Transfer from equity to law or law to equity.

¶ 2198. Where a case is improperly brought in equity instead of at law and decided by the trial court before the passage of Pub. Acts 1915, No. 314, Chap. XI, § 2, authorizing the transfer of cases to the proper side by the trial court when improperly brought in equity or at law, and such law is in effect at the time of the hearing before the Supreme Court, the bill will not be dismissed, but will be transferred to the trial court for further proceedings.—Flint v. Le Heup, 199 Mich. 41.

§ 499. Effect of appellate judgment or decree.

Of rehearing or of motion for it, see post § 549.

Construction of appellate judgment and opinion to ascertain law of the case, see ante XII. G, post XV.

Reversal opening case as to other parties, see post § 558.

Reversal for want of jurisdiction without prejudice to proper action, see ante ¶ 2180.

Effect of reversal on rights traced through judgment or decree, see generally Judgments, VII; and particularly topics treating of the rights claimed or title acquired, e. g., Executions, XIII; Judicial Sales; Foreclosure of Mortgages, IV, V; Chattel Mortgages, VII.

Implied contract to refund or reimburse, see Implied Contracts.

¶ 2199. On reversing a decision made under a state of the statutory law since changed by amendment of the procedural law, which amendment was designed to operate prospectively, the reversal will operate as of the time when the order under review was made.—In re Estate of Sanborn, 96 Mich. 606.

¶ 2200. Plaintiff sued four defendants. Against two who did not appear default was entered, and on trial before jury, judgment was rendered against all four defendants. The two defendants who appeared removed the case to the Supreme Court where the judgment was reversed. A remittitur was filed and a new trial had, with judgment for defendants, which was affirmed by the Supreme Court. Held, that the ultimate result of the issue was, as to those who did not appeal as well as to those who did appeal, no cause of action.—Hoeft v. Koch, 171 Mich. 564.

B. FINAL JUDGMENT OR REMAND.

§ 500. In general.

Particular circumstances and reasons for remand or final judgment, see generally post §§ 501-519.

Modification with final judgment as modified, see post XIII, C.

Remand with directions or leaving questions open, see post §§ 512-516.

Duty to try cause de novo on appeal, see ante XII, H.

¶ 2201. A new trial cannot be granted on reversal where all action below is set aside so that no issue of fact is left to be tried.—Smith v. Lloyd's Estate, 76 Mich. 619.

¶ 2202. In an action of garnishment where the questions involved were as to the validity of conveyances made by a debtor and alleged to be fraudulent because they hindered and delayed creditors, where no questions of fact are involved the court on reversing a judgment may enter the proper judgment without sending the case back for a new trial.—Wood v. Eldredge, 147 Mich. 554.

¶ 2203. In an action by executors upon promissory notes belonging to a testatrix's estate, the circuit judge found that the notes sued upon were executed by defendant, and delivered to the payee; that testatrix, at the time of her death, was the owner of the notes, and entitled to recover thereon; and that there was due on the notes the face amount thereof, with interest from their date at a stated rate. Defendant relied solely upon the alleged want of jurisdiction in the probate court to probate the will. Held, that if defendant had other grounds of defense which he considered fatal, he should have requested the court so to find, so that the entire controversy might have been settled upon this writ of error; and new trial will not be given, since he chose to rely upon the one point, but for which judgment would have been rendered by the court below for plaintiffs, and that judgment in their favor should be entered in the Supreme Court.—Rice v. Hosking, 105 Mich. 308.

¶ 2204. Where defendant in error has remitted the only erroneously included items in order to purge the judgment and verdict of error assigned and sustained, a case will not be remanded for a new trial on the ground that the verdict is still excessive—especially where it is uncertain from the record and the briefs of plaintiff in error that it is so.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

§ 501. Issues left open on pleadings or proofs.

¶ 2205. Though an amendment should have been allowed below, yet where no recovery can be had as the declaration stands, a new trial must be awarded.—Hamilton v. Powers, 80 Mich. 313.

¶ 2206. Upon affirmance of a decree dismissing a bill for the reformation of a contract so as to reduce the amount thereof and to enjoin an action at law for recovery on the contract, the Supreme Court will not enter a decree for the amount due on the contract, the pleadings not being framed to meet such case.—Andrus v. Scudder, 120 Mich. 502.

¶ 2207. On reversing a judgment on verdict directed for plaintiff on a sick benefit policy, because it appeared that he was not "necessarily, entirely and continuously confined to the house" during the period sued for, the case was sent back for a new trial where the court could not say that he was entitled to recover for none of the time.—Cooper v. Phoenix Accident & Sick Ben. Ass'n, 141 Mich. 478.

¶ 2208. Where it appears from an examination of the record in an action for breach of a written contract for the sale and installation of machinery by a foreign corporation not licensed to do business within the state, which contract defendant claims is void because such act of installation constitutes intrastate commerce, that there is no evidence as to the complex character of the work so as to show that the necessity of the work of installation by the seller is an essential requisite to the sale, and defendant has failed to set forth the facts upon which its defense is based in a notice attached to its plea, a judgment for plaintiff should be reversed and the case remanded for a new trial.—Power Specialty Co. v. Michigan Power Co., 190 Mich. 699.

¶ 2209. A decree of a trial court vacating a tax decree for the sale of land, in a proceeding for a writ of assistance, will be vacated, and the case remanded, the record showing that the petitioners were not allowed to offer evidence in support of their petition, as the record is insufficient.—Robert v. Loxley, 121 Mich. 63.

§ 502. Material evidence excluded.

¶ 2210. Where a finding of facts was not such as it would have been if certain evidence had not been erroneously rejected, the Supreme Court did not give final judgment on it, but ordered a new trial.—Starkweather v. Martin, 28 Mich. 471.

§ 503. Damages or amount not ascertained.

See also post ¶ 2291.

¶ 2211. The Supreme Court cannot assess the damages in law cases.—Johnson v. Ballou, 28 Mich. 379; Baylis v. Cronkite, 39 Mich. 413; Wiley v. Lovely, 46 Mich. 83; Carmichael v. Northwestern Mut. Ben. Ass'n, 51 Mich. 494.

¶ 2212. This court cannot in a case at law proceed to ascertain and assess the damages involved, no matter how well established may be their measure.—Wiley v. Lovely, 46 Mich. 83.

¶ 2213. Damages cannot be assessed here in a case at law, but must be found by the court below; and if not so found, or if the finding settles no basis of fact which will fix the amount, the Supreme Court has no means for entering judgment.—Carmichael v. Northwestern Mut. Ben. Ass'n, 51 Mich. 494.

¶ 2214. Where a judgment was made to cover interest and there were no data to show how much was due, the finding was treated on error as amounting to a mistrial.—Bell v. Ardis, 38 Mich. 609.

§ 504. Want of substantial damages or grievance.

¶ 2215. A case will not be remanded where the only error is the failure to award nominal damages, and where a judgment for such damages would not carry costs.—Haven v. Beidler Mfg. Co., 40 Mich. 287.

¶ 2216. New trial will not be granted unless the protection of substantial rights requires it, if the case is such that on new trial such damages only as are nominal and will not carry costs can be recovered.—Lewis v. Flint & P. M. R. Co., 56 Mich. 638.

¶ 2217. Where a man suffered serious injury as a remote consequence of being carried by his railway station in the night, the only direct injury being that he was obliged to walk an extra hundred rods, he was still allowed a new trial on reversal of a verdict for the remote injury, as it could not be said that damages for the direct injury would not carry costs.—Lewis v. Flint & P. M. R. Co., 56 Mich. 638.

§ 505. Want of necessary findings.

Damages not ascertainable, see ante § 503.

¶ 2218. Where the facts are not embodied in a finding, and the Supreme Court cannot therefore enter final judgment on reversal, a new trial is ordered.—Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111.

¶ 2219. Final judgment cannot be given by the reviewing court on findings that do not cover the whole case.—Briggs v. Brushaber, 43 Mich. 330.

¶ 2220. Judgment cannot be entered for the appellant upon reversal of a case not based upon findings or a verdict.—Schmid v. Village of Frankfort, 134 Mich. 619.

¶ 2221. Where a material question of fact was not submitted to the jury, but doubtless would have been had the judge been requested so to do, the Supreme Court, on reversing a judgment for plaintiff as not sustained on other grounds, will grant a new trial.—Bryan v. Straus Bros. & Co., 157 Mich. 49.

¶ 2222. Where, in answer to specific requests, only a part of the facts necessary to support the judgment are found, the case is not in shape for review, but is sent back to be retried, the proceedings being treated as a mistrial.—Adams v. Champion, 31 Mich. 233.

¶ 2223. Where a finding substantially decided that a claim was established, but left it doubtful whether or not it had been satisfied, it was held there had been a mistrial, and the case was remanded to be tried over.—Danaher v. Ward's Estate, 40 Mich. 300.

¶ 2224. Where the finding of facts is incomplete and insufficient, and where amended findings which should be made are denied, a new trial will be granted.—Sheldon Axle Co. v. Scofield, 85 Mich. 177.

¶ 2225. Final judgment for plaintiff cannot be entered on reversal of a judgment for defendant as against the weight of evidence, if there are no special findings of fact to support such a final judgment.—County of Montgomery v. Putnam, 135 Mich. 111.

¶ 2226. Where a case is tried without a jury and comes up without a finding of facts and is reversed upon a point analogous to a request to charge, a new trial must be ordered.—Biddle v. Wendell, 37 Mich. 452.

§ 506. ——Concession or waiver of findings.

¶ 2227. In a case tried without a jury questions of fact were submitted to the judge and answered by him, and he made findings on some questions of law, and exceptions were taken to findings of both classes. But no finding of facts was asked or made. Held, that the Supreme Court could not review the case, even upon a record containing the whole testimony, and that as both parties acquiesced in the irregular practice the

case would be treated as a mistrial.—Wildey v. Farmers' Mut. Fire Ins. Co. of Van Buren County, 49 Mich. 264.

¶ 2228. In a case tried by a judge without a jury certain specific speculative questions were submitted to him and exceptions taken to his answers. But no special finding was asked for or made. Counsel stipulated to dispense with formal proof of the items contained in their respective bills of particulars, but reserved their rights and objections in other respects, and on error asked the Supreme Court to review the answers made by the trial judge to the questions submitted, and thereon adjudicate the whole case. Held, that such practice was anomalous and unauthorized, and the case was treated as a mistrial.—Kinney v. Robison, 49 Mich. 247.

§ 507. Uncertain or ambiguous verdict or findings.

¶ 2229. Final judgment cannot be entered by this court in an action for conversion where there is no means of knowing how the jury made up their verdict.—Baylis v. Cronkite, 39 Mich. 413.

¶ 2230. In an action of trover for timber cut on two different sections of land, the title to which was so involved as to make a case of two distinct heads, the jury, in answer to special questions, found the value of the logs cut on the respective sections. The Supreme Court reversed the judgment on one branch of case, and held that there was no error on the other branch, but nevertheless declined to enter final judgment as to the logs covered thereby, as it did not appear how the jury had made up the amount of their verdict, and what they had included or rejected in finding it.—Johnson v. Ballou, 28 Mich. 379.

¶ 2231. New trial ordered on reversing a judgment rendered on a referee's report so defective that the court could not understand the merits.—Carroll v. Grand Trunk R. Co., 19 Mich. 94.

§ 508. Want of jurisdiction below.

¶ 2232. New trial is not granted on reversal if the lower court has no jurisdiction. Bush v. Meacham, 53 Mich. 574.

¶ 2233. Where plaintiff cannot recover under his declaration, and jurisdiction by attachment of a nonresident was obtained by an abuse of the process of the court a new trial will not be ordered on reversing judgment for plaintiff.—Webb v. Leominster Shirt Co., 101 Mich. 136.

§ 509. Cause of action barred, disproved or nonexistent.

No cause pleaded, see post § 511.
Reversal on weight or insufficiency of evidence, see also ante §§ 452-454.

¶ 2234. Where a judgment is reversed because of variance, and the cause of action which plaintiff's proofs tend to establish is barred by the statute of limitations, no new trial will be granted.—Fisher v. Radford, 153 Mich. 385. (Hooker, Moore and Ostrander, JJ., concurring in result, but finding variance in other particulars.)

¶ 2235. Where no right of action exists against a defendant, a new trial will not be granted on reversal of a judgment rendered for the plaintiff.—People v. Morrison, 75 Mich. 30; Flagg v. Chicago, D. & C. G. T. J. R. Co., 96 Mich. 30.

¶ 2236. New trial will not be granted on reversal of a judgment for the plaintiff in a suit upon a bond known by the parties, when given, to be illegal.—Cobbs v. Hixson, 75 Mich. 260.

¶ 2237. Where the facts disclose no cause of action new trial cannot be ordered, and a judgment against plaintiff must be affirmed notwithstanding prejudicial error against him.—Altman v. Fowler, 70 Mich. 57.

¶ 2238. A judgment for plaintiff in an action for commissions on the sale of pine land was reversed without remanding, where the court stated that from whatever phase the case was considered it showed by the plaintiff's own testimony an entire failure to find a purchaser within the terms of his employment.—Antisdel v. Canfield, 119 Mich. 229.

§ 510. New trial useless or hopeless.

¶ 2239. On reversal for a fatal defect in plaintiff's case (on error to judgment in a third trial), a new trial will not be ordered where it is not probable that a different case could be made thereon.—Mynning v. Detroit, Lansing & N. R. Co., 67 Mich. 677.

¶ 2240. Where a judgment for plaintiff is reversed because his case lacks a condition precedent to recovery, a new trial will not be ordered if it is clear that a different case cannot be made.—Wadhams v. Western Assur. Co., 117 Mich. 514.

§ 511. ——No cause of action stated.

Cause of action disproved or nonexistent, see ante § 509.

¶ 2241. No new trial will be awarded by the Supreme Court in reversing a judgment against plaintiff, where the declaration states no cause of action.—Delashman v. Berry, 21 Mich. 516.

¶ 2242. A new trial is not granted on reversal where the count of the declaration on which the verdict rests presents no cause of

action, even though the plaintiff might have recovered on some other count.—Dayton v. Fargo, 45 Mich. 153.

¶ 2243. A new trial will not be ordered for an error prejudicial to plaintiff where his declaration discloses no cause of action; but the judgment against him will be affirmed. —Altman v. Fowler, 70 Mich. 57.

¶ 2244. New trial on reversal is ordered pro forma, though the declaration be fatally defective, if error is not assigned on the defect.—Hart v. Brockway, 57 Mich. 189.

¶ 2245. Where plaintiff's claim is bad on its face no new trial is allowed when a judgment in his favor is reversed.—In re Hiscock's Estate, 79 Mich. 536.

¶ 2246. Where no recovery can be had under the bill of particulars, a new trial is not granted on reversal.—Sheldon v. Rounds, 40 Mich. 425.

§ 512. Remand leaving questions for trial court.

With directions for further action, see post §§ 513-516.

Reserving questions by appellate decree, see ante § 497.

Passing questions because unnecessary or likely to be eliminated on retrial, see ante §§ 261-266.

¶ 2247. Where a bill of complaint was dismissed, without the taking of proofs, under a misapprehension of the rights of the parties, and the property in controversy was already in the hands of a receiver, and all charges of fraud were denied by the answer, the Supreme Court upon reversing and remanding the cause, refused to pass upon the matter of the appointment of a new receiver, but left the same for determination by the lower court.—Albion Malleable Iron Works v. First Nat. Bank, 116 Mich. 218.

¶ 2248. The question of costs in appeal cases is largely in the discretion of the court, but on reversal of an action for official misconduct of a justice of the peace, where the judgment in favor of the plaintiff may be largely increased on a new trial, the question is not of much consequence, and the case will be remanded for a new trial, leaving it for the circuit to decide on retrial what should be allowed by way of damages for costs expended in rectifying the wrong done.—Cagney v. Wattles, 121 Mich. 469.

§ 513. Remand for further determination.

Correction without reversal, see post §§ 526, 527.

Reserving questions in appellate decree, see ante § 497.

Delay in seeking rehearing and remand for further proof or review, see post ¶ 2351.

Grounds for rehearing and remand for bill of review, see post ¶ 2340.

Denial of remand to hear motions below as penalty for delay, see also ante ¶ 618.

¶ 2249. The proofs will not be opened in the appellate court; but where a proper case is made out for a rehearing upon new evidence the cause will be remanded to the court below with proper directions for a rehearing there.—Adams v. Field, 25 Mich. 16.

¶ 2250. When a case of accounting is brought to the Supreme Court without any regular accounting having taken place below the court will refuse to hear it, and will remand it for proper proceedings.—Barnebee v. Beckley, 43 Mich. 618.

¶ 2251. Where a cause was heard on pleadings and stipulations which did not set out in terms documents necessary to be considered, the decree was vacated and the cause remanded for such further proceedings as should remedy the deficiencies.—Wilkins v. City of Detroit, 46 Mich. 120.

¶ 2252. Complainant, as remainderman, secured a decree on her bill in the lower court enjoining the sale of land to pay a drain tax. The tax was in form levied on the north sixty acres of the quarter section in question, but had by mistake been returned to the auditor general as levied upon the entire quarter section. After the appeal, the defendant auditor general produced evidence to show that the board of county supervisors had reassessed the tax and that the life tenant had paid it. Held, the case should be remanded to the lower court to have this question of fact determined.—Klotz v. Chatfield, 163 Mich. 86.

¶ 2253. On a bill to obtain a decree declaring complainant entitled to an interest in letters patent issued to defendants, a decree was entered for complainant, and defendants appealed. Subsequent to the appeal, a motion was made by defendants to remand the case for the purpose of taking testimony showing that defendants had filed an application in the patent office covering an improvement upon the invention in controversy, that a brother of complainant had filed an interference which was pending in the patent office, in which interference the complainant was attorney for his brother, and had taken a position wholly inconsistent with the testimony which he gave in the pending suit. Held, that the cause should be remanded for the purpose of permitting defendants to put in the testimony referred to, and with leave to complainant to reply thereto.—Barthel v. Crippen, 156 Mich. 20.

¶ 2254. On reversing a dismissal of a bill for accounting by a guardian, which dismissal was based on the erroneous ruling that there was no competent evidence of the receipt of moneys by the alleged guardian, a decree was entered sustaining the right to an accounting, but remanding the case to the trial court with defenses left open, and permitting a surety joined to the suit to amend by pleading the statute of limitations. —Murphy v. Cady, 145 Mich. 33.

¶ 2255. On appeal from a foreclosure decree because of the taking of proofs in open court without the notice thereof, required by Comp. L. 1897, § 10188, where the objection was technical and without equity, and the only matter not admitted by the pleadings was an amount paid for taxes after date of the bill, the decree was affirmed as to the admitted principal and interest notwithstanding the error and remanded with leave to take additional proofs as to the taxes.—Hoock v. Sloman, 145 Mich. 19.

¶ 2256. Where, in an action to set aside tax deeds because taken by defendant in his own name while in possession under an agreement with the agent of the owner, to pay the taxes for him, the connection of the agent with the owner was not, through some oversight, established by the evidence, the case was remanded with leave to complainant to supply the missing proof.—Day v. Davey, 132 Mich. 173.

¶ 2257. Where, on an appeal in a suit brought to declare a deed absolute in form to be a mortgage, it appears that, while the complainant has established her claim, the record is not sufficiently full to justify the entry of a decree without an accounting as to the amount due the grantee, the case will be remanded for such an accounting.—McArthur v. Robinson, 104 Mich. 540.

¶ 2258. In a suit by the administrator and heirs of an insane decedent against the wife and children of a deceased guardian of decedent to marshal the assets of the estate and to bring such assets into the probate court for distribution according to law, where the bill charged fraud by the guardian in having decedent declared insane, in failing to keep books of account, in failing to file an inventory or any account in the probate court, in procuring quitclaim deeds of the interests of children of the ward during her lifetime and deeding such property to his wife and children, and defendants by cross-bill claimed the benefit of the acts of the guardian and ownership of all the property, including funds in the hands of the administrator, held that in view of the complexity of the questions and inadequacy of the pleadings the case should be heard on its merits in the lower court, and that demurrers to the bill and cross-bill should be overruled and the case remanded with directions to file proper pleadings to bring the case to an issue.—Elwell v. Pierce, 200 Mich. 479.

§ 514. ——Direction to limit issues.

¶ 2259. On reversal the Supreme Court cannot limit the trial de novo to any particular question to the exclusion of any competent testimony material to the issue and authorized by the pleadings.—Macatawa Transp. Co. v. Firemen's Fund Ins. Co., 179 Mich. 443.

§ 515. Remand for revivor or amendment.

Amendment as to parties on appeal, see post § 523.

Amendment on entering final judgment, see post § 522.

Amendment of appellate judgment to allow remand for amendment below, see post § 534, ¶ 2318.

Remission of record for amendment or further action without review, see ante §§ 118, 143.

Remand on appeal from order made on motion to dismiss bill, see Jud. Act, Chap. L, § 18; Comp. L. 1915, § 13753.

¶ 2260. Where plaintiff died after a referee had found in his favor, and judgment was rendered on the finding without reviving the cause, the Supreme Court, on affirming the judgment remanded it for revivor.—Botsford v. Sweet, 49 Mich. 120.

¶ 2261. On reversing a decree for want of a necessary party, the Supreme Court granted leave to amend the bill, and remitted the cause for further proceedings.—Palmer v. Rich, 12 Mich. 414; Folkerts v. Power, 42 Mich. 283.

¶ 2262. Where a bill in equity, filed by the holder of mortgages supposed to be void, claimed an equitable lien in the nature of a mortgage, and the record showed that the parties had gone fully into their equities, that the proofs were all in, that there was no conflict on the facts constituting the complainant's case, and that the case that would have been made on a foreclosure bill was fully before the court, the record was remanded by the appellate court, with leave to so amend the bill as to pray a foreclosure of the mortgages in case they were adjudged valid.—Church v. Holcomb, 45 Mich. 29.

¶ 2263. Where complainant had stated a case not entitling him to relief, but on cross-bill an issue had been made which allowed the whole equities of the parties to be shown, and it appeared from the evidence that the complainant should have relief, the Supreme Court, on appeal, instead of dismissing the bill, ordered the case remanded, with leave to complainant to amend without prejudice to the proofs taken.—Morgan v. Palmer, 13 Mich. 367.

¶ 2264. On case made a judgment rendered on a finding that is not specific enough to show whether it is correct may be reversed without costs to give opportunity for correcting the record.—Cram v. Stiles, 47 Mich. 129.

¶ 2265. On error from a judgment taken on default in a suit begun by declaration, it appeared that no proof showing service was on file at the time default was entered, and that a return subsequently made failed to show service of notice of the rule to plead. Defendant asked that, on reversal, judgment be entered in his favor. Plaintiff asked that the record be remanded to allow him to apply for leave to file an amended return. Held, that reversal and remand was the proper practice.—Anderson v. Cole, 114 Mich. 637.

¶ 2266. A contention that a deed obtained on a tax sale is invalid because the grantees did not pay taxes then a lien on the property, cannot be considered when made for the first time on appeal; but leave will be granted to the petitioner objecting to the validity of the tax deed under such circumstances, to have the case remanded with leave to file an amended petition, and a rehearing, upon the payment of costs.—Hall v. Mann, 118 Mich. 201.

§ 516. Remand with directions for judgment and execution.

Correction on record without reversal, see post § 526.
Construction of directions, see post § 563.
Remand of ejectment cause for writ of possession, see Jud. Act, Chap. XXIX, § 55; Comp. L. 1915, § 13222.

¶ 2267. The prohibition of the sale of liquor within a certain district in Ann Arbor by Local Acts 1903, No. 543, passed after the suit was brought to the Supreme Court, justifies the remanding of a case to the lower court to vacate an order granting mandamus to compel the common council to approve a liquor bond for that district.—Rose v. Common Council of Ann Arbor, 134 Mich. 102.

¶ 2268. Where in an appeal on stipulated facts a judgment for defendant is reversed, and only a question of law is involved, the Supreme Court will order no new trial, but will on plaintiff's motion order the lower court to enter judgment for plaintiff.—Brown & Brown Coal Co. v. Antezak, 164 Mich. 110.

¶ 2269. Where a bill to enjoin an ejectment suit and to quiet title is taken as confessed against three of the defendants and is dismissed by the Supreme Court as to the rest, a decree will be entered by the Supreme Court sending the cause back to enable the complainant to have a decree entered by the trial court against said three defendants.—Vincent v. Evans, 165 Mich. 695.

§ 517. On case made.

See also ante ¶ 2264.
Modification and affirmance, see post § 524.

¶ 2270. On case made after judgment for review upon the facts, the Supreme Court cannot send the case back for a new trial.—Barman v. Carhartt, 10 Mich. 338.

¶ 2271. Though the record shows that judgment below should have been for the party against whom it was rendered, yet if the case does not show that it is brought up for review upon the facts, the Supreme Court cannot render such judgment as the court below should have given, but can only order a new trial.—Brown v. Cady, 11 Mich. 535.

§ 518. On case submitted on agreed facts.

¶ 2272. When a case has been submitted below on an agreed state of facts, a new trial will not be granted upon a reversal of judgment.—Harrington v. Hilliard, 27 Mich. 271.

§ 519. On appeal from judgment on arbitration.

¶ 2273. Where land matters not subject to arbitration were so mixed up with the other matters submitted that no settlement would be perfect without passing upon the question of their ownership, and the arbitrators were no longer impartial, the Supreme Court, upon setting aside a judgment based upon the award, declined to remand the case for further action.—Gallagher v. Kern, 31 Mich. 138.

C. MODIFICATION OR CORRECTION OF JUDGMENT.

§ 520. In general; affecting nonappellants.

Affirmance on condition of correction or reduction in amount, see ante §§ 484, 485.
Affirmance in part and reversal in part, see ante § 486.
Allowing offsets without changing decree, see post § 521.
Right to urge errors affecting nonappellant, see ante §§ 219-222.
Amendment of or relief from appellate judgment, see post XIII, F.

¶ 2274. A decree cannot be modified, or its amount increased, to appellant's prejudice, in favor of a party who has not appealed.—McCabe v. Farnsworth, 27 Mich. 52; Proctor v. Robinson, 35 Mich. 284; Brown v. Bronson, 35 Mich. 415; Match v. Hunt, 38 Mich. 1; Heath v. Waters, 40 Mich. 457; Bundy v. Youmans, 44 Mich. 376; Hoff v. Hoff, 48 Mich. 281; Hopkins Mfg. Co. v. Ruggles, 51 Mich. 474; Chadwick v. Chadwick, 59 Mich. 87.

¶ 2275. A decree in foreclosure cannot be changed in favor of the defendants when they have not appealed.—Foster v. Malone, 45 Mich. 255.

¶ 2276. Relief beyond that afforded by the decree below cannot be granted to a nonappellant.—Harrington v. Upton, 78 Mich. 28.

¶ 2277. One who does not appeal from a decree in his favor cannot be allowed additional relief on an appeal by his opponent.—Campbell v. Smith, 103 Mich. 427; Bowman v. Gork, 106 Mich. 163.

¶ 2278. Where defendant fails to appeal the decree cannot be revised so as to increase the sum to be paid to him.—Millard v. Truax, 73 Mich. 381.

¶ 2279. An item disallowed below cannot on appeal be allowed in favor of a nonappellant.—Lamont v. LaFevre, 96 Mich. 175.

¶ 2280. A defendant interested only as a subsequent incumbrancer, and appealing alone, has a right to have the decree altered by striking out the amount of an attorney's fee improperly allowed, even though the alteration operate incidentally to the benefit of the other defendants who have not appealed, and the value of the property exceeds the amount of the liens upon it.—Hardwick v. Bassett, 29 Mich. 17.

¶ 2281. On an appeal from a decree dismissing a judgment creditor's bill, the Supreme Court can determine the claims of an appealing defendant impleaded as holding securities belonging to a principal defendant, but claiming them in complainant's interest and against the owner's will and with no lien upon them, the other defendant not objecting.—Brown v. Vandermeulen, 44 Mich. 522.

§ 521. Offsets affecting nonappellant.

¶ 2282. If items claimed below by a nonappellant were erroneously rejected they may be offset against changes made above in appellant's favor.—Grant v. Merchants' & Manufacturers' Bank of Detroit, 35 Mich. 515; Robertson v. Gibb, 38 Mich. 165; Lambert v. Griffith, 44 Mich. 65; Bundy v. Youmans, 44 Mich. 376; University of Michigan v. Rose, 45 Mich. 284.

¶ 2283. A decree for complainant in an action for an accounting, will not be decreased because of an error in giving him a credit to which he was not entitled where such amount is offset by an excessive credit given defendant through an error in computation, though complainant has not appealed.—Snyder v. O'Beirne, 132 Mich. 340.

§ 522. As to amendments or further pleadings.

Remand for amendment, see ante § 515.

Amendments and additional records on appeal, see ante XI, F.

¶ 2284. Where a bill was dismissed without prejudice to the complainant's right to file a new bill based on the facts set up and admitted in defendant's answer, and it appeared from the testimony of the defendant in the case that a ground for relief existed, which was only contingently admitted in the answer, held, that the decree dismissing the bill should be so modified as to allow the complainant to amend his bill in accordance with the facts sworn to by defendant, and that on such amendment a decree for the appropriate relief should be entered.—Babcock v. Twist, 19 Mich. 516.

¶ 2285. The fact that the complainant in a bill for the specific performance of a contract for the conveyance of land failed to aver a willingness to pay a mortgage upon the land, to which payment he was bound by the contract sought to be enforced, will not on appeal sustain a decree of the circuit judge wholly denying to the complainant the relief to which, but for the omission, he would have been entitled; since an amendment may be allowed in the Supreme Court to remedy the defect.—Palmer v. Palmer, 114 Mich. 509.

¶ 2286. Where the answer to a bill for an injunction to restrain the opening of a new right of way over complainant's land in lieu of the one used by defendant asks simply for a dismissal of the bill and fails to ask for affirmative relief so as to authorize a decree establishing the new right of way, subject to right of complainant to a passage across it, the Supreme Court, upon dismissing the bill, may direct that the pleadings be amended so as to conform with the proofs and so as to ask for affirmative relief, although the trial court granted such relief without amendment of the answer over objection of complainant.—Whitman v. Cook, 191 Mich. 453. (Equally divided court.)

¶ 2287. Where the final decree in an assignment case provides for a distribution of the funds in the hands of the receiver arising from the sale of the assigned property in disregard of the right of the assignor to exemptions, the decree will be so modified on appeal as to permit him to apply for an allowance for exemptions, notwithstanding the claim therefor was not made at the hearing below.—Burnham v. Dillon, 100 Mich. 359.

§ 523. As to parties to judgment.

Modification to impose costs on survivor, see post ¶ 2296.

¶ 2288. Where verdict in replevin is against plaintiff, error in entering judgment

in favor of all defendants, whereas it should have been in favor of one, does not necessitate a new trial, but judgment for the proper defendant may be entered.—Whitney v. Hyde, 91 Mich. 13.

¶ 2289. Where, on certiorari from justice's court, the judgment of affirmance runs by inadvertence in favor of the next friend in his individual capacity, and the only complaint made by defendant is that the judgment will not preclude the infant from bringing another suit, he should have asked the circuit court to amend the judgment, and on affirmance of the circuit court judgment the amendment will be directed to be made.—Kees v. Maxim, 99 Mich. 493.

¶ 2290. Where, after trial of suit against principal and sureties in a bond, principal died and an order reviving suit against his administrator was entered without objection, and judgment was rendered in favor of surviving defendants and such administrator, writ of error, on reversal in Supreme Court, was dismissed as to administrator, and judgment entered against surviving defendants.—Healy v. Newton, 96 Mich. 228.

§ 524. As to amount or relief given.

See also Divorce, VII, X, E.

Reduction as condition of affirmance, see ante § 485.

Correction on record without reversal, see post § 526.

Modification to comply with directions in former appellate decree, see post ¶ 2391.

¶ 2291. Where certain items of damages allowed to be recovered by plaintiff in replevin were improper, the Supreme Court will not reduce and affirm the judgment instead of reversing it entirely, if the record does not show upon what theory the jury proceeded in awarding damages.—Riley v. Littlefield, 84 Mich. 22.

¶ 2292. Where in an action upon an insurance policy the jury disregarded the instruction of the court limiting the loss recoverable under a certain clause of the policy to a sum less than that covered by the clause, and the jury rendered a verdict for the greater amount, and no application was made to the trial court to correct the error, the judgment will not be reversed, but will be corrected by making the necessary deduction.—Tubbs v. Dwelling House Ins. Co., 84 Mich. 646.

¶ 2293. Where, in a suit for the violation of a penal statute, which imposes a penalty not exceeding a given sum for such violation, the proofs establish the offense, and a verdict is directed for the full amount of the penalty, and on error plaintiff files a writing waiving the recovery of the amount of the penalty above six cents, and remitting the excess, the judgment will be modified to that extent, and affirmed.—Hines v. Darling, 99 Mich. 47.

¶ 2294. Where the only legal objection to a judgment rendered against the appellant and his surety on an appeal from justice's court is that is exceeds the penalty of the appeal bond, the judgment will be modified, as to the surety, by rejecting such excess, and, as modified, affirmed.—Vreeland v. Loeckner, 99 Mich. 93.

¶ 2295. On case made where the only error appearing is that the judgment is excessive, the Supreme Court may correct it by reducing the amount to the proper sum as shown by the record.—Walrath v. Campbell, 28 Mich. 111.

§ 525. As to costs.

¶ 2296. On reversing a judgment for plaintiffs, where a suggestion of death of one of them was made after judgment on error, the judgment in so far as it allowed costs was modified so that the costs would run against the surviving plaintiff.—Seymour v. Bruske, 140 Mich. 244.

§ 526. Correction on record without reversal.

See also post § 527.

¶ 2297. It is the practice of this court to refrain from ordering new trials where the record is such as to enable the court to eliminate errors and to render a judgment for the items regarding which error is shown.—Sloman v. Mercantile Credit Guarantee Co., 112 Mich. 258.

¶ 2298. On error to judgment of debt on an arbitration bond to pay an award, a mistake of $6.13 made in computing interest, the award being for a fixed sum, could be corrected from the record itself, and was no ground for reversal.—James v. Schroeder, 61 Mich. 28.

¶ 2299. An error in allowing a small item of an account, probably resulting from oversight, may be corrected by a reduction of the amount of the judgment.—Beard v. Hoffman, 133 Mich. 624.

¶ 2300. An error of the trial court in permitting interest to be given upon a note for too long a time can be remedied by a mere computation, and does not require the case to be sent back for a new trial.—In re King's Estate, 94 Mich. 411.

¶ 2301. On appeal from a judgment in a case, in which one of the defendants has failed to plead, but the plaintiff has neglected to file an affidavit thereof, under How. St., § 7636, the defendant's default for not plead-

ing may be entered nunc pro tunc by the Supreme Court to save the verdict and judgment.—Steers v. Holmes, 79 Mich. 430.

§ 527. Correction of clerical errors.

¶ 2302. The Supreme Court on appeal may correct a mere clerical error of computation as to the amount of a judgment.—Moden v. Superintendents of Poor, 183 Mich. 120.

§ 528. In cases on certiorari from justice.

¶ 2303. Since the circuit court was required by Comp. L. 1871, § 5477, to give judgment as the right of the matter might appear, this court can render the proper judgment in a case brought to the circuit court on certiorari and taken up on error; but if the plaintiff in error has received too favorable a judgment below, and the other party does not complain, it can only affirm the judgment, though it may give costs to the defendant in error.—McClatchie v. Durham, 44 Mich. 485.

D. DIVISION OF OPINION.

§ 529. Decision by majority.

Dissenting opinions, see Jud. Act, Chap. I, §§ 5, 30; Comp. L. 1915, §§ 12010, 12035.

¶ 2304. Where only seven judges participate in a decision, the conclusion of four of them shall be held not only to dispose of the property in question, but to settle the law.—Dolph v. Norton, 158 Mich. 417.

¶ 2304a. By statute the Supreme Court of Michigan consists of eight justices, five constituting a quorum. Held, that where five justices concur in an opinion, no dissenting opinion being offered, the formal decree may be settled and entered by three of the five.—Scott v. Sullivan, 164 Mich. 467.

§ 530. Affirmance by equal division.

Equal division, see Jud. Act, Chap. I, § 26; Comp. L. 1915, § 12031.

¶ 2305. Where the Supreme Court is equally divided the judgment below is affirmed.—Hoffman v. Harrington, 28 Mich. 90; Marquette & O. R. Co. v. Taft, 28 Mich. 289; Sands v. Finan, 88 Mich. 616.

¶ 2306. In an action to determine the rights to the proceeds of an insurance policy, a decree of the circuit court finding the sale to be for security only, was affirmed by a divided court, the only question involved being sufficiency of the evidence.—New York Life Ins. Co. v. Preston, 142 Mich. 232.

¶ 2307. In an action by the owner of an automobile to recover for injuries sustained as the result of being struck by defendant's train at a street crossing, judgment affirmed as by a divided court.—Garland v. Michigan Cent. R. Co., 196 Mich. 695.

¶ 2308. In an action by a farmer against the owner of a bull and one who had charge of it on his own premises to recover damages for getting one of plaintiff's heifers with calf while at large on plaintiff's premises, a judgment for plaintiff was affirmed by divided court.—Hosley v. Bamber, 199 Mich. 655.

§ 531. ——On different grounds from those below.

¶ 2309. Where the court is equally divided on a question, the decision of the lower court is affirmed although the justices for affirmance give a different ground for their opinion from that of the lower court.—Scharman v. Bay County Bridge Commission, 158 Mich. 77.

§ 532. Effect of diversity of opinions.

Majority of quorum as deciding vote, see ante § 529.

Effect on law of the case on retrial, see post § 554.

Dissenting opinion on quorum decision as ground for rehearing, see post § 544.

Effect on value of opinion as precedent, see Courts, IV.

¶ 2310. It is the practice in this state to regard judgments of the Supreme Court entered of necessity and not by a concurrence of the opinions of the justices as the same in effect as a judgment entered by a vote of the majority of the justices.—Gourlay v. Ins. Co. of North America, 189 Mich. 384.

¶ 2311. The conclusiveness of a judgment affirmed by operation of law in case of the justices of the reviewing court being equally divided in opinion is not affected by the fact that the judgment was entered on demurrer.—Gourlay v. Ins. Co. of North America, 189 Mich. 384.

E. AMENDMENTS OF, OR RELIEF FROM APPELLATE DECREE OR JUDGMENT.

§ 533. In general; time or stage of the cause.

Motion to dismiss made after judgment on error, see ante § 145, ¶ 627.

Disability of trial court to grant relief, see post § 564.

Power of court respecting amendments to record, see also ante § 240.

Granting amendment on rehearing, see post § 550.

Time for application for rehearing, see post § 546.

Amendment or modification of judgment under review, see ante XIII, C.

¶ 2312. Where a judgment rendered in the circuit court in favor of a plaintiff in certiorari who had given bond simply to pay any judgment rendered against him in the circuit court has been reversed in the Supreme Court, and where, upon the judgment entered in the latter court, execution has been taken out, it is too late to ask that the judgment entry in the Supreme Court be changed so as to empower the circuit court to enter judgment against the surety in such bond; the proper practice would have been to ask for a new bond in the circuit court.—Stoll v. Padley, 100 Mich. 404.

¶ 2313. If judgment overruling a demurrer is sustained in error, the court cannot thereafter remit the case with leave to withdraw the demurrer and plead over.—Farwell v. Fox, 19 Mich. 10.

¶ 2314. The Supreme Court has no power, after hearing, to correct, on its own motion, errors in the record.—People v. Grand Rapids & W. Plank Road Co., 64 Mich. 618.

§ 534. Occasion or ground for relief.

¶ 2315. A decree of the Supreme Court may, on motion, be amended so as to correct a mistake of the date from which interest should be allowed.—Crawford v. Osmun, 90 Mich. 82.

¶ 2316. The Supreme Court, having set aside a judgment entered nunc pro tunc, will not modify its order so as to allow the judgment to stand as of the date actually entered, for the sake of saving to the party his interest upon the judgment, inasmuch as interest may be saved in the entry of a new judgment.—Detroit v. Wayne Circuit Judge, 109 Mich. 12.

¶ 2317. Where the decree of the Supreme Court awarded a money judgment against a corporation and its surety on an appeal bond, limiting the liability to the amount of the bond and providing that the decree should constitute a claim against the property of the corporation, but not making it a preferred claim on the assets of the corporation, which had afterwards become insolvent and gone into the hands of a receiver, the Supreme Court will neither modify the decree by making the claim a preferred one, nor grant a rehearing on the application of the surety company, which for a consideration had given its undertaking to pay the decree or the penalty of its bond, it having no claim to a preference or to be relieved from its obligation at the expense of the creditors generally.—Sparrow v. E. Bement & Sons, 146 Mich. 326.

¶ 2318. An order overruling a demurrer to a bill was reversed on appeal. The bill was dismissed, instead of being sent back for amendment, on the ground that its allegations of fraud were insufficient. A motion was made by complainant before the Supreme Court to amend the decree, substituting for the order of dismissal an order that the cause be remanded with leave to the complainant to file an amended bill, the application being based on new allegations of fraud. Held, the motion should be granted.—Macomber v. Cottrell, 162 Mich. 718.

§ 535. ——Laches.

In application for rehearing, see post § 545.
In seeking leave to apply to trial court for rehearing, see post § 545, ¶ 2348.

¶ 2319. Where a party to a bill for partition consented that it be dismissed as to him, and the case as to the others went to decree, and the case was afterwards appealed to the Supreme Court, that court refused to arrest the proceedings for his relief and remit the cause to make him a party and allow him to plead, there being no showing of mistake or fraud, and he having had ample time to apply for relief in the court below and failed to do so.—Campau v. Campau, 19 Mich. 180.

¶ 2320. A decree of foreclosure and sale in the Supreme Court was signed January 7, 1911, and by clerical error required the mortgagors to pay the sum decreed by January 5, 1911. The statute gave the right to redeem within six months after sale. The decree expressly provided that defendants, at any time before the date set for sale of the premises, might, by paying instalments in default and costs, be reinstated under the mortgage. Defendants discovered said error January 23, 1911, but did not call the court's attention to it. The sale did not take place until after the decree was settled. Held, defendants had ample notice and time to redeem and the decree should not be disturbed on rehearing.—Union Trust Co. v. Electric Park Amusement Co., 168 Mich. 574.

¶ 2321. No formal notice was given defendant mortgagor's solicitor of the filing in the Supreme Court of a decree of foreclosure and sale or of the steps taken to advertise and sell. The record showed he had actual notice and was fully advised thereof in ample time to protect defendant's rights. The first published notice of sale was seen by him two days after its issue. He was served with notice of taxation of costs before sale. A person from his office attended the sale and took memoranda thereof. He was notified of the commissioners' report of sale and filed exceptions thereto. Held, upon rehearing, the decree of the Supreme Court for foreclosure and sale should not be disturbed.—Union Trust Co. v. Electric Park Amusement Co., 168 Mich. 574.

§ 536. Discretion to grant relief.

Relief grantable on rehearing, see post § 550.

¶ 2322. On appeal from an order sustaining a demurrer to a bill of complaint the court may, in their discretion, after affirming the ruling, permit an amendment to the bill, or dismiss the latter without leave to amend. (Pub. Acts 1909, No. 299; Comp. Laws 1897, § 549; How. St. (2nd Ed.), § 12071.)—Macomber v. Cottrell, 173 Mich. 352.

§ 537. Protection of third persons.

¶ 2323. An order discontinuing a writ of error in a suit involving title to land, entered on stipulation signed after some of the plaintiffs in error had assigned their interest in the land to a third person and without authority from him, was amended on his petition so as not to prejudice his right to proceed in the court below for the protection of his interest.—Woodman v. Missionary Soc. of M. E. Church, 124 U. S. 161, 31 L. ed. 352, 8 Sup. Ct. Rep. 416.

XIV. REHEARINGS AND PROCEDURE THEREON.

§ 538. In general; grounds.

Matters considered on the rehearing, see post § 548.

Effect of delay, time to apply, see post §§ 545, 546.

Various specific grounds, see also post §§ 539-544.

Reargument of cause, see ante § 239.

Rehearings in equity generally, see Equity, XI.

¶ 2324. A rehearing on the same facts and legal controversy will not be granted unless there has been some very peculiar assumption or defect on the first hearing by which court and parties have been misled. —Brown v. Brown, 64 Mich. 82; People for Use of Holmes v. Cotteral, 115 Mich. 43.

¶ 2325. The Supreme Court cannot ordinarily be depended upon to go outside of the printed record and briefs to ascertain what question may be involved in any case, and cannot give parties a rehearing when they have not seen that the case was properly presented.—Auditor General v. Hill, 98 Mich. 326.

¶ 2326. Rehearing will be denied unless the court's attention is directed either to a misapplication of the law, or to something in the record or briefs that has been overlooked and is material to a proper disposition of the case.—Smith v. Walker, 57 Mich. 456.

¶ 2326a. The fact that the Supreme Court of the United States had decided a case a few days earlier than the case at bar was decided but reported subsequently involving Federal questions decided at bar and established a different test of the liability of the directors of a national bank for participating in alleged false official reports to the comptroller of the currency, is no ground for a rehearing where that case does not touch the principal grounds upon which the case at bar was decided, although such test must be considered to be the law in further proceedings.—Smalley v. McGraw, 148 Mich. 384.

¶ 2327. The fact that the brief of one party on appeal was inadvertently lost after filing, will not entitle him to a rehearing where an examination of the brief convinces the court that its conclusion would be the same as on the prior hearing.—Dowagiac Mfg. Co. v. Corbit, 127 Mich. 473.

§ 539. New points.

Points covered by settled law, see post § 540.

¶ 2328. Rehearing is not granted to allow argument on a question that has been investigated by the court, but not argued before nor discussed in the opinion.—Hutchins v. Kimmell, 31 Mich. 126.

¶ 2329. A question neither raised nor argued on the original hearing of a case will not be considered on rehearing.—Lagden v. Concordia Mut. Fire Ins. Co. of Bay, Saginaw, and Arenac Counties, 188 Mich. 689. (Stone, C. J., and Ostrander, J., dissenting.)

¶ 2330. A rehearing will be denied where the points upon which it is asked were substantially covered by the court on the hearing.—Wilcox v. Toledo & A. A. R. Co., 45 Mich. 280.

§ 540. Points not discussed or answered.

¶ 2331. Where a question raised by the record, but not argued before, has, nevertheless, been investigated by the court, though not discussed in the opinion delivered, a rehearing will not be granted for the purpose of giving an opportunity of arguing it, where the argument on the motion for rehearing does not present the subject in any different light than that in which it was considered. —Hutchins v. Kimmel, 31 Mich. 126.

¶ 2332. It is not a ground for rehearing that the court has omitted to pass on one of the contentions made by counsel in the brief if the point has already been squarely decided and becomes the settled law of the state; so that it cannot be material to the case or of instruction for the future.—Detroit National Bank v. Blodgett, 115 Mich. 160.

¶ 2333. Where a case was submitted upon the understanding that the former rule that

the failure to except to the refusal of requests to charge precluded a review of such requests was still in force, Pub. Acts 1901, Act No. 52, providing that error may be assigned upon the refusal to give requests, without the taking of an exception, having been overlooked, the court on rehearing examined the refused requests.—Finkbinder v. Ernst, 135 Mich. 226.

§ 541. Mistake or misapprehension.

Points overlooked, see ante §§ 538-540.
Cause submitted under misapprehension as to rules applicable and not discussed, see ante ¶ 2333.
Ground for correction of appellate judgment, see ante § 534.

¶ 2334. Where, in the opinion as filed, a fact essential to sustain the conclusion reached by this court is by mistake stated to have been specially found by the jury, but upon the whole record it is clear that such fact was necessarily found in the general verdict, rehearing asked on ground of such mistake is denied.—Johnston v. Davis, 61 Mich. 278.

¶ 2335. Though the opinion of the Supreme Court erroneously states that a certain question of fact was submitted to the jury below, rehearing will be denied if a review of the record shows that the question was one of law and rightly decided.—Cobbs v. Fire Ass'n of Philadelphia, 68 Mich. 465.

¶ 2336. An inadvertent misstatement of fact in narrating in the opinion the facts of the case will not be ground for a rehearing, where it was immaterial because the decision was right notwithstanding.—Roff v. McCreery, 190 Mich. 391.

§ 542. New evidence or proofs.

¶ 2337. An application for a rehearing, based upon a showing of facts that were already upon the record, or that would not materially alter or add to the case made on the first hearing, will be denied.—Taylor v. Boardman, 24 Mich. 287; Ryerson v. Eldred, 18 Mich. 490.

¶ 2338. Rehearing in the Supreme Court is denied if no new evidence requiring consideration has been found since the decision of the case.—Thompson v. Jarvis, 40 Mich. 526.

¶ 2339. Proceedings will not be stayed to permit an application for a rehearing on the ground of newly-discovered evidence, where the statement of the proposed new evidence is very vague, and indicates nothing more than cumulative testimony that cannot fairly be called newly-discovered evidence.—Case v. Case, 26 Mich. 484.

¶ 2340. The denial of a petition for rehearing of a case in the Supreme Court and to remand the case to the circuit court in order to allow the introduction of additional testimony or a bill of review on the ground of newly-discovered evidence is proper where such testimony is merely cumulative and, even if admitted, there would be no different results.—Frohlich v. Aikman, 201 Mich. 64.

§ 543. Causes affecting membership or qualifications of the court.

¶ 2341. Rehearing of a case decided on appeal will not be granted on the mere ground that a change in the court has taken place or is about to do so.—Peoples v. Evening News Ass'n, 51 Mich. 11.

¶ 2342. Rehearing will not be granted on the ground that a son of the judge who wrote the opinion belonged to a firm who were attorneys of record for one of the parties when the suit was brought, especially if the firm did not manage the case and did not appear in the appellate court.—Maclean v. Scripps, 52 Mich. 214.

§ 544. ——Decision by quorum only.

Dissenting opinion as ground, when, see Jud. Act, Chap. I, § 5; Comp. L. 1915, § 12010.

¶ 2343. Five justices of the Supreme Court of Michigan, consisting of eight members, concurred in an opinion. Before the decree was entered two of them were retired by death or otherwise. Held, that no rehearing could be demanded since there was no dissenting opinion to bring the case within the provisions of Act No. 250, Pub. Acts 1903, relating to rehearings, when a case is heard by a quorum of five justices with a dissenting opinion.—Scott v. Sullivan, 164 Mich. 467.

§ 545. Equities and diligence of applicant.

See also ante § 535.

¶ 2344. On petition for a rehearing for additional evidence, the physical and pecuniary condition of the petitioner is properly considered in determining whether reasonable diligence had been shown in trying to obtain it for the first hearing; so also is the knowledge of the party as to the essential facts of the case and the difficulty of establishing them by competent testimony.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 2345. A rehearing for evidence which the petitioner could not produce upon the first trial is not granted if it does not appear that testimony which is not merely cumulative, and could not with reasonable diligence be procured in season, has been discovered since the decision of the case, which, if introduced, might, in the court's opinion, change the re-

sult to petitioner's advantage.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 2346. Rehearing for new evidence will not be granted where the petitioner had an intimation that it might have been obtained and did not compel its production.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 2347. Rehearing on foreclosure will not be granted on the ground that notes secured by the mortgage were void for usury in the state where they were given. This is so at least where the notes are apparently good. —Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 2348. An application by an appellant, made after the affirmance of a decree, for leave to apply to the court below for a rehearing, will be denied where it appears that the evidence sought to be introduced on the rehearing was within the knowledge of the appellant at the time of the first hearing, and should have been suggested by the testimony of the appellee.—Sherwood v. Central Michigan Sav. Bank, 104 Mich. 65.

¶ 2349. Rehearing will not lie where nothing is involved but the gains and losses of a venture dependent on fraud.—Reeg v. Burnham, 55 Mich. 89.

¶ 2350. A rehearing will not be granted thirty years after the submission of a case, on the ground of newly-discovered evidence which merely tends to make clearer documentary evidence of public record, and which available at the time of the trial.—Attorney General v. Joy, 181 Mich. 266.

¶ 2351. A petition for rehearing of a case in the Supreme Court and to remand the case to the circuit court for the purpose of allowing the introduction of additional testimony or a bill of review on the ground of newly-discovered evidence will be denied where, although the witness, whose evidence is claimed as the basis of the petition to be newly discovered, was a witness for the adverse party at the time of trial, his unfinished answer to a question put by the adverse party suggested an inquiry as to what was claimed to be newly-discovered evidence, and such answer was not given, owing to an objection made by the other party.—Frohlich v. Aikman, 201 Mich. 64.

§ 546. Time and stage of the cause.

Laches and want of diligence, see ante § 545.
For application to amend appellate judgment, see ante § 533.

¶ 2352. A rehearing will not be granted in this court after the decree has been actually entered and remitted to the circuit.—Ryerson v. Eldred, 18 Mich. 490.

§ 547. Motion or petition and matters considered thereon.

On the rehearing proper, see post § 548.
Application for rehearing and practice thereon, see Sup. Ct. Rule 51. [Amended 200 Mich.]

¶ 2353. Notice of a motion for a stay of proceedings to enable the party to apply for a rehearing on the ground of newly-discovered evidence should be given to the opposite party.—Case v. Case, 26 Mich. 484.

¶ 2354. Service of notice of an application for a rehearing is not essential to give the Supreme Court jurisdiction where it could grant a rehearing of its own motion, without any application whatever.—Culver v. Fidelity & Deposit Co. of Maryland, 149 Mich. 630.

¶ 2355. Argument on the merits cannot be made on a motion for a rehearing, but only on the rehearing itself, if granted.— Kraft v. Raths, 45 Mich. 20.

§ 548. Scope and subjects of rehearing.

Of application for rehearing, see ante § 547.

¶ 2356. A case must be reheard, if at all, on the record, and not on affidavits explaining the facts.—Vanneter v. Crossman, 39 Mich. 610.

¶ 2357. An affidavit filed in the Supreme Court, upon rehearing cannot be considered as evidence in the cause.—Patnode v. Darveau, 112 Mich. 127.

§ 549. Effect of motion or of rehearing.

¶ 2358. A motion for rehearing in the Supreme Court does not, of itself, operate to stay proceedings on a final judgment.—Busch v. Wilcox, 106 Mich. 514.

§ 550. Order, judgment or relief.

Procedure for relief after affirmance on rehearing, see post ¶ 2396.
Costs on rehearing, see Costs, V.

¶ 2359. The opinion of the Supreme Court will be amended on rehearing to correct a misstatement as to the description of land in a deed.—Bird v. Stimson, 197 Mich. 582.

¶ 2360. A modification of its decree will be denied by the Supreme Court where questions urged were considered and decided on the original hearing.—Gaskill v. Weeks, 156 Mich. 668.

XV. REMISSION TO TRIAL COURT AND SUBSEQUENT PROCEDURE THEREIN.

§ 551. Remission of cause and mandate in general.

Grounds and propriety of remission or final judgment or modification above, see ante XIII, B, C.

Remand with directions for further action, see ante §§ 513-516.

Filing remittitur as restoring jurisdiction below, see ante § 137.

As cutting off right to amendment of appellate judgment or rehearing, see ante §§ 533, 546.

Remand to restore lower court's jurisdiction, see ante ¶ 596.

Remission of files and records on appeal, see Jud. Act, Chap. L, § 26; Comp. L. 1915, § 13761.

§ 552. Character and incidents of retrial in general.

¶ 2361. The effect of a reversal by the court, where a new trial is ordered, is to send the case back to the court below to be tried in the usual manner, with or without a jury, as may thereafter be determined; the case, where tried before a referee, does not go again before him.—Hopkins v. Sanford, 41 Mich. 243.

§ 553. Appellate decision as law of the case.

Law of the case on second review, see ante XII, G.

Extension of time to appeal after dismissal of former appeal for delay, see also ante ¶ 344.

Construction of directions, see post § 563.

Costs for disregarding law of the case on retrial, see Costs, V.

Contempt in disobeying judgment of the Supreme Court, see Contempt, I.

¶ 2362. An utter disregard on a second trial, of the rules laid down by the Supreme Court on the reversal of a former judgment calls for a second reversal, with costs of both courts.—Wheeler v. Meyer, 101 Mich. 465.

¶ 2362a. A decision of the Supreme Court upon error is conclusive upon the parties, so far as the law is concerned, whenever the same state of facts is presented; but upon different facts other principles apply.—Pelton v. Schmidt, 104 Mich. 345.

¶ 2363. In debt on an administrator's bond a ruling that the trial court erred in holding that a judgment on an earlier bond was a bar to action on the present one must be followed in the second trial as the law of the case.—Wayne Probate Judge v. Joslyn, 101 Mich. 551.

¶ 2364. Where the Supreme Court had examined a certain contract and warehouse receipts and construed them and their legal effects, such decision on a retrial of the case in the lower court is the law in the case.—Julius Kessler & Co. v. Velo, 148 Mich. 472.

§ 554. ——Dissent or special concurrence in result.

Decision by majority, see ante § 529.

¶ 2365. Where all of the justices sitting concurred in a reversal, and the granting of a new trial on one ground stated in the opinion, but one of the justices did not concur on another ground stated in the opinion, this latter fact does not permit an assumption that a dissenting opinion was filed, and does not change the result, nor can a new trial be in any manner affected thereby.—Moon v. Pere Marquette R. Co., 143 Mich. 125.

§ 555. ——Conclusiveness as to facts in issue.

¶ 2366. Where a case is reversed, and upon the second trial the case presented is substantially the same as the one reversed, the trial court is right in directing a verdict for defendant.—Hutchinson v. Cleveland-Cliffs Iron Co., 152 Mich. 367.

§ 556. ——Form and propriety of instructions.

Adherence on second review, see ante § 467.

Following approved instructions, see ante § 467.

¶ 2367. Where upon a former appeal the Supreme Court has said that the "record title" to certain land was imperfect, the fact that the court upon retrial states that the "title" is imperfect, is not prejudicial.—Weaver v. Richards, 150 Mich. 20.

¶ 2368. Where upon a former appeal it has been decided that the question of whether a contract was made with certain persons as individuals, or with plaintiff corporation, was one of fact for the jury, a charge upon a retrial that if under the evidence any contract was proved, it was a contract with the company, is not error when supported by the record.—Anderson Carriage Co. v. Pungs, 153 Mich. 580.

§ 557. Matters open on retrial.

Effect of appellate judgment, see ante § 499.

Passing questions without decision because unnecessary and leaving them open to retrial, see ante §§ 261-266.

Remand leaving questions open, see ante § 512.

Objections not passed on open on second review, see ante § 470.

Matters relating to judgment or amendment thereof, see post §§ 562-564.

Direction to exclude issue, see also ante § 514.
Power below to grant new trial, see post § 565.

¶ 2369. In replevin for wheat the defense was that defendant's father conveyed to plaintiff a farm leased to defendant in consideration of an agreement that defendant should be allowed to raise thereon a crop of wheat. Held, that this was substantially the same as the defense made on an earlier trial that the deed was in consideration of an agreement that the grantor should be allowed to raise the wheat, which agreement inured to defendant's benefit; and that it was admissible.—Breitenwischer v. Clough, 116 Mich. 340.

¶ 2370. Where the Supreme Court reverses and remands a case for a new trial on the sole ground of defect of necessary parties, and states that it does not consider other questions involved, the question of the sufficiency of the complaint upon demurrer is not rendered res judicata by such decision.—Godfrey Lumber Co. v. Kline, 167 Mich. 629.

§ 558. ——Reversal inuring to respondent or defendant.

See also ante ¶ 2200.

¶ 2371. Plaintiff sued for damages for breach of a contract of sale. Defendant gave notice of a set-off. The court instructed that the jury should allow the set-off, whatever verdict they brought in. The jury found for the plaintiff, and defendant appealed, but plaintiff did not. Held, that on reversal of the judgment for plaintiff, the defendant should be allowed his set-off.—Jordan v. Walker, 154 Mich. 394.

§ 559. Change of theory on retrial.

See also post ¶ 2379.
Adherence to theory of trial on appeal, see ante §§ 267-269.
Making amendments or adduction of changed evidence, see post §§ 560, 561.

¶ 2372. At the former trial plaintiff's evidence indicated that a turntable might be moved in either direction and his counsel conceded such fact. The case was sent back by the Supreme Court for a new trial under an opinion that if said turntable turned freely in both directions plaintiff was not entitled to recover. Plaintiff's counsel at the second trial attempted to introduce evidence to show that said turntable could be turned only in one direction. Held, the trial court properly excluded such evidence as plaintiff was not entitled to take wholly inconsistent positions.—Connor v. Lake Shore & M. S. Ry. Co., 168 Mich. 29. (Moore, J., dissenting.)

¶ 2373. Plaintiff on a retrial of the case after reversal in the Supreme Court cannot take a position wholly inconsistent with the claims made upon a former trial.—Macatawa Transp. Co. v. Firemen's Fund Ins. Co., 179 Mich. 443.

¶ 2374. Where on retrial in an action on an insurance policy plaintiff claimed that representations contained in the application for insurance were made by one of his employees without authority from him, it was held there was no change in position, although on the former trial more emphasis was laid upon the claim that the representations were true, both trials being had upon the same declaration.—Macatawa Transp. Co. v. Firemen's Fund Ins. Co., 179 Mich. 443.

§ 560. Amendments of pleadings or issues.

Remand with directions, see ante § 515.

¶ 2375. The court of chancery has power to allow the bill to be amended after a decree sustaining a demurrer has been sustained by the Supreme Court on the same reasons that governed the court below.—Bank of Michigan v. Niles, W. 398.

¶ 2376. Denial of an application to amend the plea after reversal and remand, is within the discretion of the trial court.—Central Sav. Bank v. O'Connor, 139 Mich. 82.

¶ 2377. A declaration failing to show who are the next of kin damaged by the negligent killing of their relative may be amended in that respect on a second trial.—Walker v. Lake Shore & M. S. R. Co., 104 Mich. 606; Garrity v. Detroit Citizens' St. Ry. Co., 112 Mich. 369.

¶ 2378. Under 3 Comp. L. 1897, § 10268, authorizing amendments of pleadings or proceedings at any time before judgment, the plaintiff is not entitled to an amendment of his declaration as of course after reversal of judgment and remand for new trial.—Merrill v. Leisenring, 157 Mich. 133.

¶ 2379. Where a plaintiff abandons one count upon the trial, and subjects defendant to the expense of a trial on the other count, it is not error for the judge, after the reversal of a judgment obtained on that trial, to decline to permit plaintiff to amend by reinstating the abandoned count, in the absence of any showing of mistake or discovery of new facts after the abandonment.—Merrill v. Leisenring, 157 Mich. 133.

¶ 2380. Where an order overruling a demurrer to a bill is reversed on appeal there is nothing in 1 Comp. L. 1897, § 549, as amended by Act No. 299, Pub. Acts 1909, relating to the right to amend a bill on demurrer sustained, which requires that complainant be allowed to amend a bill so defective as to be incapable of effective amendment.—Macomber v. Cottrell, 162 Mich. 718.

§ 561. New evidence or change of testimony.

¶ 2381. Upon a new trial ordered by the Supreme Court a party is not compelled to stand or fall by the testimony he gave at the former trial, although if one changes his testimony the jury may consider the change as affecting credibility.—Pelton v. Schmidt, 104 Mich. 345.

¶ 2382. In an action against a railroad company for a personal injury, a slight discrepancy in plaintiff's testimony on two different trials as to the place where he alighted from a train is a question for the jury, and does not warrant a reversal of the judgment. —Mensing v. Michigan Cent. R. Co., 117 Mich. 606.

§ 562. Judgment and relief after remand.

Remand with directions for judgment, see ante § 516.

Conclusiveness of allowance of appellate costs against change by trial court on retrial, see Costs, V.

Proceedings on reversal of judgment in arbitration proceedings, see Comp. L. 1915, § 13666.

¶ 2383. A judgment against one of two defendants was improper where on a former trial judgment was entered against both and one severed for the purpose of appeal, and where on the second trial no discontinuance was entered as to the nonappealing defendant, and where the proceedings were in fact against both, and the judgment should have been so entered.—McPherson v. Bristol, 122 Mich. 354.

¶ 2384. Where the defendant in a proceeding to enjoin the violation of an easement held by the complainant in a stairway, removes the stairway upon the dismissal of the bill and makes changes at great cost, pending the appeal which is promptly taken, complainant was entitled upon reversal to an injunction and a restoration of the easement as it existed before bringing suit, although the change may have been beneficial and the cost of putting the premises in their former condition be so large as to be entirely disproportionate to the injury done complainant. —Ives v. Edison, 124 Mich. 402.

§ 563. ——Reserved questions and directions.

Remand with directions, see ante §§ 513-516.

¶ 2385. An order for a payment of dividends to creditors of an assignor provided for payment of a twenty per cent. dividend, and that a claim then in litigation should not share in it. In reviewing the judgment on that claim the Supreme Court passed by the question with the remark that possibly there might not be enough money subsequently realized to place it on an equality with claims which had already been paid a dividend. When finally allowed, it was ordered to participate with the unpaid eighty per cent. of the other claims, thus in effect denying to it the twenty per cent. received by the others. Held, that, since How. St. § 8747, requires equality in dividends, neither court had power to cut off the claim from the right to share in the twenty per cent dividend, and the decisions should not be construed as determining otherwise.—Farwell v. Myers, 66 Mich. 678.

¶ 2386. The statement made in Church v. Anti-Kalsomine Co., 118 Mich. 219, that the circuit court in an action at law might appoint auditors if examination of accounts became necessary, was not intended to mean that it must appoint them; nor was such a meaning conveyed by refusing a mandamus thereafter to vacate the appointment of only one auditor, it having been regarded as a discretionary matter. Hence the court is not thereafter disabled to discharge such auditor on the incoming of his report.—Anti-Kalsomine Co. v. Kent Circuit Judge, 123 Mich. 658.

¶ 2387. The provision in a decree on appeal for the distribution of a trust, reserving the right to the complainant and to the trustee to apply to the circuit court for special allowance for services of counsel and expenses in a particular accounting, was directory.—Sprague v. Moore, 136 Mich. 426.

¶ 2388. The provisions in a decree on appeal for the distribution of a trust fund directing allowances to compensate an administrator and his solicitor in litigation required by the decree and for services in litigation made necessary by the action of an adverse party, and the ruling of the court thereon, are mandatory on the court below. —Sprague v. Moore, 136 Mich. 426.

¶ 2389. Under a decree on appeal adjusting rights and for an accounting, which reserved to the circuit court on application power to make a special allowance for counsel fees and expenses in such accounting, the circuit court should determine the propriety of making such allowance before making it; but before disturbing it on a subsequent appeal it must appear that an allowance made without first determining its propriety was one improper to be made under the facts appearing of record.—Sprague v. Moore, 136 Mich. 426.

¶ 2390. In a partnership accounting, an affirmed decree which recites that the defendant partner cut and removed and manufactured timber from the partnership property, and sold it in his retail yard, and refers the cause to a commissioner with instructions to charge the defendant with the amounts received for the timber, or, if impossible of ascertainment, with the market price, re-

fers to the market value at retail in the defendant's yard rather than the market value where cut.—Hughes v. Love, 138 Mich. 281.

¶ 2391. On appeal from proceedings to determine the amount of the respective liens of parties to an action for subrogation to rights claimed by reason of the payment of mortgages and legacies which were liens upon an estate, which payments had been made in the honest belief that certain heirs had been devised the land in fee, held that the trial court by considering a claim which was not properly a lien, and by bunching the combined payments for the mortgages and legacies which bore different rates of interest and by allowing each of the two parties a proportion of the combined amount which the amount which each had paid bore to such amount, one of the parties having paid the entire amount of the legacies, did not make "deductions and compute proportions accordingly" as directed in a former decree of the Supreme Court remanding the case for further proceedings and that the decree of the trial court should be modified accordingly.—Stroh v. Bauman, 188 Mich. 579.

§ 564. ——Amendment or relief from judgment.

Revision of cost award on retrial, see Costs, V.

¶ 2392. The circuit court cannot grant leave to file a bill to review a decree made by the Supreme Court.—Ryerson v. Eldred, 18 Mich. 490.

¶ 2393. After reversal of a joint judgment against husband and wife on appeal by her only, a motion cannot be entertained in the trial court to vacate the judgment as to her and affirm it as to him.—Hall v. Calhoun Circuit Judge, 123 Mich. 555.

¶ 2394. Amounts found due, by a decree of the Supreme Court upon an appeal in chancery, to respective creditors upon their demands, cannot be changed by the circuit court, nor can the case be reopened for a rehearing by the latter tribunal; the Supreme Court alone can grant relief, if any.—Fifth Nat. Bank v. Clinton Circuit Judge, 100 Mich. 67.

¶ 2395. Where the circuit court, to which a case brought to determine the amount upon which a dividend should be paid to the several creditors secured by a trust mortgage is remanded by the Supreme Court, to make the distribution of the trust fund in accordance with the decree of that court, is convinced that its order of distribution is incorrect as measured by said decree, it has the power to vacate the order, to the end that the direction of the Supreme Court may be carried out.—Fifth Nat. Bank v. Clinton Circuit Judge, 100 Mich. 67.

¶ 2396. On affirming on rehearing a decree as against an appellant assignor for creditors in so far as it adjudged that certain property passed by the assignment and not by a chattel mortgage in contemplation of the assignment, if it was not binding as to the assignor by reason of an irregularity, the proper proceedings against him may be taken on the foot of the decree; where the decree was valid as between the assignee (receiver) and the mortgagee, and the assignor merely had possession.—Burnham v. Dillon, 100 Mich. 359, on rehearing of 100 Mich. 352.

¶ 2397. In replevin a verdict and judgment that the defendant did not unlawfully detain the property, fixing the value of the property and, on defendant's motion, a judgment that the defendant recover costs and charges, when affirmed by the Supreme Court, may be amended on leave from the Supreme Court so as to allow recovery of the property or its value, where the sole question decided in the Supreme Court was as to the plaintiff's right to maintain replevin.—Salter v. Sutherland, 125 Mich. 662.

§ 565. Grant of new trial after remand.

Right to error on grant or denial, see ante ¶ 224.

¶ 2398. In a case remanded on affirmance without direction, the trial court has power in the absence of laches to grant a new trial if justice requires it.—Reynolds v. Newaygo Circuit Judge, 109 Mich. 403.

XVI. RIGHTS AND LIABILITIES ON BONDS AND SECURITIES.

§ 566. Measure of liability in general.

Various liabilities covered, see post §§ 567-569.
Joint and several liability, see post § 570.
Requisites and sufficiency of bonds, see ante VI, C.
Necessity for bond, see ante § 81.
Bonds for supersedeas and liability on them, see Stay of Proceedings, II.
Allowance of damages for vexation, frivolity or delay, see Costs, V.
Bond on error to forcible entry proceedings, see Forcible Entry, II.

¶ 2399. The measure of damages for breach of a bond, reciting judgment, to prosecute a writ of error to effect, is the amount of such judgment with costs and interest.—Healey v. Newton, 96 Mich. 228.

§ 567. Liabilities covered by bond.

¶ 2400. The specific condition in a bond instead of the usual form that the obligation shall remain in full force and effect in case of appeal (sic) to the Supreme Court

if the judgment in said court, with interest and costs, is not paid, must control the liability rather than a general recital.—Miner v. Rodgers, 65 Mich. 225.

¶ 2401. After rendition of judgment against him defendant obtained an order extending time to settle bill of exceptions and staying proceedings on condition of filing the statutory bond. He filed a bond which was approved and acquiesced in, conditioned to prosecute his writ of error to effect, and to pay such judgment as should be rendered, but nothing was done except to settle the bill of exceptions. Held, that the bond was a contract, enforceable as a common-law bond, and by its recital of judgment against the principal obligor concluded the parties and bound them to pay if the writ was not sued out.—Healey v. Newton, 96 Mich. 228.

§ 568. ——Trial and appeal costs.

On joint bond, see post § 570.

¶ 2402. Where the parties to a chancery cause make cross-appeals upon which one succeeds and recovers costs as against the others, the latter's appeal bond may be made to secure their recovery, even though his own appeal was merely from a denial of costs below, and though the appellate court passed upon his adversary's appeal below, without reference to his, and awarded costs of both courts against him.—Prosser v. Whitney, 46 Mich. 405.

¶ 2403. Costs are presumably secured by the bond.—Connorton v. Miller. 41 Mich. 1.

¶ 2404. Under Comp. L. 1857, § 3597, the appeal bond was conditioned "to pay all costs" and the appeal bond covered the costs of the circuit court as well as those of the Supreme Court.—Daly v. Litchfield, 11 Mich. 497.

¶ 2405. Under Pub. Acts 1877, No. 13, the statutory liability on the appeal bond is limited to costs on the appeal itself.—Michie v. Ellair, 60 Mich. 73; Warner v. Cameron, 64 Mich. 185.

¶ 2406. Appeal bonds are not limited to securing such costs only as result from the appeal; they cover also costs made before the decree.—Prosser v. Whitney, 46 Mich. 405.

¶ 2407. A decision on appeal, affirming the decree as against one joint appellant and modifying it as to another, and specifying as to the latter that as she made a joint appeal and signed a joint bond "no costs should be granted her in this court or below, but no costs are to go against her in either court," intends that she shall not be liable for any costs incurred in the chancery court; and she is not liable for them on the joint bond.—Warner v. Cameron, 64 Mich. 185.

§ 569. ——Deficiency or liability on debt after satisfaction of decree.

Exclusion of possible deficiency from bond, see ante § 83, ¶ 376.

¶ 2408. The bond only obligates the appellant to the performance of the decree of the Supreme Court in those particulars in which he was individually bound in the decree appealed from. Accordingly, where, after the decree for the complainant in a foreclosure suit, one of the defendants, not personally liable on the decree, appealed therefrom, and the decree was affirmed by the Supreme Court, it was held that the appellant was not liable for the amount of deficiency after sale had been made on the decree.—Kephart v. Farmers' & Mechanics' Bank of Michigan, 4 Mich. 602.

¶ 2409. The sureties on a chancery appeal bond must pay costs, including those of the Supreme Court in case of affirmance, but they are not liable upon the bond for any portion of a deficiency left on sale of the appellant's property to satisfy the decree. (Comp. L. 1871, § 5180, How. St., § 6738.)—Kennedy v. Nims, 52 Mich. 153.

¶ 2410. In a former suit to foreclose a land contract in which suit plaintiff was complainant, a decree was entered for plaintiff. Upon appeal taken by defendants in that suit an appeal bond was filed pursuant to Act No. 340, Pub. Acts 1907, conditioned upon the performance of the final decree entered by the upper court. The upper court affirmed the decree of the lower court with modifications, ordered defendant to pay costs, but said nothing as to liability in case of a deficiency after sale of the premises. In a suit on the bond, held, defendant bondsman was not liable for such deficiency.—Kelly v. Gaukler, 164 Mich. 519.

§ 570. Joint and several liability.

See also ante ¶ 2407.

¶ 2411. Where parties whose interests in the suits are distinct jointly appeal with a joint bond, and one prevails, and no costs are awarded against him, though expressly adjudged against co-appellants, he is no longer liable on the joint appeal bond.—Warner v. Cameron, 64 Mich. 185.

§ 571. Breach or fulfillment of condition.

Proper amount and conditions, see ante § 83.

¶ 2412. The affirmance of the judgment of the court below is a sufficient judgment of the Supreme Court to support the condition of a bond to pay any judgment in the latter court.—Miner v. Rodgers, 65 Mich. 225.

¶ 2413. Plaintiff secured a judgment in attachment in justice's court against one Antezak, who appealed to the circuit court. Defendant surety signed the appeal bond, the

condition of which was that Antezak should prosecute his appeal with due diligence. Antezak went into bankruptcy and secured his discharge. Held, defendant surety was not discharged from his liability as surety on the appeal bond.—Brown & Brown Coal Co. v. Antezak, 164 Mich. 110.

§ 572. Remedies, pleading and procedure to enforce bond.

Reinstatement of dismissed cause at instance of surety, see ante § 171, ¶ 733.

Right to enforce appeal bond and leave sureties to be subrogated in bankruptcy to appellee's right to prove in bankruptcy, see Bankruptcy.

Accrual of right of action on supersedeas bond, see Limitation of Actions, IV.

¶ 2414. In an action upon an appeal bond jointly executed by husband and wife as principals, the wife must be joined as defendant.—Post v. Shafer, 63 Mich. 85.

¶ 2415. A declaration, setting out a joint appeal bond and alleging affirmance of the decree as to one of the appellants and a decree against him for costs, and the failure on his part to satisfy the decree and costs so adjudged, states a cause of action against both appellants joining in such bond and sued thereon, though there is no allegation stating whether or not the decree was affirmed or anything adjudged against the other appellant, and though in fact such other defendant prevailed on the appeal and was thereby discharged; since such fact is matter of defense not pleadable by demurrer. —Warner v. Cameron, 64 Mich. 185.

¶ 2416. A demurrer to a declaration upon a bond conditioned to prosecute an appeal to effect, on the ground that such declaration fails to set up the facts necessary to make such bond effectual under the statute, is properly overruled, where the averments are sufficient at least to show a good common-law bond.—Boyer v. Sowles, 109 Mich. 481.

§ 573. Rendition of judgment in appellate court.

Entry of judgment against security for costs as an incident of judgment on the cause, see Security for Costs, III.

Entry of judgment against sureties on bond, see Jud. Act, Chap. XXII, § 5; Comp. L. 1915, § 12795.

¶ 2417. The statute allowing summary judgment against persons becoming security for costs, does not apply to the sureties on a bond conditioned to abide the result of an appeal.—Willard v. Fralick, 31 Mich. 431; Bondie v. Bourassa, 46 Mich. 321; Reed v. Northrup, 50 Mich. 442; Booth v. Radford, 57 Mich. 357; Knack v. Wayne Circuit Judge. 147 Mich. 485.

§ 574. Burden of proof and evidence.

Issues concluded by judgment, see post §§ 575, 576.

Issues of fraud, duress or mistake, or of the execution of the bond, or other matters wherein the fact that it is an appeal bond or a bond for writ of error has no distinctive importance, see Bonds; Execution of Instruments; Contracts; Fraud; Duress; Mistake; and other specific topics.

¶ 2418. Where an appeal bond names certain persons as sureties it must be assumed that each one contemplates that the rest will join in its execution; and one who sues on the bond has the burden of explaining the omission of any one to do so. And if any surety denies its execution on oath, and testifies that his supposed signature is a forgery and the justification of the sureties a fraud, the plaintiff is under stronger obligation to show that defendant signed and delivered the bond with full knowledge of the facts.—Woodin v. Durfee, 46 Mich. 424.

§ 575. Matters concluded by appellate judgment.

¶ 2419. In an action against the sureties upon an appeal bond to recover taxed costs, it was held that the only question open in the case was the question of the jurisdiction of the court rendering the judgment.—Miller v. Maher, 178 Mich. 571.

§ 576. ——Costs and allowances.

¶ 2420. In an action on an appeal bond, a judgment for costs against the principal is conclusive as against his sureties.—Miller v. Maher, 178 Mich. 571.

¶ 2420a. In an action against the sureties on an appeal bond to recover taxed costs, defendants cannot be heard to object for the first time to the amount of such costs, the remedy being by objection at the time of taxation of costs or by requesting retaxation.—Miller v. Maher, 178 Mich. 571.

XVII. COSTS AND ALLOWANCES.

§ 577. In general; cross-references.

The right to costs on error or appeal is regulated by Jud. Act, Chap. XLVII, §§ 20-24; Comp. L. 1915, §§ 13701-13705; see also Sup. Ct. Rules 2, 48-50. The decisions are collected in Costs, V, which see.

Liability on bond for costs, and conclusiveness as to same, see ante §§ 568, 576.

APPEAL TO PREJUDICE.

Cross-References.

In argument to jury, see Argument of Counsel; Indictment, IX, C.

By remarks of counsel in course of trial, see Trial, II; Indictment, IX, C.

APPEARANCE.

TREATS of the formal or informal act by which a party submits himself voluntarily to the jurisdiction of the court in a civil action, whether made in person or by an attorney, also the authority of the attorney for that purpose and the sufficiency and effect of the appearance.

Analysis.

§ 1. In general; nature and office.
§ 2. Time for appearance; entry and withdrawal.
§ 3. Appearance by attorney or representative.
§ 4. ——Presumptions and proof of authority.
§ 5. Joint and several appearances.
§ 6. General appearance; what constitutes.
§ 7. ——Pleading to cause or the merits.
§ 8. ——Otherwise invoking or recognizing jurisdiction.
§ 9. Special appearances and reservations.
§ 10. Matters admitted, waived or consented to by general appearance.
§ 11. ——Jurisdiction and defects in process.
§ 12. Effect on collateral proceedings.

§ 1. In general; nature and office.

Matters admitted in the action, and effect on collateral actions and proceedings, see post §§ 10-12.

Necessity of notice of proceedings when appearance is entered, see Defaults; Motions and Orders.

Bail to appear, see Arrest, Commitment and Bail; Civil Arrest.

Default for want of appearance, see Defaults.

Collateral attack for want of appearance, see Judgments, VII.

Procedure in confessing judgment, see Confession of Judgment.

Appearance on appeal or error, see Appeal, § 130.

Before justices of the peace, see Justices of the Peace, IV, B.

Appearance before referee or master, see Reference, III.

Of parties before arbitrators on hearing, see Arbitration, § 9.

Attendance and appearance by witnesses, see Witnesses, I.

Arrest and arraignment for crime, see Arrest, Commitment and Bail; Indictment and Prosecution, V.

Of administrator or executor to revive action, see Jud. Act, Chap. XII, §§ 34, 35, 37; Comp. L. 1915, §§ 12385, 12386, 12388.

By interested person in chancery suits against unknown defendants, see Jud. Act, Chap. XII, § 26; Comp. L. 1915, § 12377.

¶ 1. An appearance is the formal proceeding by which a defendant submits himself to the jurisdiction of the court.—Crawford v. Vinton, 102 Mich. 83.

§ 2. Time for appearance; entry and withdrawal.

Form of notice of retainer to avoid general appearance, see post ¶ 14.

Entry of judgment in general, see Judgments, III.

Effect of answering bill on premature appearance, see Equity, VII, C.

Mode of appearance by infants, see Infants, VII; Guardians ad Litem.

General provisions, see Jud. Act, Chap. XIII, § 6; Comp. L. 1915, § 12409.

On substituted service, see Jud. Act, Chap. XIII, §§ 46-48; Comp. L. 1915, §§ 12449-12451.

After judgment in chancery cases, see Jud. Act, Chap. XIX, §§ 2, 3; Comp. L. 1915, §§ 12656, 12657.

¶ 2. Under Comp. L. 1897, § 9989, which provides that original writs in personal actions shall be returnable according to rules of the court, the day of serving the summons is excluded and the day of compliance is included in computing the time allowed to file an appearance.—Vohlers v. E. H. Stafford Mfg. Co., 171 Mich. 8.

¶ 3. By Circuit Court Rule 36, when the date of compliance falls on Sunday the appearance may be filed any time on the following Monday, but intervening Sundays are included.—Vohlers v. E. H. Stafford Mfg. Co., 171 Mich. 8.

¶ 4. The omission of the clerk to enter defendant's appearance in a cause resultir

in a judgment is a mere matter of form, which may be amended by an order nunc pro tunc.—Norvell v. McHenry, 1 Mich. 227.

§ 3. Appearance by attorney or representative.

Presumptions and proof of authority, see post § 4.
General functions and authority of attorneys, see Attorneys and Counselers.
Authority of personal representative to appear or act for heirs in litigation, see Estates of Decedents, XI, A.
Collateral attack on judgment for want of appearance or because appearance was unauthorized, see Judgments, VII.
In person or by attorney, see Jud. Act, Chap. IV, § 14; Comp. L. 1915, § 12261.
Stating name of attorney in pleading, see Jud. Act, Chap. XIII, § 1; Comp. L. 1915, § 12404.

¶ 5. The record should name the person assuming therein to act as "attorney" for the party, so that the latter may know to whom to look for indemnity in case the appearance in his behalf was unauthorized.—Durfee v. Abbott, 50 Mich. 278.

¶ 6. Jurisdiction over a railroad company is not acquired by an appearance and plea of the general issue by the receivers for the company.—Price v. Delano, 187 Mich. 49.

§ 4. ——Presumptions and proof of authority.

In justices' courts, see Justices of the Peace, IV, B.
Presumption on collateral attack that jurisdiction was had, see Judgments, VII.
Presumption of authority in attorney's appearance in a foreign judgment, see Foreign Judgments, III.
Warrant of attorney dispensed with, see Jud. Act, Chap. XIII, § 1; Comp. L. 1915, § 12404.

¶ 7. An appearance by an attorney is presumed to have been authorized, even though entered without service of process.—Corbitt v. Timmerman, 95 Mich. 581.

¶ 8. Until the contrary is shown it must be presumed that an attorney in the circuit court has authority to appear for a client whose appearance he has entered in due form. —Norberg v. Heineman, 59 Mich. 210.

¶ 9. When an attorney appears in a court of record having general jurisdiction the presumption is that he has authority to appear.—Dunlap v. Byers, 110 Mich. 109.

¶ 10. A warrant of attorney and plea of a defendant, taken from the files in the case, are evidence, in the same court, of the defendant's appearance.—Crane v. Hardy, 1 Mich. 56.

§ 5. Joint and several appearances.

¶ 11. Any defendant against whom process has issued at common law or in equity has the right to appear without service, and defendants, whether joint or not, may always protect their rights by doing so seasonably. —Ralston v. Chapin, 49 Mich. 274.

§ 6. General appearance; what constitutes.

Pleading to the action or merits, see post § 7.
Giving bonds for release or to dissolve attachment, see post § 8.
Making disclosure in garnishment, see post § 8.
Asking continuance, see post § 8.
Making motions, see post § 8.
Asking new trial on merits, see post § 8.
Matters admitted or waived, see post §§ 10, 11.

¶ 12. An appearance to set aside proceedings for irregularities, or to object to the jurisdiction, is not a general appearance in the cause.—Brown v. Thompson, 29 Mich. 72; Schwab v. Mabley, 47 Mich. 512.

¶ 13. Where attorneys appear and participate in the trial of a cause, such action must be construed as a general and not as a special appearance for their client, and hence as rendering proper as against him an amendment at the trial.—Sarmiento v. The Catherine C., 110 Mich. 120.

¶ 14. The notice of retainer filed and served is general in its nature where no limitation appears in it.—National Coal Co. v. Cincinnati Gas Coke, Coal & Mining Co., 168 Mich. 195.

¶ 15. A joint petition for the removal of a cause to the federal court, by defendants not served with process, is not a general appearance as to them.—Schwab v. Mabley, 47 Mich. 512.

¶ 16. An appearance by a solicitor made expressly for the exclusive purpose of demurring to the jurisdiction does not admit it if the bill contains no matter of equitable cognizance.—Woodruff v. Young, 43 Mich. 548.

§ 7. ——Pleading to cause or the merits.

Demurrer for want of equitable jurisdiction, see also ante ¶ 16.

¶ 17. A demurrer is an appearance.— Thompson v. Michigan Mut. Ben. Ass'n, 52 Mich. 522.

¶ 18. A general demurrer is a sufficient appearance to give jurisdiction.—Stevens v. Harris, 99 Mich. 280.

¶ 19. Although professing to appear specially, a defendant who enters a plea and demands a jury waives defects in service of process.—Audretsch v. Hurst, 126 Mich. 301.

¶ 20. Inasmuch as the distinction between pleas to the jurisdiction and pleas in abatement existing at common law are not recognized in this state, the filing of a plea to the jurisdiction by attorney, instead of in person, does not admit jurisdiction.—Fell v. Gorman, 144 Mich. 521.

¶ 21. The plea of the general issue in forcible entry proceedings waives irregularity in summons and venire.—Falkner v. Beers, 2 D. 117.

¶ 21a. Pleading to the merits in replevin waives mere clerical defects in the affidavit. —Baker v. Dubois, 32 Mich. 92.

¶ 22. One who answers a bill for an injunction, and replication is filed and proof taken in open court, voluntarily submits the question to the court and cannot thereafter deny its jurisdiction, since if he wished to raise the question of jurisdiction it was his duty to demur.—F. H. Wolf Brick Co. v. Lonyo, 132 Mich. 162.

¶ 23. A defendant who appears and files his answer to a petition thereby submits himself to the court's jurisdiction.—Dunlap v. Byers, 110 Mich. 109.

¶ 24. A defendant in an action of ejectment who appears and pleads to the merits thereby waives any objection that he was improperly made a party by amendment.—Farrand v. Kavanaugh, 132 Mich. 486.

¶ 25. Where, in a mandamus suit by a subordinate lodge against the grand lodge, the officers of the latter resident in another state appear voluntarily and answer, they submit to the jurisdiction of Michigan courts.—Golden Star Lodge No. 1 v. Watterson, 158 Mich. 696.

§ 8. ——Otherwise invoking or recognising jurisdiction.

Effect as making amendment binding on client, see also ante 13.

Review of judgment rendered for want of appearance, see generally Appeal and Error; Certiorari.

¶ 26. An appearance to obtain a continuance is a waiver of defects in procedure.—Lane v. Leech, 44 Mich. 168.

¶ 27. The consent to the hearing and the effect of appearance of counsel before circuit judge at chambers to oppose motion, upon its merits, making no objection to jurisdiction, will be a bar to a technical objection later to the jurisdiction.—Blair v. Compton, 33 Mich. 414.

¶ 28. A motion for a new trial supported by an affidavit of merits by the defendant operates as a general appearance, thereby waiving defects of service.—Priest v. American Ins. Union, 171 Mich. 321.

¶ 29. The giving of a release bond in an attachment suit is not an appearance so as to waive defects in process.—Reynolds v. Marquette Circuit Judge, 125 Mich. 445.

¶ 30. The dissolution of an attachment by giving the statutory bond to pay any judgment recovered in the suit operates as an appearance and converts the suit from one in rem to one in personam, and waives any defects in the affidavit.—Butcher v. Cappon & Bertsch Leather Co., 148 Mich. 552.

¶ 31. Where a defendant garnishee appears and makes disclosure without objecting to the jurisdiction, and examination subsequently proceeded at which counsel appeared and took part and intervention of another defendant was permitted, he cannot thereafter raise the objection that the affidavit for garnishment is defective.—Sachs v. Norn, 139 Mich. 357.

¶ 32. Appearance to a bill or petition to revive a foreclosure suit on an instalment, after payment of the instalment and death of the mortgagor before proceedings for a further decree on a subsequent instalment, is not an appearance in the case; since there is no suit to appear or answer to until revivor is had.—Brown v. Thompson, 29 Mich. 72.

¶ 33. A motion to strike from the files a suggestion of a claim for mesne profits in an action of ejectment because not filed within one year from the docketing of the judgment, and for want of service, does not amount to an appearance so as to waive the question of want of service.—Thomson v. McMorran Milling Co., 132 Mich. 591.

§ 9. Special appearances and reservations.

What are general and what special, see ante §§ 6-8.

Effect of demanding jury after special appearance, see ante ¶ 19.

Form of pleading or motion on special appearance, see Pleading, III.

Appeal or error or certiorari from judgment after special appearance, and reviewable questions thereon, see generally Appeal and Error; Certiorari.

¶ 34. An appearance for the exclusive purpose of demurring to the jurisdiction does not admit it if the substantial matter of the bill is improper for the cognizance of the court. —Woodruff v. Young, 43 Mich. 548.

¶ 35. Appearing to object to the jurisdiction is not, upon an adverse judgment being rendered, a submission to jurisdiction on a general appearance.—Farrow v. Railway Conductors' Co-operative Ass'n, 178 Mich. 639.

¶ 36. Where a defendant appeared to enter default of the plaintiff for not declaring, and the default was set aside under a stipulation that his appearance should not waive any irregularity or defect in the process or proceedings, it was held that the appearance to enter default did not preclude him from making any objection to the proceeding which he could have made on a special appearance to complain of defects.—Stearns v. Taylor, 27 Mich. 88.

¶ 37. A special appearance for the sole purpose of objecting to the regularity of the proceedings to bring a party into court does not waive the irregularity.—McLean v. Isbell, 44 Mich. 129; Lane v. Leech, 44 Mich. 163.

¶ 38. While the filing of an appearance might waive the failure to serve process in the manner pointed out by statute, yet seasonable objection to the jurisdiction under a special appearance requires the suit to be dismissed.—Greacen v. Buckley & Douglas Lumber Co., 167 Mich. 569.

¶ 38a. Where a default judgment was entered in Illinois against the defendant corporation on return of summons by the sheriff indorsed to show service on an agent of the corporation, the court on these facts either had or had not jurisdiction to enter the default judgment on nonappearance of the defendant, and the jurisdiction is not aided by the special appearance of the defendant on a motion to vacate the judgment on the ground that the person served was not an agent of the defendant corporation.—Marshall v. R. M. Owen & Co., 171 Mich. 232.

¶ 39. Where a garnishee defendant appears specially and moves to open default taken against it and to set aside the writ and its service because by the return of service jurisdiction does not appear, he may raise the point after judgment entered on a further default.—Lyon v. Baldwin, 194 Mich. 118.

§ 10. Matters admitted, waived or consented to by general appearance.

See also ante §§ 7, 8.

Appearance as waiver of objection to notice of trial, see Calendar § 6.

Matters reserved by special appearance, see ante § 9.

Effect of general appearance in circuit on special appeal from justice, see Justices of the Peace, V, C.

Waiver of dilatory pleas by plea to the merits, see Pleading, III.

Modes of acquiring jurisdiction in general, see Courts, V; Process; Attachment; Civil Arrest (capias ad respondendum).

Appearance of contestant as waiver of defects in process in the appointment of administrator, see Estates of Decedents, III, B.

Appearance in habeas corpus, and effect thereof, see Habeas Corpus.

¶ 40. A general appearance by a defendant pending a rule granting leave to plaintiff to amend is not a waiver of the defect sought to be amended.—Wheeler v. Wilkins, 19 Mich. 78.

¶ 40a. The plea of the general issue waives only such jurisdictional defects as appear on the face of the declaration.—Segar v. Muskegon Shingle & Lumber Co., 81 Mich. 344.

¶ 41. Appearance and plea on the part of the defendant is not a waiver of the defense of the statute of limitations, although it doubtless is a waiver of jurisdictional questions.—Colling v. McGregor, 144 Mich. 651.

¶ 42. After plea of the general issue defendant cannot urge that there was an assignment for the sole purpose of suing in a county other than his residence.—Hicks v. Steel, 126 Mich. 408.

¶ 42a. By voluntarily appearing and pleading to the merits one waives all defects in irregularities in the service and return of process, and he cannot thereafter object to the manner in which he was brought into court. —Crane v. Hardy, 1 Mich. 56; Burson v. Huntington, 21 Mich. 415; Pardee v. Smith, 27 Mich. 33; Manhard v. Schott, 37 Mich. 234; Bryant v. Hendee, 40 Mich. 543; Austin v. Burroughs, 62 Mich. 181; Dailey v. Kennedy, 64 Mich. 208.

¶ 42b. Where the court has jurisdiction of the subject-matter of a suit, it is a general rule that a plea to the merits waives irregularities in obtaining jurisdiction of the person. —Watkins v. Plummer, 93 Mich. 215.

¶ 42c. Where jurisdictional objections may be waived, a party cannot go to trial upon the merits and afterwards question the jurisdiction.—Home Ins. Co. of Columbus, Ohio, v. Curtis, 32 Mich. 402.

¶ 42d. A plea in bar is a waiver of an objection to the jurisdiction of a court of general jurisdiction.—Webb v. Mann, 3 Mich. 139.

¶ 42e. One who pleads the general issue submits to the jurisdiction and cannot first raise the question thereof in the Supreme Court.—Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461; Gott v. Brigham, 41 Mich. 227.

¶ 42f. A general demurrer waives objections to jurisdiction of the person.—Thompson v. Michigan Mut. Ben. Ass'n, 52 Mich. 522.

¶ 42g. If one appears as administrator when he is not named as such, and pleads the general issue, he cannot deny the jurisdiction.—Singer Mfg. Co. v. Benjamin, 55 Mich. 330.

¶ 42h. After a defendant in a transitory action has pleaded in bar of the action, and thus submitted himself to the jurisdiction of a court of general jurisdiction, he must be held to have waived the question of jurisdiction of the person.—Johnson v. Burke, 167 Mich. 349.

§ 11. ——Jurisdiction and defects in process.
See also ante § 10.
Appearance in habeas corpus as waiver of statutory notice, see Habeas Corpus.

¶ 43. A plea to the general issue and trial upon the merits is a waiver of any objection of want of jurisdiction of the defendant by reason of defective service.—Clute v. Everhart, 137 Mich. 5.

¶ 44. Ordinarily a respondent who appears and pleads issuably cannot complain afterwards that the court has not acquired jurisdiction of the case, provided the cause is of a character within the power of the court to try.—Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 45. General appearance waives all irregularities in previous process.—Gunn Hardware Co. v. Denison, 83 Mich. 40.

¶ 45a. When defendant pleads to the merits the character of the process used to commence the action becomes immaterial.—Miller v. Rosier, 31 Mich. 475.

¶ 45b. One who joins issue, and goes to hearing on the merits, is generally understood to waive objections to the process which he does not distinctly make known.—Maxwell v. Deems, 46 Mich. 35.

¶ 45c. Appearing in an action of replevin and pleading to the merits will waive the objection that the writ was returnable on Sunday.—Pierce v. Rehfuss, 35 Mich. 53.

¶ 45d. By appearing and joining issue in replevin defendant waives the right to have the writ set aside for defects in the affidavit and bond.—Clark v. Dunlap, 50 Mich. 492.

¶ 45e. Appearance in response to a summons to answer a complaint waives the informality where the proper process should have been an order to show cause.—Curran v. Norris, 58 Mich. 512.

¶ 46. A general appearance in circuit court on appeal gives jurisdiction, and is a waiver of the right to insist on a dismissal for mere formal defects.—Sherwood v. Ionia Circuit Judge, 107 Mich. 136.

¶ 47. The publication of an order in a suit for divorce for the appearance of a nonresident defendant is unnecessary where defendant appears by solicitor after the order is granted.—Long v. Long, 59 Mich. 296.

¶ 48. Consent to an order of court takes the place of process to bring the party consenting within the jurisdiction.—Durfee v. Abbott, 50 Mich. 278.

¶ 49. Defective service is waived by pleading the general issue after the denial of a motion to quash, excepting in cases in which the party is deprived of his liberty.—Improved Match Co. v. Michigan Mut. F. Ins. Co., 122 Mich. 256.

¶ 50. Suit was begun by attachment under the usual affidavit to recover on a past-due account, and also under an affidavit filed under How. St., § 8016a, for the amount of a note not yet due. Held, that after appearing and pleading without objection defendant could not object on the trial to the introduction of the note in evidence because not due when suit was begun and because the special affidavit was insufficient.—Gunn Hardware Co. v. Dennison, 83 Mich. 40.

¶ 51. A nonresident foreclosure defendant proceeded against by advertisement, who was permitted to come in and defend more than three years after the decree against him thereby appears and waives objection that the order for his appearance as a nonresident was not in compliance with the statute.—Stone v. Welling, 14 Mich. 514.

¶ 51a. If a defendant whose motion, on special appearance, to quash the proceedings for defective service, is overruled, pleads to the action and goes to trial on the merits, he waives his objection and submits himself to the jurisdiction.—Dailey v. Kennedy, 64 Mich. 208.

¶ 52. The attorneys for defendant in a suit for libel, after putting in and perfecting special bail and entering the appearance of defendant, moved to quash and dismiss the

proceedings, upon the ground that the affidavit to hold to bail conferred no jurisdiction upon the court to issue the writ or make an order to hold to bail. Held, that the general appearance waived all defects as to the right to maintain the suit for damages, and that the motion was properly denied.—Graham v. Cass Circuit Judge, 108 Mich. 425.

¶ 53. An application for a rehearing on the ground that the court sustained service in the lower court under an act which was not in force at the time of the service, is denied where the record shows defendant entered a general appearance.—Young v. Reeves & Co., 172 Mich. 363.

¶ 54. A defendant served with process while in a county temporarily in an action upon a claim assigned to the plaintiff for the purpose of jurisdiction, cannot raise the question of jurisdiction after a plea of the general issue.—Hicks v. Steel, 126 Mich. 408.

§ 12. ——Effect on collateral proceedings.

On foreclosure of appearance to petition for revivor, see ante ¶ 32.

¶ 55. A general appearance entered in an action at law by defendants before they learned of an unauthorized chancery order permitting the complainant in a suit in equity to begin such action, but restraining all proceedings in the law court, after service of process, does not estop defendants from contesting the validity of such order.—Foster v. Kent Circuit Judge, 116 Mich. 285.

¶ 56. Waiver of jurisdictional defects by appearance does not give validity to a pending collateral proceeding in garnishment, if the latter would otherwise be void on account of such defect.—Isabelle v. Iron Cliffs Co., 57 Mich. 120; Iron Cliffs Co. v. Lahais, 52 Mich. 394.

APPEARANCES to APPREHENSIONS.

Cross-References.

Appearances—
- To actions and suits, see Appearance.
- As subject of opinion testimony, see Evidence, VI; Indictment, VIII, B.
- Foundation for belief or assumption, see topics involving the belief or assumption as cause or defense, e. g., Malicious Prosecution, III (probable cause); Arrest, I (ground for arresting); Negligence (duty dependent on appearance of safety or danger); Master and Servant, III (duty and assumption of risk); Notice and Record of Title, I (facts putting on inquiry): Negotiable Instruments, XIII.

Appliances of Trade—
- Duties of master and servant, see Master and Servant, III; Workmen's Compensation Law.
- Liability of carriers to passengers and shippers, see Carriers.
- Negligence respecting, see Negligence, and specific topics.
- As fixtures, see Fixtures; Landlord and Tenant, IV, E.

Application—
- To court for judicial action, see specific topics treating of the relief or action, e. g., Motions and Orders; Equity; Attachment; New Trial; Receivers; Stay of Proceedings; and the like.
- For insurance, see Fraternal Beneficiary Associations; Insurance, V.

Application of Payments, Assets or Credits—
- See generally Payment, III; Marshalling Assets.
- On executions, see Executions, VIII.
- On foreclosure, see Foreclosure, II, E, III, G; Chattel Mortgages, VI.
- Of assets of estates or firms in liquidation, see Corporations, XXIII; Partnership, VII; Joint Adventures; Estates of Decedents, XIII; Trusts, XI; Assignments for Creditors, § 25.
- Of pledge or proceeds, see Pledges.
- Of public funds and revenues, see Taxes, X; Municipal Corporations, XIII; Counties, V; Townships; Constitutional Law, XIV.

Appointing Power—
- See generally Constitutional Law, II; Officers, II; Municipal Corporations, XV; Schools, III, V.

Appointments to Office or Trust—
- Executors and administrators, trustees, and the like, see Estates of Decedents, III; Guardianship, II; Receivers, II; Trusts, V; Wills, I, VI, F; and see cross-references, ante, under "Appointing Power."
- Arbitrators, see Arbitration, § 8.
- Referees or masters, see Reference, II.
- Evidence of appointment, competency, see Evidence, IV-VIII.
- Contracts for, public policy, see Contracts, IV, B.

Apportionment—
- Of state into official and representative districts, see Constitutional Law, XII; Elections.
- Of public revenues and liabilities, see State of Michigan; Counties, V; Municipal Corporations, XIII; Townships; Constitutional Law, XIV; Bridges, V; Highways, VIII.
- Of cost of local improvements, see Drains, II, C; Local Improvements, VI.
- Of damages, see Damages, IV; Verdicts and Findings, III; and see specific topics, e. g., Libel and Slander, VIII.
- Of award in condemnation, see Eminent Domain, V, E; Highways, II, B.

Of income or depreciation, see Life Estates, II; Annuities; Estates of Decedents, XIII; Trusts, XI; Wills, VI, F-I.
Of insurance, see Insurance, XVII.
Of dower, see Dower, VI, C.
Of land on partition, see Partition.
Of rents, see Landlord and Tenant, IV, G.

Appraisals; Appraisers—
In condemnation proceedings, see Eminent Domain, V; Highways, II, B.
In drain or improvement proceedings, see Drains, II, C; Local Improvements, VI.
In arbitration proceedings, see Arbitration.
On levy, see Attachment, VI, B; Executions, VI; Exemptions, II; Homesteads, VIII.
Of estates of decedents, see Estates of Decedents, V, C.

Apprehensions—
Of insecurity, ground for enforcing chattel mortgage, see Chattel Mortgages, II, A.
Ground for injunction, see Injunctions, I, II.
Of harm as ground for self defense, see Assault and Battery; Homicide.

APPRENTICES.

TREATS of the relation of master and apprentice and of its incidental rights and liabilities.

General rights of infants and their parents or guardians, see Infants; Parent and Child; Guardianship.
Rights arising from relation of master and servant, see Master and Servant.
Applications of the Workmen's Compensation Law, see that topic.
General provisions as to apprentices, see Comp. L. 1915, chap. 219.

¶ 1. A provision in an agreement of apprenticeship that the master may discharge for acts of disobedience if he deem it best, does not give the master the authority to pass arbitrarily upon what constitutes disobedience.—Bradley v. Perkins, 138 Mich. 356.

¶ 2. An apprentice is justified in leaving his master and may recover a bonus provided for by a contract where the master without reasonable grounds attempts to penalize him by adding a month's time to his apprenticeship for alleged disobedience.—Bradley v. Perkins, 138 Mich. 356.

¶ 3. Wilful disobedience sufficient to justify the discharge or penalizing of an apprentice is not shown by evidence that he refused to work overtime on account of cold feet in a shop where the stove had been temporarily removed.—Bradley v. Perkins, 138 Mich. 356.

APPROACHES to AQUATIC RIGHTS.

Cross-References.

Approaches—
To bridge or crossing, duty and negligence respecting, see Bridges, III; Railroads, VIII, D.

Appropriation of Money or Property—
For public use, see Eminent Domain; Highways, II, B.
Allotment of public money or revenues, see State of Michigan; Municipal Corporations, XIII; Counties, V; Schools, IV; Constitutional Law, XIV.
Taking as element in crime or tort, see Larceny; Crimes, II (specific crimes); Conversion; Replevin; Trespass.

Appropriation of Name—
As giving prior right, see Corporations, III; Trade Marks; and see also Injunctions, II.

Approval—
See generally topics treating of the thing or act which is the subject of approval, e. g., Attachment, IV, B (bond); Municipal Corporations, V (ordinances); Municipal Bonds, I (submission to vote).
As used in the sense of "acknowledgment," "admission" or "assent," see cross-references found under those headings.
Sales on approval, see Sales.

Appurtenances—
What constitute appurtenances, see Real Property; Easements; Fixtures; Landlord and Tenant.
Rule as to passing with the land, see preceding references, and see also Deeds, III; Wills, VI.

Apt Words—
See generally Deeds, III; Wills, VI; Pleading, as to words technically expressive of a given legal meaning.

Aquatic Rights—
See generally Waters; Navigable Waters; Mills.

ARBITRATION AND AWARD.

TREATS of the nonjudicial settlement of controversies by reference to persons chosen by the parties to hear and determine and make an award, excluding the reference under stipulation in contract that an architect, inspector or scaler shall ascertain and determine facts coming into question under the contract (see Building and Construction Contracts, VI; Contracts, VI, VII; Sales).

Analysis.

§ 1. In general; subjects arbitrable.
§ 2. ——Controversies involving landed rights.
§ 3. The agreement and submission.
§ 4. ——Subject matter and parties bound.
§ 5. ——Statutory submission and requisites thereof.
§ 6. ——Revocation and withdrawal.
§ 7. Waiver of contract right to have arbitration.
§ 8. Arbitrators or umpire.
§ 9. Hearing, issues, evidence and procedure.
§ 10. The award, signature and execution.
§ 11. ——Scope, certainty and contents.
§ 12. ——Delivery, filing or publication.
§ 13. ——Interpretation and effect.
§ 14. Judgment on award.
§ 15. Enforcement of or relief from award.
§ 16. ——Separate actions or suits.
§ 17. ——Grounds for relief, and evidence of grounds.
§ 18. Liability and suits on bonds.
§ 19. Bar and estoppel by award.
§ 20. Effect of pending submission on rights.

§ 1. In general; subjects arbitrable.

Capacity of persons to agree to arbitration, see post § 4.

Subject matter covered by submission, see post § 4.

Under the Workmen's Compensation Law, see Workmen's Compensation Law.

Stipulations in contracts for adjustment of differences by architects, referees, scalers, or other agents, see Contracts; Building and Construction Contracts; Sales.

Submission of agreed case to court, see Submission of Controversy.

Public policy as to agreements for arbitration instead of actions, see Contracts IV, R.

Submission or offer to submit as condition precedent to right of action on contract, see Actions, § 8; Contracts; Insurance.

¶ 1. Experts selected to pass upon [illegible] designs submitted according to invitation are not arbitrators and the law of arbitration has no application to their mode of proceeding or to their action.—Donaldson v. Detroit Museum of Art, 72 Mich. 82.

¶ 2. The law favors the settlement of [illegible] by arbitration.—Chicago & M. L. S. R. Co. v. Hughes, 25 Mich. 136. Overruling Switzer v. Fletcher, 47 Mich. 333.

¶ 3. While an agreement to abide by the statement of a third person as to a disputed fact, as a reference to a third person to make a mere clerical computation from an agreed state of facts—such as the computation of interest upon a note—may not be considered analogous to a submission to arbitration, yet where witnesses are examined and the person to whom the submission is made is called upon to exercise his best judgment upon the matter in controversy, and to decide conclusively between the parties according to the law and the facts upon a consideration of testimony and arguments to be submitted to him, this must be considered a case of arbitration.—Backus v. Coyne, 35 Mich. 5.

¶ 4. A claim that is illegal and forbidden by statute, e. g., a contract to pay more than $10 for services in securing a pension, cannot be made the subject of arbitration.—Hall v. Kimmer, 61 Mich. 269.

§ 2. ——Controversies involving landed rights.

Construction of the submission as calling for conveyance, see the next ¶ 49.

Actions to recover real estate, see Comp. L. 1915, § 13647.

¶ 5. Under Comp. L. 1915, § 6886, [illegible] § 6871, are [illegible]

as to the title in fee of lands whose ownership is disputed, is beyond their jurisdiction, and an award involving such determination cannot be sustained or enforced, nor can a judgment based upon it be upheld.—Gallagher v. Kern, 31 Mich. 138.

¶ 6. A controversy as to the ownership of a strip of land one hundred and eight feet wide claimed by both parties in fee simple is, by How. St., § 8475, excluded from arbitration. Award and judgment set aside.—Lang v. Salliotte, 79 Mich. 505.

¶ 7. Damages for a right of flowage are a proper subject of statutory arbitration, since Comp. L. 1871, § 6890, only excludes freehold estate.—Fitch v. Constantine Hydraulic Co., 44 Mich. 74.

§ 3. The agreement and submission.

Revocation and withdrawal, see post § 6.
Necessity under terms of contract that arbitration be demanded, see post § 7.
Qualifications and selection of the arbitrators, see post § 8.
Requisites and sufficiency of the award, see post §§ 10-13.
Parol submission, see also post ¶ 44.
Mode of enforcing common law award, see post § 16.
Grounds for vacation of award or relief from it, see post § 17.
Liability on bonds, see post § 18.
Submission and bond in separate instruments, limitation of one by other, see post ¶ 104.
Rule that bare agreement does not bar or estop, see post § 20.
General law of contracts as involved in submission but not peculiar to arbitrations, see Contracts.
Arbitration provisions in contracts of insurance, see Fraternal Beneficiary Associations; Insurance.
Submission by corporation to arbitration, and officers to execute submission, see Corporations, XII, A, XVII, B.
Authority of partner to agree to arbitration of firm matters, see Partnership, IV, A.
Proper corporate officers to execute submissions, see Corporations, XVII, B.
Manner of execution of submission by agent for principal, see Execution of Instruments, II.
Presumption on appeal of authority of agent to make submission, see Appeal and Error, ¶ 1531.

¶ 8. A parol submission to arbitration is good at common law and is not forbidden by statute.—Cady v. Walker, 62 Mich. 157.

¶ 9. An arbitration which was intended to but does not conform to the statutory requirements may nevertheless be good at common law.—Galloway v. Gibson, 51 Mich. 185.

¶ 10. If an agreement to submit to arbitration contains no covenant not to sue, or that the award shall be made the foundation of a judgment, it is for a common-law arbitration and enforceable only by action.—McGunn v. Hanlin, 29 Mich. 476.

¶ 11. A mere agreement to arbitrate does not preclude a resort to a court of justice, and cannot be pleaded in bar. Such agreements will not be specifically enforced, nor will the arbitrators be compelled to act.—McGunn v. Hanlin, 29 Mich. 476.

§ 4. ——Subject-matter and parties bound.

Arbitrable subject-matter, see ante §§ 1, 2.
Illegal subject-matter, see ante § 1.
Dealings of the arbitrators with the subject-matter, see post § 8, ¶ 31.
Scope and contents of award, see post § 11.
Allowance of counterclaims, see also post ¶ 93.
Affidavits to show what was intended to be submitted, see post ¶ 99.
Rearbitration as destroying bar of award, see post § 19, ¶ 110.
Estoppel of married woman accepting benefits to deny validity of award for want of capacity to submit, see post ¶ 109.
Capacity of married woman to arbitrate, see Husband and Wife, IV.
Persons who may agree to arbitrate, see Comp. L. 1915, § 13646.

¶ 12. A dispute as to the liability of a contractor for liquidated damages for delay in completing a building, held not within a provision of a contract requiring the submission of differences to arbitration.—Maurer v. School Dist. No. 1, 186 Mich. 223.

¶ 13. A contract for sale of 13,000 acres of land for the consideration of $3.50 per acre on a basis of 5,000 feet of standing timber per acre and agreeing to the making of an estimate by estimators to be appointed by the parties and increase or decrease of price in proportion to the amount of timber on the land, cannot be construed as a submission to arbitration but is a mere collateral part of the contract irrevocable by either party.—Noble v. Grandin, 125 Mich. 383.

¶ 14. An agreement for the settlement of a contest of a will, is not invalid because one of the children was not a party to the agreement though interested in the settlement of the estate, where she did not make herself a party to the controversy, and the award of the arbitrators under the agreement did not determine her rights.—Hoste v. Dalton, 137 Mich. 522.

§ 5. ——Statutory submission and requisites thereof.

Defective submission good as one at common law, see ante § 3.

Bond good as common-law bond, see post ¶ 101.
Necessity of acknowledgment, see Comp. L. 1915, § 13648.

¶ 15. Under express provisions of Comp. L. 1871, § 6891, there must be an acknowledgment, else the award cannot sustain judgment. —Gibson v. Burrows, 41 Mich. 713.

¶ 16. A submission under R. S., 1838, was not required to be under seal.—City of Detroit v. Jackson, 1 D. 106.

¶ 17. Where the execution by a municipality party to an arbitration agreement under the statute was by P., "mayor of said city," the certificate of the officer taking the acknowledgment of the agreement, that such party appeared before him by such agent, for that purpose duly appointed, and acknowledged the same, is sufficient evidence of the execution of the agreement, and of the authority of the agent, to authorize the arbitrators to act, and the circuit court to render judgment upon their award.—City of Detroit v. Jackson, 1 D. 106.

¶ 18. An acknowledgment of voluntary submission to an arbitration is irregular if not made until after the arbitrators have begun their work, but if made before they have finished it may be allowed for the purpose of sustaining a statutory judgment on the award.—Davis v. Berger, 54 Mich. 652.

¶ 19. An acknowledgment is not invalidated because it is unnecessarily made on oath.—Davis v. Berger, 54 Mich. 652.

¶ 20. Parties to an amicable settlement may be presumed to intend that which they execute; and if it is lawful and practicable a mere mistake as to statutory requisites should not prevent its execution in some suitable proceeding.—Galloway v. Gibson, 51 Mich. 135.

¶ 21. A submission expressly following the statute, except where it permissibly varied from it, will support an award conformable thereto.—Fitch v. Constantine Hydraulic Co., 44 Mich. 74.

§ 6. ——Revocation and withdrawal.

Necessity of consent, see Comp. L. 1915, § 13668.

¶ 22. Either party to an arbitration may revoke the authority of the arbitrator, and this he may do notwithstanding the agreement to arbitrate is valid.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

¶ 23. A common-law agreement for arbitration is revocable by either party and is revoked by bringing suit.—Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633.

¶ 24. A contract for the erection of a building provided that the contractor, under the direction and to the satisfaction of the architect, "acting, for the purposes of the contract, as agent of the owner," should provide all materials, etc.; that, if alterations were made in the plans, the value of the work added or omitted should be computed by the architect, and the amount so ascertained added to or deducted from the contract price; that, in case of dissent from such award by either party, the valuation of such work should be referred to three disinterested arbitrators, whose decision should be final. Held, that the arbitration clause was not revocable as a general agreement to submit all differences, but was specific as to the disputed alterations and was valid, and binding upon the parties.—Weggner v. Greenstine, 114 Mich. 310.

§ 7. Waiver of contract right to have arbitration.

Revocation of submission, see ante § 6.
Waiver of unanimous decision, see also post ¶ 48.
Stipulations for arbitration before resort to action occur most frequently in contracts of insurance, and the effect of such a stipulation on the right to sue is treated in Insurance, XX, A.

¶ 25. Mere silence or forbearance to claim arbitration made a condition precedent to action on a policy does not amount to a waiver of it.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

¶ 26. Where the right to have arbitration is dependent on the making of a request for it, a failure to request it is a waiver.—Nurney v. Fireman's Fund Ins. Co., 63 Mich. 633.

¶ 27. A waiver of the right to have arbitration, reserved by contract, necessarily implies a waiver of all the conditions dependent upon it, and leaves the parties in the same situation as they would be in if they had made no agreement to arbitrate.—Chippewa Lumber Co. v. Phenix Ins. Co., 80 Mich. 116.

§ 8. Arbitrators or umpire.

Who are arbitrators and what is arbitration, see ante § 1.
Decision by majority, see post § 10.
Right to retain award to secure costs, see post ¶ 51.
Disqualification of judge to become arbitrator, see Judges, II.
Oath of arbitrators under statutory arbitration, see Comp. L. 1915, § 13650.

¶ 28. An arbitrator chosen by a lessee as one of three to fix the rent to be paid is

not incompetent because of an opinion favorable to the lessee expressed by him upon the lease five years before, there being no showing that at the time of his acting as arbitrator he had any opinion such as would influence his judgment.—Brush v. Fisher, 70 Mich. 469.

¶ 29. Whatever objection there was to two arbitrators selecting the third by lot was waived where, with knowledge of the mode of choice, the parties submitted the controversy without objection to the three arbitrators.—Brush v. Fisher, 70 Mich. 469.

¶ 30. The oaths of arbitrators need not be in writing.—Davis v. Berger, 54 Mich. 652.

¶ 31. Arbitrators ought not to undertake any care or charge whatever of property and business that is under their arbitration.—Gallagher v. Kern, 31 Mich. 138.

§ 9. Hearing, issues, evidence and procedure.

Validity of hearing when formalities of execution of submission are not yet completed, see also ante ¶ 18.
Signing and executing the award, see post § 10.
Number necessary to concur in award, see post § 10.
Scope and contents of award, see post § 11.
Delivery of the award to parties or filing, see post § 12.
Grounds for vacation or relief, see post § 17.
Time and place for hearing, notice thereof, and adjournments, see Comp. L. 1915, § 13649.
Quorum of arbitrators, see Comp. L. 1915, § 13652.
Summoning and attendance of witnesses, see Comp. L. 1915, § 13651.
Rehearing on order of court, see Comp. L. 1915, § 13657.

¶ 32. It is improper for counsel of one party to make, opposing counsel being absent, further argument to arbitrators whose decision has been intimated to him, and it is further improper for him to intimate his own opinion as to the error of the proposed award, to the arbitrator selected by his client.—Lattin v. Gamble, 154 Mich. 177.

¶ 33. Courts are not inclined to interfere with the doings of arbitrators on any technical ground, or to bind them to the nice rules of pleading and evidence or the principles of decision which control the action of more formal tribunals, or to review the original controversy on the merits; nor will the real determination be disturbed for mere error of judgment of the arbitrators upon any matter within the scope of the submission, where no fraud has intervened nor such a mistake as would seem to have caused the case to be so far misapprehended that the declared result does not express the real judgment of the arbitrators upon it.—Chicago & M. L. S. R. Co. v. Hughes, 28 Mich. 186.

¶ 34. Where an arbitrator is furnished with a memorandum of authorities by one of the parties after the closing of the testimony and after a stipulation that neither party should be represented by counsel, the award will be set aside without any examination by the court as to whether the arbitrator was in any way influenced by the ex parte communication. Communications of law as well as fact offend the rule.—Hewitt v. Village of Reed City, 124 Mich. 6.

¶ 35. The adjournment of an arbitration is within the power of the arbitrators, and where the continuance of a lease depends upon the result of the arbitration such an adjournment cannot deprive the tenants of their rights.—Abeel v. Hubbell, 52 Mich. 37.

¶ 36. Persons selected to ascertain the value of a pier which one of the parties was to pay for are merely appraisers and their action merely an appraisal, where they are to base it on an inspection of the pier by themselves; and accordingly it is not requisite that the parties be summoned or notified to be present when that is done.—James v. Schroeder, 61 Mich. 28.

¶ 37. Where a bill is filed to redeem from a mortgage on tender of an award as part payment, and the answer admits the submission, and that the parties mutually executed bonds to abide the award, the validity of which it attacks only on the ground that the arbitrators "did not award in accordance with the submission," which ground the defendant in his testimony abandons, and alleges invalidity because the arbitrators, after hearing part of the case, adjourned to a specified day, or to the first rainy day, and then, without sufficient notice to him, met at an earlier day and made their award—the evidence showing, however, that he not only had actual notice of the last meeting, but purposely disregarded it, and secretly tried to induce one of the arbitrators to withdraw from the arbitration—the award will not for such reasons be held invalid.—Flanders v. Chamberlain, 24 Mich. 305.

¶ 38. A clause in the submission bond submitting all controversies between the parties, and "all matters relating thereto," would seem to import authority in the arbitrators to award concerning the costs of the arbitration.—Clement v. Comstock, 2 Mich. 359.

§ 10. The award, signature and execution.

Requisites and sufficiency of the submission, see ante §§ 3-5.
Hearing and taking evidence and arguments on which to base award, see ante § 9.
Grounds for vacation or relief, see post § 17.

Vacation for mistake in submission allowing two to decide, see post ¶ 95.
Evidence to show disagreement procured by counsel, see post ¶ 100.
Duress in procuring award, see Duress.
Unanimity or majority in concurrence, see Comp. L. 1915, § 13652.

¶ 39. An award that in no manner conforms to the submission must be disregarded. —Sawtells v. Howard, 104 Mich. 54.

¶ 40. As a general rule, all three arbitrators must agree on an award; and decision by only two is not binding.—Lattin v. Gamble, 154 Mich. 177.

¶ 41. An award is invalid if not executed by each arbitrator in the presence of all the others.—Daniels v. Ripley, 10 Mich. 237; French v. Butler, 39 Mich. 79.

¶ 42. An award is valid if signed by two arbitrators in accordance with a submission requiring execution by a majority.—Cooper v. Andrews, 44 Mich. 94; Fitch v. Constantine Hydraulic Co., 44 Mich. 74.

¶ 43. Where, in an action upon an award by arbitrators against a mutual benefit association had pursuant to the contract of insurance, the defence is that the award was signed by only two of the three arbitrators, it cannot be claimed that defendant's failure to produce its by-laws at the hearing before the arbitrators waived the signing by all the arbitrators as required by the by-laws; since by the contract itself the award is invalid.—Russell v. North American Ben. Ass'n, 116 Mich. 699.

¶ 44. An award made by a lawyer in pursuance of a parol submission by parties resorting to him as a common arbiter is valid. —Cady v. Walker, 62 Mich. 157.

§ 11. ——Scope, certainty and contents.

Scope of submission and of hearing, see ante §§ 4, 9.
Right to allow costs, see ante ¶ 38.
Certainty and substance, see post § 11.
Omission to state date, see also post ¶ 54.
Omission to find amount, see post ¶¶ 54, 56.
Omission to state ownership of chattels, see post ¶ 90.
Omission to consider elements of value in appraising, see post ¶ 91.
Excessive interest, see also post ¶ 88.
Construction of the award, see post § 13.
Award in alternative, see also post ¶ 55.
Necessity of including evidence to enable court to review award on facts, see post § 15, ¶ 74.
Effect as bar of things necessarily implied, see post § 19.

¶ 45. An award to be binding must be certain. The certainty required is certainty to a common intent. Courts will not intend an award to be uncertain, but the uncertainty must appear on the face of the award or by averment.—Clement v. Comstock, 2 Mich. 359.

¶ 46. An award that is definite enough to be binding if it were a contract is sufficiently definite.—Bush v. Davis, 34 Mich. 190.

¶ 47. An award directing the return of property, but not expressly determining the title to it or directing releases to be executed, is sufficiently certain.—Clement v. Comstock, 2 Mich. 359.

¶ 48. Articles of arbitration based on settlement of a suit and an award pursuant to them will not prevent a judgment, though no court is mentioned.—Fitch v. Constantine Hydraulic Co., 44 Mich. 74.

¶ 49. An agreement to arbitrate if an agreement was not reached on the amount of damages to be paid for flowage, the award to fix damages and provide for a conveyance, followed by articles of arbitration which do not provide for a conveyance, does not require the award to so provide.—Fitch v. Constantine Hydraulic Co., 44 Mich. 74.

§ 12. ——Delivery, filing or publication.

Tardy delivery as discharging liability on bond, see post § 18.
Filing in court and confirmation, see Comp. L. 1915, § 13653.

¶ 50. An award is valid though not made and ready for delivery until a late hour in the evening of the last day for completion.—Clement v. Comstock, 2 Mich. 359.

¶ 51. The arbitrators may retain the award in their hands until paid costs awarded where authority was given to include costs. —Clement v. Comstock, 2 Mich. 359.

¶ 52. The failure to file an award within the time specified in an arbitration agreement, is no ground for setting aside such award where the agreement did not provide that the award should be void if it was not made within the time appointed.—Patrick v. Batten, 123 Mich. 203.

§ 13. ——Interpretation and effect.

Necessity of certainty, see ante § 11.
Relief against defective part of award, see post § 15.
Strength of evidence required to impeach award, see post § 17.
Award as equivalent to account stated, see Account Stated, § 1, ¶ 6, § 2, ¶ 13.

¶ 53. Awards are to be liberally construed, and all presumptions are to be made in favor of their validity.—Clement v. Comstock, 2 Mich. 359; Bush v. Davis, 34 Mich. 190.

¶ 54. An award will not be deemed void on the ground of failure to find the amount due at its date, where all the elements are found and set forth so that it is a matter of the simplest computation to determine the exact amount.—Bush v. Davis, 34 Mich. 190.

¶ 55. An award in the alternative (both alternatives being certain) is not void for uncertainty. Where one of the alternatives is certain, and the other uncertain or impossible to be performed, the award has been held good, for the party could perform its requirements by performing that which was certain.—Clement v. Comstock, 2 Mich. 359.

¶ 56. Where an award of arbitrators leaves the amount due from one party to the other to be determined from an examination of certain books of account, and such accounts are so incomplete that the amount awarded cannot be ascertained without something more than computation, the award is void for uncertainty.—Mather v. Day, 106 Mich. 371.

¶ 57. Where the award was that C. and H. should redeliver to B. all the personal property which they had taken by virtue of two chattel mortgages (describing said mortgages), and also by a certain writ of replevin (specifying it), held, that as the presumption was that the mortgages and replevin writ showed what the property was, the award in that respect was sufficiently certain.—Clement v. Comstock, 2 Mich. 359.

¶ 58. An award that is so uncertain and ambiguous in some of its parts that it cannot be enforced is void in toto, although sufficiently definite in other respects; and especially is this so in a case where it was the intent of the parties that all differences existing between them with reference to the subject-matter of the submission should be determined by the arbitrators.—Mather v. Day, 106 Mich. 371.

¶ 59. An unauthorized decision as to costs avoids award for the excess only.—Clement v. Comstock, 2 Mich. 359.

¶ 60. Notwithstanding that How. St., § 8474, excepts married women from its provisions authorizing arbitration a submission signed by both husband and wife, with an award may bind him if she has no interest, other than as wife, in the matters submitted and joined only because of such relationship.—Taylor v. Smith, 93 Mich. 160.

¶ 61. Where a provision of an award evidently leaves a particular obligation between the parties to rest upon the contract which created it, and which, for that purpose, was to be left in full force, and not merged or extinguished in the award, such provision does not prevent a specific money award made from constituting an equitable set-off to the mortgage debt which is the subject of the arbitration. The two clauses or provisions may be independent of each other.—Flanders v. Chamberlain, 24 Mich. 305.

¶ 62. Where a submission is general as to all controversies between the parties, the court will intend, until the contrary appears, that the arbitrators decided all matters in difference.—Clement v. Comstock, 2 Mich. 359.

¶ 63. An award of arbitrators that there is due the plaintiffs as subcontractors for work on two buildings two specified sums and that the payment thereof is subject to discharging any and all liens, including costs, against the buildings or property on which they are situated, which liens have been served by any materialman or subcontractor serving the plaintiff, is final and definite and certain where the law fixes the place where claims of liens should be filed and the time in which they must be filed, and such time has expired, and the number and amount of the liens is easily ascertainable.—Pigott-Healy Const. Co. v. H. A. Jones Real Estate Co., 201 Mich. 102.

§ 14. Judgment on award.

As depending on whether submission was common law or statutory one, see also ante § 3.
Requisites of statutory submission to allow entry of judgment thereon, see ante § 5.
Concurrent action in equity to annul award, see post § 15.
Modes for seeking vacation or other relief from award, see post § 15.
Reviewableness on error of proceedings on award, see Appeal and Error, § 21.
Agreement for finality as cutting off right to appeal, see Appeal and Error, § 63.
Waiver of errors anterior to submission, see Appeal and Error, XII, B; Saving Questions for Review, V.
Errors available on writ of error to judgment, see Appeal and Error, XII.
Presumptions in favor of judgment on writ of error, see Appeal and Error, XII, C.
Disposal of case on writ of error, remand or final judgment, see Appeal and Error, XIII, B.
Final judgment on error, see Appeal and Error, § 519.
Confirmation by court, see Comp. L. 1915, § 13653.
Record of judgment, see Comp. L. 1915, § 13660.
Effect of judgment and execution thereon, see Comp. L. 1915, § 13661.

Costs of proceeding, see Comp. L. 1915, §§ 13659, 13664.
Writ of error to judgment, or order vacating it, see Comp. L. 1915, §§ 13662, 13665.

¶ 64. The award of arbitrators, under the statute, is an official act, and is itself the evidence and authority upon which the court may render judgment.—City of Detroit v. Jackson, 1 D. 106.

¶ 65. Judgment confirming an award cannot be refused by the court except for a reason specified in How. St., § 8482; the court cannot vacate an award merely because in its opinion the ends of justice require such action.—Phelps v. Wayne Circuit Judge, 117 Mich. 35.

¶ 66. A judgment confirming an award need not repeat a provision therein explicitly requiring one of the parties to release certain claims.—Chicago & M. L. S. R. Co. v. Hughes, 28 Mich. 186.

¶ 67. Where the subject-matter of a pending suit was submitted to arbitrators, whose award by their stipulation was to have "the effect of a verdict, and that judgment should be rendered on said award as on a verdict," held, that as the court had power under the statute to render judgment on the award of the arbitrators, that part of the record anterior to the submission might be rejected by the court though not sufficient to support a verdict.—Vanderhoof v. Dean, 1 Mich. 463.

¶ 68. The judgment of a court upon an award made by arbitrators cannot be said to be inconsistent with the award because it provides for the payment of the costs of the court to be taxed, while the award provided that the expenses and charges of the arbitration should be mutually borne and paid by the parties; the costs in the court and the expenses of arbitration are different things. —Chicago & M. L. S. R. Co. v. Hughes, 28 Mich. 186.

¶ 69. A judgment is in conformity with the award of arbitrators for construction work performed by subcontractors, where the award is for a specified sum subject to the subcontractor's paying all liens which have been served by any materialman or subcontractor serving the subcontractors and the judgment is for the amount of the award less liens in specified sums in favor of specified parties who have furnished materials to and performed labor upon the buildings for the subcontractors.—Pigott-Healy Const Co. v. H. A. Jones Real Estate Co., 201 Mich. 102.

§ 15. Enforcement of or relief from award.

Confirmation and judgment on statutory submission, see ante § 14.
Common law and statutory submissions distinguished, see ante § 3.
Certainty and meaning of award, see ante §§ 11, 13.
Nonconformity to submission, see also ante ¶ 39.
Effect of invalidity in part, see ante § 13.
Effect of resubmission to bar enforcement of award, see post ¶ 110.
Duress in procuring award, see also Duress.
Errors correctible on appeal, see Appeal and Error, XIII, B.
Admission of improper evidence to impeach award as harmless error, see Harmless Error.
Of judgments not sounding in money, see Comp. L. 1915, § 13663.
Vacation or modification of award by court, and grounds for so doing, see Comp. L. 1915, §§ 13654, 13655.
Motion to vacate or modify in court, see Comp. L. 1915, § 13656.

¶ 70. The prosecution of a motion to confirm an award, may be carried on although such action at law is at peril of being set aside in equity on a bill pending before the same judge on the other side of the court.—Early v. Ingham Circuit Judge, 166 Mich. 517.

¶ 71. Where the defeated party has invoked the aid of the chancery court to set aside an award, he is not required to pursue the remedy of a motion to vacate said award afforded under 3 Comp. L. 1897, § 10932.—Early v. Ingham Circuit Judge, 166 Mich. 517.

¶ 72. Where it is possible, relief may be granted against the defects in an award separately without disturbing the award as a whole.—Beam v. Macomber, 33 Mich. 127.

¶ 73. The statutory remedy against an award is, under Comp. L. 1871, § 6896 et seq., by motion to vacate made at the next term, and the court may vacate it for cause, or order a rehearing, or modify and correct the award in certain cases.—Cooper v. Andrews, 44 Mich. 94.

¶ 74. Where the evidence on which an award is based is not reported, it cannot be determined under How. St., § 8483 (which authorizes the court in certain cases to modify or correct an award), whether such award is excessive.—Taylor v. Smith, 93 Mich. 160.

§ 16. ——Separate actions or suits.

Concurrent action and motion for confirmation or to vacate, see ante § 15.
Effect of chancery proceeding for relief as staying motion or proceeding on law side for enforcement, see Stay of Proceedings, I.

¶ 75. A common-law award is enforceable only by action.—McGunn v. Hanlin, 29 Mich. 476.

¶ 76. A common-law action will lie to enforce a common-law award if it fairly disposes of the matters in controversy and leaves nothing open.—Galloway v. Gibson, 51 Mich. 135.

¶ 77. Where an award does not conform to the statute, it is enforceable, if at all, by bill or action as a cause of action, and not as a substitute for a verdict.—Gibson v. Burrows, 41 Mich. 713.

¶ 78. Equity has original jurisdiction to set aside an award; and Comp. L. 1897, § 10932 et seq., providing for the vacation of an award by the law courts does not show want of jurisdiction in equity when construed with section 10945 providing that the power of the chancery court shall not be impaired or diminished.—Kearney v. Washtenaw Mut. Fire Ins. Co., 126 Mich. 246.

¶ 79. The circuit court in chancery has jurisdiction to set aside an award of arbitrators.—Early v. Ingham Circuit Judge, 166 Mich. 517.

¶ 80. Where arbitrators actually pass their judgment upon the subject-matter submitted to them, strictly in accordance with the intention of the parties, but the award as written fails to express that judgment, the mistake will be held of a clerical nature; and a court of equity has the power to correct the same and decree a specific performance.—Buys v. Eberhardt, 3 Mich. 524.

¶ 81. Where members of a church submitted a business difficulty to an arbitration according to the rule of their church, the submission not defining the controversy and not making provision as to finality of the award, and after the making of a second award the bishop thought that the same was appealable, though the first might have been insisted on, held, in an action to enforce such award, that the parties would be held to have intended not a common-law arbitration, but one subject to the rules of their church as interpreted by its officers, and that therefore the award could not be enforced by the courts.—Rawlinson v. Shaw, 124 Mich. 340.

¶ 82. No legal objection exists to the prosecution of proceedings on the one side to enforce, and on the other to set aside, an award, although manifestly action at law to enforce the award is at peril of having the award set aside in equity, where it appears that the complainant in equity will not suffer injury if the award is confirmed and where it may be assumed that the proceedings will be so controlled that neither party will be damaged.—Early v. Ingham Circuit Judge, 168 Mich. 451.

¶ 83. In an action on an award under an insurance policy it is proper to put in evidence the proofs of loss and the submission and award.—Haslinger v. Long Island Ins. Co., 62 Mich. 144.

¶ 84. In an action on a common-law award made by a lawyer as arbitrator, he may prove the award, it not being a privileged matter under the circumstances.—Cady v. Walker, 62 Mich. 157.

§ 17. ——Grounds for relief, and evidence of grounds.

Land titles involved, see also ante ¶ 6.
Nonparticipation of joint party, see also ante ¶ 14.
Conduct of hearing by arbitrators and misconduct thereat, see ante § 9.
Delay in delivery or filing, see ante § 12.
General law of duress, fraud or mistake, see Duress; Fraud; Mistake.

¶ 85. An award of arbitrators will not be opened for any small or light occasion; but fraud and mistake may furnish grounds for equitable interference.—Beam v. Macomber, 33 Mich. 127.

¶ 86. Equity has power to relieve against awards in some cases where there has been fraud or misconduct in the arbitrators, or they have acted under manifest mistake; but generally awards are not interfered with by the courts.—Port Huron & N. W. R. Co. v. Callanan, 61 Mich. 22.

¶ 87. The courts will not review the amount of an award deliberately made merely for excess, where it does not appear that it was outrageous and beyond reason.—Port Huron & N. W. R. Co. v. Callanan, 61 Mich. 22.

¶ 88. An award will not be disturbed for allowing interest at ten per cent, unless the record discloses that the allowance of such interest was beyond the scope of the submission.—Bush v. Davis, 34 Mich. 100.

¶ 89. Where partners keep separate account of their own matters, and submit their final accounting to arbitrators, the wilful omission of either to lay before the arbitrators his full knowledge of the facts amounts to legal fraud vitiating the award.—Beam v. Macomber, 33 Mich. 127.

¶ 90. Where the subject-matter of a pending suit in replevin was submitted to an arbitrator, whose award failed to determine in whom the general property in the article was

at the time it was replevied, so that the court could not know from the award what judgment to give, it was held to be a case where the arbitrator had imperfectly executed his powers, and that the award should be vacated.—Davidson v. Gunsolly, 1 Mich. 388.

¶ 91. It was submitted to arbitrators to determine the value of certain real estate of one of the parties, at which valuation the other party was at his option to purchase the same. The arbitrators, by omitting to take into consideration the value of a water power connected with the property, appraised it at much less than its actual value. For this mistake the award was set aside.—Buys v. Eberhardt, 3 Mich. 524.

¶ 92. A lessee covenanted to make certain improvements and to pay the taxes, the rent to be fixed by agreement or arbitration at intervals of five years. An award at the end of one of the intervals took no account, in fixing the rent, of the increased value of the land, the taxes also having increased. Held, no showing of partiality or misconduct, such as would warrant a court in setting aside the award.—Brush v. Fisher, 70 Mich. 469.

¶ 93. Under an arbitration agreement between a landlord and tenant, not specifying any particular question in dispute but covering all questions in dispute and providing that the premises and all crops growing thereon should be surrendered, an award will not be set aside at the instance of the landlord granting the tenant a claim for improvements made by him and damages for surrendering the lease.—Patrick v. Batten, 123 Mich. 203.

¶ 94. Strong evidence is required to impeach a result on which the arbitrators heard the parties and exercised their judgment, and where there was no concealment of facts.—Beam v. Macomber, 33 Mich. 127.

¶ 95. An award signed by two of three arbitrators was set aside in equity, where the evidence overwhelmingly showed that it had been agreed that the provisions that an award by two should be binding was to be stricken out; although plaintiff's agent failed to strike out one of such provisions, and although complainant retained a copy of the agreement and might have discovered the mistake.—McCurdy v. Daniell, 135 Mich. 55.

¶ 96. An award of $740 is not stamped as so grossly inadequate as to show constructively that it must have been fraudulent or corrupt by the fact that appraisers some time later when conditions might have changed for the worse, and who had poorer facilities for knowing all the facts, reached an inventory showing that the amount was $7,000.—Michels v. Western Underwriters Ass'n, 129 Mich. 417.

¶ 97. In a suit to set aside an award between an insurer and insured as false, fraudulent and corrupt, the record discloses no evidence of fraud or corruption, where it appears that experienced and disinterested men under oath, one appointed by each party, spent several days examining the property, taking statements, and making the award.—Michels v. Western Underwriters Ass'n, 129 Mich. 417.

¶ 98. An award on a submitted issue of the value of land to be taken for public use will not be disturbed on a bill to vacate it on bare proof that the land owner caused false rumors as to the value of similar or adjacent lands to reach the jury of twelve acting as arbitrators, where it does not appear that a majority, whom the submission allowed to act, failed to act upon their own judgment, and where there is nothing to indicate tampering or fraud.—Port Huron & N. W. R. Co. v. Callanan, 61 Mich. 22.

¶ 99. Under an arbitration agreement between a landlord and tenant, not specifying any particular question in dispute but covering all questions in dispute and providing that the premises and all crops growing thereon should be surrendered, the tenant was not prevented from claiming and recovering for improvements made by him and damages for surrendering the lease, and the landlord could not in proceedings to set aside the award, by ex parte affidavits establish what it was agreed should or should not have been submitted.—Patrick v. Batten, 123 Mich. 203.

¶ 100. One of three arbitrators was appointed by counsel for one of the parties, and refused to accede to the decision of the other two. It appeared that in fact there were errors pointed out by the dissenting arbitrator, in the decision of the other two. Held, that the evidence did not establish that the disagreement was procured by counsel, so as to modify the general rule requiring all three arbitrators to assent to the award, and so as to make the decision of two binding.—Lattin v. Gamble, 154 Mich. 177.

§ 18. Liability and suits on bonds.

Bond as the instrument of submission, see ante §§ 3-6.

¶ 101. A submission bond with condition that judgment may be rendered on the award in a court of record is valid as a common-law bond, where it is evident from the conduct of the parties that they did not intend to make it a statutory arbitration, and they did not pursue the forms requisite for that purpose.—Clement v. Comstock, 2 Mich. 359.

¶¶ 102, 103. A bond for arbitration was conditioned on the performance of an award to be made on or before a certain date at an hour named, and the submission and hearing were begun after that hour, and the award was not made until afternoon of the day. Held, that there could be no recovery on the bond for the nonperformance of the award.—Elliot v. Hanson, 39 Mich. 157.

¶ 104. A bond to pay the amount to be fixed by appraisers as the value of a pier and conditioned to be void if the party should pay it "in ninety days from the date when said referees shall make their report" is not limited by the terms of an undated agreement not executed simultaneously, which provided for the submission and required the report to "be ready for the parties hereto * * * within thirty days from date hereof."—James v. Schroeder, 61 Mich. 28.

§ 19. Bar and estoppel by award.

Evidence necessary to impeach, see ante § 17.
Admissibility of original contract in action on award, see ante ¶ 83.
Construction of award, see ante § 13.
Interpretation as merging or leaving open particular right, see ante § 13.
Effect of bare agreement to arbitrate, see post § 20.
Conclusiveness of decision or estimate by architect, referee, scaler, or the like under stipulation of contract, see Contracts, VI, VII; Buildings and Construction Contracts, VI; Sales, II.

¶ 105. An award may conclude the parties on the question of the right of possession and ownership of chattels.—McArthur v. Oliver, 53 Mich. 299.

¶ 106. Where an arbitration fails and litigation is begun, the decree therein cannot properly be based upon an award of the arbitrators, made out of time and not relied upon by either party.—Alpena Lumber Co. v. Fletcher, 48 Mich. 555.

¶ 107. In an action to recover money alleged to have been paid under a mistake, the finding of an arbitrator to whom the matter was submitted under an agreement that his decision should not be binding, is not admissible.—Truax v. Bliss, 139 Mich. 153.

¶ 108. If an award by arbitrators requires the plaintiff to execute releases of certain claims found against him, it is wholly unnecessary to insert an order requiring it in the judgment of a court confirming the award; where the claims and the final decision rejecting them, together with the arbitrators' explicit decision that they shall be released, clearly and fully appear on the record, and the determination of the arbitrators is confirmed by the circuit court and the confirmation is acquiesced in by the defendant in error, the claims are released and the judgment is a complete bar of record.—Chicago & M. L. S. R. Co. v. Hughes, 28 Mich. 186.

¶ 109. Though a married woman could not under the statute submit to arbitration, yet where she has had the benefit of performance by the opposite party she is estopped to claim that it was void because she joined therein with her husband.—Taylor v. Smith, 93 Mich. 160.

¶ 110. Where, after an award has been rendered upon a matter submitted to arbitration, the parties agree to another arbitration of the disputed matter, the previous award is waived, and no action lies upon it, nor can it be set up as a defence in an action brought upon the original claim.—Rawlinson v. Shaw, 117 Mich. 5.

§ 20. Effect of pending submission on rights.

See also ante ¶¶ 11, 106.
Agreement that arbitration shall be precedent to right to sue, see Actions, § 4; Contracts, IV; Insurance, XX.
Submission of pending action as discontinuance of it, see Discontinuance, Dismissal and Nonsuit.

¶ 111. A mere agreement to arbitrate cannot be pleaded in bar.—McGunn v. Hanlin, 29 Mich. 476.

¶ 112. A mere agreement to arbitrate does not prevent one from suing.—Chadwick v. Phoenix Accident & Sick Benefit Ass'n, 143 Mich. 481.

¶ 113. A mere agreement to submit to arbitration the subject-matter of a pending suit does not operate as a discontinuance where there has been no award.—Callanan v. Port Huron & N. W. R. Co., 61 Mich. 15.

ARCHITECTS to ARGUMENTATIVENESS.

Cross-References.

Architects—
See generally Building Contracts, VII.
Decision as umpire of questions, see Building Contracts, VI.
Area Ways—
Duty and negligence respecting, see Buildings; Highways, XII.
Argument of Cause in Court—
In civil cases, see Argument of Counsel.
On trial for crime, see Indictment, IX, C.
On error or appeal or certiorari, see Appeal and Error, XI, E; Indictment, XVI, D; Certiorari.
Argumentativeness—
In instructions, see Instructions, II; Indictment, IX, E.
In pleading, see Pleading, I, A; Equity, VII.

ARGUMENT OF COUNSEL.

TREATS of the addresses of the attorneys to the jury in civil cases and the regulation thereof by the court, excluding objections and colloquies in the course of the trial, which are not in their nature addressed to the jury as such (see Trial); and also excluding address and arguments in criminal prosecutions (see Indictment and Prosecution).

Analysis.

§ 1. In general.
§ 2. Right of argument, and waiver of right.
§ 3. Opening statement or address.
§ 4. ——Scope and latitude.
§ 5. ——Sufficiency to present and define issues.
§ 6. Right to open or close and to reply.
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§ 25. Reference to insurance or indemnification.
§ 26. Reading papers or pleadings in case.
§ 27. Reading law reports, books, newspapers, etc.
§ 28. Statements called forth by adversary.

§ 1. In general.

Address and arguments on trial for crime, see Indictment and Prosecution, IX, C.

Arguments on objections to evidence, see Trial, V, C.

On hearing before jury in condemnation cases, see also Eminent Domain, V, C.

Briefs and arguments on appeal or error, see Appeal and Error, XI, E.

General misconduct of counsel on trial, see Trial, II.

Misconduct consisting in improper argument on offer or objection to evidence, see Trial, V, C.

Arguments before arbitrators on hearing, see Arbitration and Award, § 9.

Mode of saving objections to argument for review on error, see Saving Questions for Review.

Assigning errors for review, see Appeal and Error, VI, E.

Exclusion of argument from bill of exceptions unless material to exceptions taken, see Appeal and Error, § 101.

Showing in record for review of rulings on argument, see Appeal and Error, § 184.

Presumption as to harm from improper argument, see Appeal and Error, § 359.

Review of rulings of court on argument of counsel, see Appeal and Error, § 409.

§ 2. Right of argument, and waiver of right.

Right in condemnation proceedings to make statement to jury, see Eminent Domain, V, C.

¶ 1. In an action for personal injuries where there is some evidence of the plaintiff's

neglect of injuries and disregard of her physician's instructions after the accident, it is error to preclude the defendant's counsel's arguing the question to the jury.—Zibbell v. City of Grand Rapids, 129 Mich. 659.

§ 3. Opening statement or address.

Construction and effect of opening statement in reviewing verdict directed thereon, see Appeal and Error, §§ 386, 387.

¶ 2. The object of counsel's opening statement is to assist the jury to understand the testimony as it is introduced, and the bearing it has upon the issues involved.—Zucker v. Karpeles, 88 Mich. 413.

¶ 3. In an action of assumpsit for work and labor, it is not error for plaintiff's attorney in opening the case to the jury, to refresh his recollection from an account book. —Hunkins v. Kent, 151 Mich. 482.

¶ 4. An opening to the jury may be so unfair in its statement of irrelevant facts, and so well calculated to prejudice the jury improperly, as to justify setting aside a verdict obtained by the party making it. But the Supreme Court will not reverse a judgment for an unfair opening except in a very plain case.—Porter v. Throop, 47 Mich. 313.

¶ 5. Allowing an improper opening of a case may be such an abuse of discretion as to warrant reversal.—Scripps v. Reilly, 35 Mich. 371.

§ 4. ——Scope and latitude.

Sufficiency under the issues, see post § 5. Of closing arguments, see post § 9 et seq.

¶ 6. The opening statement cannot cover a case not made by the declaration.—Douglas v. Marsh, 141 Mich. 209.

¶ 7. Counsel have the right in opening the case to the jury to state in good faith their claims as to what the law may be in so far as may be necessary to give to the jury an understanding of the theory propounded. They are not limited to stating facts to be proved. —Prentis v. Bates, 93 Mich. 234, modifying on rehearing 88 Mich. 567.

¶ 8. An opening statement of a case to the jury includes neither an argument of the facts nor a discussion of the law of the case. —Wells v. Ann Arbor R. Co., 184 Mich. 1.

¶ 9. In an action for a negligent injury counsel may, in his opening to the jury, explain the evidence he intends to introduce by showing a diagram of the premises.—Battishill v. Humphreys, 64 Mich. 494.

¶ 10. An opening to the jury should state the facts which it is expected to prove, but should not set forth evidence in detail.— Scripps v. Reilly, 35 Mich. 371.

¶ 11. Counsel in his opening to the jury has a right to state at length his claims as to the law, and the facts as he expects to prove them.—Prentis v. Bates, 93 Mich. 234, modifying on rehearing 88 Mich. 567.

¶ 12. Counsel in his opening statement may state that he cannot produce a material witness and give the reason therefor.—Phillips v. U. S. Benevolent Society, 120 Mich. 142.

¶ 13. In opening his case to the jury it is not proper for counsel to enter into a detailed statement of the testimony by which he expects to substantiate the facts of his case; he should call the attention of the jury to the salient points, and what he expects to establish without repeating the evidence. —Zucker v. Karpeles, 88 Mich. 413.

¶ 14. Plaintiff's attorney, in his opening statement to the jury, stated that plaintiff's husband lived in another city a little more than a year, and on his return to his former home, where the suit was brought, defendant again threw around him injurious influences, and violated the law by selling liquor to him. Held, that this was a general statement of what the plaintiff proposed to show, and was not open to exception.—Ford v. Cheever, 105 Mich. 679.

¶ 15. Where a will is contested on the ground of undue influence and mental incapacity, it is not error for the court to permit counsel for the contestants in his opening to the jury to refer to the fact that the will was made in favor of the relations of the testatrix's husband, excluding her own kindred, and to claim that it was an unnatural will, and to state that in such cases the law would infer that the will was procured by a fraud.—Prentis v. Bates, 93 Mich. 234, modifying on rehearing 88 Mich. 567.

¶ 16. Reference by counsel for plaintiff in his opening statement in an action for personal injuries to the fact that plaintiff has been a widow for a number of years, with several children dependent upon her for support, whom she has succeeded in keeping in school, is improper.—McKormick v. City of West Bay, 110 Mich. 265.

¶ 17. In an action for an injury from a defective sidewalk it was not an abuse of discretion to permit plaintiff's counsel in his opening argument to the jury, to state, against objection, that he would prove that the walk in front of the premises where the accident

occurred had been out of repair for four or five years, and also that the walk around on another side of the same premises was in the same condition; and this though the court afterwards refused to admit such proof, since it would be a very narrow rule which restricted counsel to a statement of such facts as should turn out to be admissible under the strict rules governing the admission of testimony.—Campbell v. City of Kalamazoo, 80 Mich, 655.

¶ 18. Permitting counsel for the plaintiff in his opening statement to the jury in an action for fraud and misrepresentation in the sale of a hotel to refer to the fact that the plaintiff went to another state to get his children, intending to make a home for them, held not prejudicial error.—Bales v. Evans, 182 Mich. 383.

§ 5. ——Sufficiency to present and define issues.

Limitation of issues or defenses by opening addresses on theory of admissions thereby made, see Pleading, IX; Trial, V, A.
Direction of verdict on opening statement, see Directing Verdict.

¶ 19. Defendant may avail himself of a defence presented by the testimony, although it was not referred to in his counsel's opening statement.—Petherick v. General Assembly of Order of Amaranth, 114 Mich. 420.

¶ 20. In trover against the assignee of a chattel mortgage for property seized thereunder, plaintiff's counsel claimed, in his opening to the jury, that plaintiff owned the property and had never sold it; that defendant had never paid anything for the mortgage, and that before defendant took the mortgage it had been much more than paid in full. Held, that the opening was sufficient to notify the defense that plaintiff meant to go into a full investigation of the dealings which he had had with the mortgagee before giving the mortgage, and that under such an opening, although he had not used the word "usury," he could show that the mortgage did not represent any actual indebtedness.—Canning v. Harlan, 50 Mich. 320.

¶ 21. Testimony in an action for attorney's fees showing a contract for ten dollars per day is not a variance from the opening statement that the contract was one for a reasonable fee.—Meade v. Bowles, 123 Mich. 696.

§ 6. Right to open or close and to reply.

Right to open and close where special defense only is in issue or where case stands on set-off or recoupment, see 1916 C. C. Rule 42, § 3.

¶ 22. The right to open and close the argument belongs to the party entitled to open and close the proofs.—Taff v. Hosmer, 14 Mich. 309.

¶ 23. The right to open and close the argument belongs to the party who seeks to alter the existing state of things.—Attorney General v. May, 99 Mich. 538.

¶ 24. There is no absolute right on the part of counsel for defendants to cut off further argument to the jury by plaintiffs' counsel by declining to reply to the opening argument on plaintiffs' behalf, at least where other counsel for plaintiffs desire to be heard; but this matter comes within those discretionary rules which must, unless in extreme cases, leave the trial judge to determine the course of the procedure. It is the duty of the judge, however, to so regulate this matter as to give a fair opportunity for counsel to thoroughly present the whole case to the jury.—Barden v. Briscoe, 36 Mich. 254.

§ 7. Regulation and restraint by court.

See also post ¶ 36.
Right of argument, see ante § 2.
Right to reply, see ante § 6.
Refusing leave to state the law, see post ¶ 39.
Requiring desistance from comment on extraneous matters, see post ¶ 64.
Disregard of admonition as aggravating error, see also post ¶ 101.
General control of trial by court, see Trial, II.
Form and substance of cautionary instructions, see Instructions, VI.
Erroneous arguments made harmless by action of the court, see generally Harmless Error.
Harmfulness as depending on closeness of the case and laxity of the court, see Harmless Error.
Taking objections and saving questions for review, see Saving Questions for Review.

¶ 25. A trial judge must restrain counsel from commenting on testimony that has been excluded, if objection is made to such comments.—Hollywood v. Reed, 57 Mich. 234.

¶ 26. It is the duty of trial courts, so far as possible, to prevent improper remarks by counsel engaged in the argument of causes, especially if mutually provoked; and persistent transgressions justify, if they do not demand, more stringent measures than mere instructions to juries to disregard such statements.—Tunnicliffe v. Bay Cities Consol. R. Co., 107 Mich. 261.

¶ 27. The only practicable method of controlling and keeping counsel within due bounds, when disposed to transcend their privileges, is with the trial court, which has a large discretion in such matters. Where

this power is not exercised, and there is reason to believe that injustice has resulted from the improper course taken by counsel, the Supreme Court will grant relief, as it has in some instances done.—Randall v. Evening News Ass'n, 101 Mich. 561.

¶ 28. Where counsel in argument present to the jury as facts matter wholly outside the record the court must strike it out and reprimand counsel, and it is prejudicial error not to do so.—Martin v. Fisher, 143 Mich. 462.

§ 8. ——Time allowable.

¶ 29. 1897 C. C. Rule 63 provides that "not less than one hour on each side shall be allowed to counsel, if desired, in summing up a cause;" and a trial judge is therefore in error in limiting arguments to ten minutes on a side.—Harrison v. Howe, 109 Mich. 476.

§ 9. Mode, range and substance of arguments in general.

Of opening address, see ante § 4.
Impropriety of arguments in opening case, see ante § 4.
Statements, claims and references of fact or of law, see post §§ 10-17.
Inflammatory and prejudicial statements and suggestions, see post §§ 18-22.
Injecting improper elements or measure of recovery, see post §§ 23-25.
Reading books, papers or pleadings to jury, see post §§ 26, 27.
Retorts and provocation, see post § 28.
Time allowable, see ante § 8.
Impertinence and acrimony or vituperation in appellate briefs, see Appeal, § 237.

¶ 30. The use by counsel for plaintiff of a balance in his argument in a civil suit to demonstrate the preponderance of evidence is not error.—Billett v. Michigan Bonding & Surety Co., 195 Mich. 202.

¶ 31. It is not error for the trial court to permit counsel for the plaintiff to argue his case in the form of questions to and answers from a certain witness where it is obvious that if the witness was untruthful the argument must be unsound.—McArthur v. Sault News Printing Co., 148 Mich. 556.

¶ 32. Extravagant or irrelevant remarks of counsel in the heat of argument to the jury, which are not apt to mislead or prejudice the jury are not ground of reversal.—Battishill v. Humphreys, 64 Mich. 514.

¶ 33. An argument by counsel which is intemperate and unfair constitutes error, as a defendant has a right to have a dispassionate consideration of the questions in his case.—Philip v. Heraty, 135 Mich. 446.

¶ 34. Misstatement of the testimony by counsel in arguing the case before the jury will require the setting aside of the verdict only in a very clear case of misstatement which is not open to correction.—Varty v. Messmore, 132 Mich. 314.

¶ 35. Arguments of counsel, in an action on the case for malicious prosecution, which were not in good taste, were not ground for a reversal, where such remarks were supported by the evidence.—Harris v, Thomas, 140 Mich. 462.

¶ 36. The use of intemperate and improper language by counsel in his argument, and failure on the part of the trial judge to appreciate and perform his responsibilities and duties in the conduct of the trial, are reversible error.—Potter v. Detroit, G. H. & M. R. Co., 122 Mich. 179.

¶ 37. The rule that broad latitude will be allowed where fraud is alleged will not permit the making of an incompetent and prejudicial argument to the jury.—Bales v. Evans, 182 Mich. 383.

§ 10. Stating and misstating matters of law.

Stating law in opening address, see ante § 4.
Reading law books, see post § 27.

¶ 38. In an employee's action to recover for injuries sustained by being caught in his employer's machinery it is not error for the court to allow counsel, in addressing the jury, to state his understanding of the law and what he regards as defects therein.—Kean v. Detroit Copper & Brass Rolling Mills, 66 Mich. 277.

¶ 39. Where plaintiff, the vendor, seeks to recover the purchase price of a cultivator, it is proper for the court to refuse to let plaintiff's counsel argue to the jury that his client is entitled to the purchase price less the damages suffered by the defendant by reason of plaintiff's defective performance of the sale contract, since it is the province of the court to instruct the jury on the law.—Ruthruff v. Faust, 154 Mich. 409.

¶ 40. Argument of counsel that the fact that defendant in an action for damages caused by fire escaping from a smokestack on defendant's saw-mill, subsequently made changes in the spark arrester, was evidence that it was unsafe, when followed by the giving of a charge apparently in accord with such argument, was error.—Wager v. Lamont, 135 Mich. 521.

¶ 41. Where the trial court has ruled that the question of contributory negligence of deceased is not an issue for the jury in an

action for death in a railroad crossing accident and that the only question is that of gross negligence of defendant, it is error to allow plaintiff's counsel over objection to comment in his argument on the law of contributory negligence in railroad crossing accident cases.—Halloran v. Michigan Ry. Co., 107 Mich. 308.

§ 11. Claims of fact and comments on evidence.

Misstatement amounting to error, see also ante ¶ 34.
Facts outside the case and within personal knowledge of counsel, see post § 13.
Stating what might have been proved, see post § 14.
Right to contradict misstatement, see post § 28.
Proper cautionary instruction, see Instructions VI.
Admissibility of evidence in contradiction, see Evidence, III.

¶ 42. The statement of an undisputed fact by counsel for defendant in his argument, over exception, was not error.—Paul v. De Carrie, 106 Mich. 434.

¶ 43. Counsel, in his argument to the jury, may state such inferences of fact as he in good faith draws from all the circumstances of the case, and what would be likely to follow if such inferences should turn out to be correct.—Hart Mfg. Co. v. Mann's Boudoir Car Co., 65 Mich. 564.

¶ 44. An attorney, in arguing the facts to a jury, has the right to affirm that the natural presumptions, under the circumstances of any given case, are against the testimony of any one or several witnesses. He is not bound to admit any fact because it is sworn to, and cannot be prevented by the court from arguing, in a decent and orderly way, the probabilities of the truth or falsity of any statement of any witness in a cause.—Bronson v. Leach, 74 Mich. 713.

¶ 45. An attorney is entitled to some license in his argument, and the case will not necessarily be reversed because he claims more from the testimony for his client than the Supreme Court can discern, or because he argues that facts are established which said court thinks were not established.—Dikeman v. Arnold, 83 Mich. 218.

¶ 46. A verdict will not be disturbed for extravagances of counsel in summing up and urging inferences from facts in evidence, unless the trial court has plainly allowed them to mislead the jury.—Staal v. Grand Rapids & I. R. Co., 57 Mich. 239.

¶ 47. Counsel have the right to present their own views of the testimony in argument to the jury; and where a contention is made in apparent good faith, and there is evidence tending to support it, a case will not be reversed because such contention, in the judgment of the court, is unsound.—Warren v. Halley, 107 Mich. 120.

¶ 48. It is improper for counsel to assert in his opening to the jury a fact evidence of which was held inadmissible by the Supreme Court on a previous review of the case.—Baumler v. Antlau, 79 Mich. 509.

¶ 49. The fact that counsel commented upon the testimony of a witness and upon her manner of giving it, and drew incorrect conclusions therefrom is not sufficient ground for reversal.—Wheeler v. Jenison, 120 Mich. 422.

¶ 50. It is error to argue that plaintiff burned the defendant's barn, in an action for slander in charging that he burnt it, where there was no plea of truth of the charge but only proof of threats to burn it, which were admitted solely to show that defendant was honest in the belief that plaintiff burnt it when the charge was made.—Hitchcock v. Moore, 70 Mich. 112.

¶ 51. A statement by defendants' counsel to the jury that a horse had been returned to the seller according to contract for a breach of warranty, is not error, in an action upon promissory notes given in part payment for such animal; where the evidence shows that upon the failure of the horse to comply with the guaranty, the defendants returned him to the plaintiff and made demand for another horse under the terms of the contract, and that the plaintiff refused to comply with the demand.—Carey v. Nissle, 145 Mich. 383.

¶ 52. In an action for the purchase price of a stock of goods in which the defendant by a notice under a plea denied all indebtedness to the plaintiff, but which notice the defendant did not himself draw up and testifies on the trial that he never saw, it is prejudicial error for the plaintiff's counsel to base a derogatory and scathing argument upon the conflict of the pleadings with the defendant's testimony that he owed the defendant but had settled it by another transaction.—Grabowsky v. Baumgart, 128 Mich. 267.

¶ 53. Waiver of privilege by plaintiff, in an action for injuries received by falling upon a defective sidewalk, after the physician was produced in court, in the presence of the jury, as a witness for the defendant, does not bar comment in argument of counsel for the plaintiff of improper disclosures made by the physician in his testimony.—Hodge v. City of St. Louis, 146 Mich. 173.

¶ 54. In an action for the price of beer sold, defendant pleaded the general issue with notice of a special defense that the beer was defective, and that in April plaintiff agreed that if defendant would continue to buy beer from him, he would deduct so much per barrel from the price of future purchases, so as to make allowance for the defective quality of the beer previously purchased. Defendant's evidence showed that such compromise was made in the following December, when there was more due for defective beer than was due in April. Held, that since, by Circuit Court Rule 7, subd. e, the date of the compromise as alleged in the notice was an admission not requiring proof, the variance between the testimony and allegation in the plea as to the date was a proper subject of comment by counsel as bearing upon the credibility of defendant's testimony.—Buckeye Brewing Co. v. Eymer, 157 Mich. 518.

¶ 55. Counsel may state in his argument to the jury that the testimony of certain expert witnesses is in conflict, and cannot be reconciled.—Fillingham v. Michigan United Rys., 154 Mich. 233.

¶ 56. Counsel for plaintiff in his argument to the jury stated extravagantly that there were five or six eye-witnesses to the accident. Defendant's counsel excepted, and plaintiff's counsel then stated that the jury would remember the facts established by the evidence. Held, the statement of plaintiff's counsel was not so prejudicial as to warrant a reversal.—Pierce v. C. H. Bidwell Thresher Co., 158 Mich. 356.

§ 12. Reference to matters not in evidence.

Excluded evidence, see also ante ¶ 25.
Stating law on matters not in issue, see ante § 10.
Comment on absence of witnesses who could not have given admissible testimony, see post § 15.
To other trials or proceedings, see post § 17.
Personal knowledge of jurors, see post § 24.
Reading books of science or newspapers or other printed matter, see post § 27.
Provoked references, see post ¶¶ 154, 155.

¶ 57. Reference to facts outside the case as made is improper, e. g., in a libel action a reference to the fact that defendant's editor was once arrested and bound over for a libel on the trial judge.—Randall v. Evening News Ass'n, 97 Mich. 136.

¶ 58. Counsel in summing up a case must not go outside of the proper issue for the jury.—Seligman v. Ten Eyck's Estate, 60 Mich. 267.

¶ 59. The only facts which counsel are properly permitted to comment upon before a jury are such as have been legally elicited upon the trial of the cause.—Carne v. Litchfield, 2 Mich. 340.

¶ 60. A witness for defendant having testified that plaintiff requested him to get defendant drunk at his expense, defendant failed to connect such testimony with the case and allowed it to be stricken out. Held, that it was error to permit him to comment afterwards upon it, against objection, in his argument to the jury.—Hitchcock v. Moore, 70 Mich. 112.

¶ 61. Counsel, in his argument to the jury, should not be allowed to use a map of the premises where the assault occurred, there being no proof of its correctness other than its adoption by the city council.—Zube v. Weber, 67 Mich. 52.

¶ 62. Counsel have no right to comment upon papers that have not been put in evidence, or on the conduct of the parties in connection with them.—Donovan v. Richmond, 61 Mich. 467.

¶ 63. Where defendant is not responsible for a third person's acts, remarks of plaintiff's counsel in his address to the jury confounding such third person with the defence and alluding to "these defendants" are prejudicial.—Moore v. Thompson, 92 Mich. 498.

¶ 64. It is not error for the court to order counsel to desist from commenting in their argument to the jury upon alleged entries in books of account which, though inquired about on cross-examination, are not made evidence by the introduction of the books.—Hirschfield v. Waldron, 83 Mich. 116.

¶ 65. It is improper for counsel for the defendant in an action by a passenger against a street railroad company for personal injuries to tell the jury that no report was made of any such accident to defendant by the crew, as evidence to such effect would be inadmissible.—Sibert v. Detroit United Ry., 198 Mich. 117.

¶ 66. It is error for an attorney to argue in an action for injuries sustained by a collision with a train at a highway crossing, as proof that the plaintiff stopped before attempting to cross the railroad, that his counsel would not by reason of extensive experience have commenced the action if he had not stopped.—Britton v. Michigan Cent. R. Co., 118 Mich. 491.

¶ 67. In an action against a husband and wife for tortious acts of the wife remarks of plaintiff's counsel assuming facts which were not supported by the evidence held to be prejudicial to appellant husband where

the court did not caution counsel and instruct the jury to disregard the statements.—Sweezy v. Fisher, 142 Mich. 258.

¶ 67a. In an action for breach of promise, an insinuation in argument, without support in the evidence, that defendant had bribed witnesses in his behalf, and had caused improper methods to be used by a detective, cannot be said to be not prejudicial.—Reed v. Louden, 153 Mich. 521.

§ 13. ——Stating personal knowledge or belief.

Proper cautionary instruction, see Instructions, VI.

¶ 68. It is inadmissible for counsel in his argument to the jury to state his belief—as based upon his own knowledge—of a fact, such as the age of plaintiff suing for breach of promise to marry.—Rutter v. Collins, 103 Mich. 143.

¶ 69. Jurors must get the evidence from the lips of sworn witnesses, and not from the unsworn statements of the lawyers in the argument of the case.—Rutter v. Collins, 96 Mich. 510.

¶ 70. Counsel has no right to put before the jury, by way of argument, that he has personal knowledge of facts of the case, outside of the testimony, even though it is to be accompanied by an explanation that counsel would not state what he knew and would not take the stand as a witness.—Amperse v. Fleckenstein, 67 Mich. 247.

¶ 71. It is improper for counsel in his address to the jury to refer to letters of his to the opposite party who had at one time consulted him, which letters had been introduced in evidence, and to endeavor to explain them where he is not a witness.—Atherton v. Defreeze, 129 Mich. 364.

§ 14. ——Stating what might have been proved.

Comments on tendency of missing evidence, see post § 15.

¶ 72. To permit counsel, against the objection of opposing counsel, to tell the jury what he could have proved by certain witnesses, whom he might have called had he seen fit to do so, is error.—Pringle v. Miller, 111 Mich. 663.

§ 15. Comments on absence of witnesses or evidence.

On claim of privilege, see post § 16.
On absence of evidence that would be inadmissible, see also ante § 12.
Stating what might have been proved, see ante § 14.
Mention of absence of witness in opening, see ante ¶ 12.

¶ 73. Defendant's counsel has a right to comment to the jury upon the plaintiff's omission to produce important witnesses who are within reach.—Gavigan v. Scott, 51 Mich. 373.

¶ 74. Before counsel can properly comment upon the absence of witnesses, there must be some facts or circumstances shown from which the jury would have the right to infer that their testimony would be important and material, and it is the duty of the court to prevent such comment, in the absence of such a showing.—Cook v. Standard Life & Accident Ins. Co., 86 Mich. 554.

¶ 75. In trover by a vendee of goods against an officer who attached them for the vendor's creditors, the burden of proof of fraud is upon defendant, and plaintiff need not anticipate such defense or call all of his witnesses in the first instance; and accordingly it is improper for defendant's counsel, in opening his case to the jury, to say that certain persons, naming them, have been and are in the court room, and have not been called as witnesses by plaintiff.—Bendetson v. Moody, 100 Mich. 553.

¶ 76. Under the rule of Vergin v. City of Saginaw, 125 Mich. 499, remarks of counsel to the effect that the defendant did not dare to put on two physicians who had examined the plaintiff are held justified by the circumstances in the case.—Wilkins v. City of Flint, 128 Mich. 262.

¶ 77. Argument by plaintiff's counsel assuming that the defendant railroad's fireman who failed to testify, was still in the employ of the company, was improper in the absence of testimony that such fireman was still in defendant's employ.—Hinchman v. Pere Marquette R. Co., 136 Mich. 341.

¶ 78. In an action against a township for injury from a defective highway, where the burden of proving that there was notice of the defect alleged had not been supported by any proof by plaintiff, it was error for the counsel for plaintiff in argument to comment on the failure of the highway overseer, sitting in court, to take the stand and testify on that subject; there was nothing in the case imposing any duty to explain or testify.—Cavanagh v. Township of Riverside, 136 Mich. 660.

¶ 79. In an action for injuring live stock, it is not reversible error for the plaintiff's counsel in his argument to the jury to ask where are the conductor and the fifty passengers who were on the car, where the record shows there were fifty passengers, that no attempt was made to produce them or account for them, and the defendant's counsel criti-

cized severely one of the plaintiff's witnesses. —Airikainen v. Houghton County St. R. Co., 138 Mich. 194.

¶ 80. In an action to recover the value of goods lost in transit, argument by counsel for the plaintiff of the absence of testimony to meet the plaintiff's case is proper; and while it is error for counsel to refer to defendant's ability to procure witnesses "because this railway company has behind it all the money it needs to do business" it was not calculated to prejudice the jury.—Dahrooge v. Pere Marquette R. Co., 144 Mich. 544.

¶ 81. In a personal injury case caused by a horse becoming frightened by the emission of steam at a railroad crossing, in which the jury were not permitted to see the horse, it was improper for plaintiff's counsel to suggest in his argument that an inspection of the horse would have shown that it was not vicious.—Hinchman v. Pere Marquette R. Co., 136 Mich. 341.

¶ 82. In a suit for personal injuries against defendant street railway for starting up its car while plaintiff was alighting, thereby causing injury to plaintiff, the plaintiff's counsel stated in his argument to the jury that defendant had omitted to call its timekeeper or other witnesses to contradict the plaintiff's statement that the car was late. Held, such remark did not constitute error because it is proper in a civil case to comment on the omission of an adverse party to call witnesses in its employ upon a subject peculiarly within their knowledge, and because the question whether the train was late was of no importance in the case.—Dykstra v. Grand Rapids, G. H. & M. Ry. Co., 165 Mich. 13.

¶ 83. In an action against a railroad company for damages for loss of property by fire, alleged to be due to the defective equipment and management of defendant's engine, where it was shown that the engine was overhauled and new netting put in the spark arrester or screen three months before the fire, and that immediately after the fire the engine was examined and the spark arrester found to be in good condition, and also that it could easily have been removed and produced in court, held that it was not reversible error for plaintiff's counsel to comment on the failure of defendant to produce it at the trial. Stoddard v. Grand Trunk Western Ry. Co., 191 Mich. 321.

§ 16. Commenting on claim of privilege.

Comment on evidence given under waiver, see ante ¶ 53.

¶ 84. Comments by counsel in their argument to the jury as to a witness availing himself of his constitutional privilege to refuse to answer questions on the ground that the answers might tend to incriminate him, is reversible error.—Bales v. Evans, 182 Mich. 383.

§ 17. Reference to other trials or proceedings.

¶ 85. A. devised part of his farm to B., an adopted daughter, and died leaving a widow who became administratrix, the will not being produced. The widow married again, and died without being discharged as administratrix. She left all her property to her husband. B. married, had a son, lost her husband, and married again. Held that, in proceedings by her to establish the missing will, contestant's counsel had no right, in opening to the jury, to relate dealings between the second husband of A.'s widow and the proponent's son on one side, and the contestant on the other, in regard to the possession of the testator's farm, nor to narrate legal proceedings for its possession brought by proponent and the second husband against contestant. These matters were foreign to the issue. And it was improper to suggest that B.'s son was born too soon after her marriage, and hearsay for a witness to state what he had heard Mrs. A. say on the subject. It was also improper to show by a physician how soon birth happened, as this had no legal connection with the issue.—Rickabus v. Gott, 51 Mich. 227.

¶ 86. In an action by the wife's administrator for conversion of her property, received by her from her husband, by levying on it as property of the husband fraudulently transferred to her, it is not error for the defendant sheriff's counsel to state in argument that one of the defendant's witnesses, who was also a creditor of the husband, "did not proceed with any such proceedings as we find in this case."—Major v. Brewster, 148 Mich. 623.

§ 18. Appeals to passion, sympathy or prejudice.

In opening address, see ante § 3.
Allusion in opening to poverty or circumstances, see ante § 4.
Reference to poverty or wealth, see post § 20.
Aspersions and vituperations, see post §§ 21, 22.
Asking jury to award what members would take for similar wrong, see post § 24.

¶ 87. It is improper for counsel in his argument to the jury to appeal to their sympathies upon matters not at issue in the case. —Antosik v. Michigan Alkali Co., 166 Mich. 415.

¶ 88. Impassioned arguments of counsel do not amount to reversible error unless it clearly appears that they were not warranted by the evidence and contributed to an unjust result.—Houser v. Carwody, 173 Mich. 121.

¶ 89. Where counsel, in summing up, appeal to a jury's prejudice against nonresidents and make injurious remarks not justified by evidence, and exception is taken to this conduct, it is error if the trial judge omits to stop it and counteract its effect. So held where counsel said that attaching creditors adversely interested were hogs, and wanted to gobble up all the property.—Bedford v. Penny, 58 Mich. 424.

¶ 90. An argument on the amount of damages to a boy who had lost both feet, appealing to the jury not to quibble over the amount, that "he cannot have too much" but "we do not want so much as to shock common sense"; further appealing to the jury to "disabuse yourselves from sympathy" but not to give a pittance that would be no compensation—was held not to be error though it might have been an appeal to sympathy under cover of frankness and fairness.—Retan v. Lake Shore & M. S. R. Co., 94 Mich. 146.

¶ 91. Arguments to the jury that the case was between the stockholders of a bank which had been paid $125 for $100 of stock and the depositors of an insolvent bank, were prejudicial and calculated to arouse the sympathies and prejudices of the jurors, in an action against the receiver of an insolvent bank upon a fraudulently certified check, where the crucial question at issue was whether such check was purchased upon an honest belief of the validity of the certification.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

¶ 92. A statement by plaintiff's counsel in his closing argument to the jury in an action against a municipality for personal injuries, that the corporate authorities had conspired to defeat plaintiff's recovery, and that counsel had been threatened by witnesses for defendant, and was a "spotted" man, because of his acting for plaintiff, is ground for a reversal, where the only basis for the statement consists in the fact that a witness not connected with the municipal government in any way had told such counsel that he was being injured by his connection with the case, and the further fact that some of the authorities, prior to the trial, had sent for certain children, who were afterwards sworn for the defence, and put to them leading questions, to ascertain what they knew about the accident.—Strudgeon v. Village of Sand Beach, 107 Mich. 496.

¶ 93. Remarks of counsel in concluding his address to the jury that his client, "may be like an old horse turned out into the street, your verdict may save him, now let me ask you, boys, mercy" are improper.—Atherton v. Defreeze, 129 Mich. 364.

¶ 94. It is reversible error for counsel for plaintiff, in an action to recover damages for several alleged assaults to commit rape, to appeal to the passions and prejudices of the jury by insisting in his argument that neither the jury nor any parent would feel that their daughter was less entitled to damages because previously to the acts of defendant she had yielded to a young man to whom she was engaged, and that the position taken by counsel for defendant was unjust and contrary to the natural feelings of parent nd child.—Mortensen v. Bradshaw, 188 Mich. 436.

¶ 95. Argument of counsel in an action upon a benefit policy alluding to the distress of insured's widow, held within the bounds of proper argument.—Grimme v. General Council of Fraternal Aid Ass'n, 167 Mich. 240.

¶ 96. In an action against a street car company for damages for personal injuries to a boy passenger a statement by counsel for plaintiff in his argument to the jury that the jury could do something to help the plaintiff bear his infirmities held not to be erroneous.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

§ 19. ——Against corporations.

Denying credibility of corporate employees, see also post § 21.
Drawn out by adversary's statements, see post § 28.

¶ 97. Where, in an action for negligent injury, plaintiff's counsel, in his argument to the jury, refers, without provocation, to defendant as "the unfortunate city railway, whether driven through the streets by the mob, or driven along in its usual course," such remarks, in view of the great anger and excitement of the populace, which has culminated in mob violence a few weeks before the trial, is prejudicial error.—Geist v. Detroit City R., 91 Mich. 446.

¶ 98. A judgment for a railroad company in an action to recover for personal injuries will not be reversed because counsel for defendant said to the jury in his argument that they had evidently learned from their service as jurors during that term of court that damage suits for personal injuries had developed into quite a business, the remark being intended only to invite careful scrutiny of such claims.—Baxter v. Detroit Ry., 116 Mich. 188.

¶ 99. It is improper for counsel in the trial of a case and in his briefs to refer in a sneering way to the adverse party as a corporation, to the witnesses as corporation witnesses, and to the attorneys as cor-

poration attorneys.—People ex rel. Esper v. Detroit & Saline Plank Road Co., 125 Mich. 366.

¶ 100. In an action against a railroad for killing cattle, it is error to interweave with a just argument, an improper appeal that the jury should take into consideration that plaintiff was an individual and the defendant a corporation.—Johnson v. Detroit & M. Ry. Co., 135 Mich. 353.

¶ 101. An argument by counsel for plaintiff in a suit for personal injuries against a corporation, the manifest and studied purpose of which is to induce the jury to deal with a defendant corporation differently than it would with an individual and when the court interrupts and directs his attention to the impropriety of his conduct, instead of withdrawing his statements undertakes to point out the distinction between a corporation operating a business for gain and a human person, is improper and constitutes prejudicial error for which the case must be reversed.—Whipple v. Michigan Cent. R. Co., 143 Mich. 41.

¶ 102. In an action against a telegraph corporation it is improper for counsel for plaintiff to state in his argument that it is too often the practice of public service corporations in this country to assume the attitude of the public be "damned' or "darned."—Burroughs v. Postal Tel. Cable Co., 199 Mich. 672.

§ 20. Reference to wealth, race, occupation or station.

Provoked remarks, see post ¶ 156.

¶ 103. In replevin for a span of horses it is improper for defendant's counsel to go outside of the record in commenting to the jury upon plaintiff's wealth and other facts not appearing in evidence.—Hutchinson v. Hutchinson, 102 Mich. 635.

¶ 104. An argument of an attorney, referring to poverty in the plaintiff's home, of which there is no proof, has no bearing on the question of whether one of two contractors agreed to pay for services performed, and a reference to the duty of jurors to stand by their neighbors in a suit against nonresidents, is improper. A verdict secured by such appeals to prejudice will not be allowed to stand.—Smith v. Jennings, 121 Mich. 393.

¶ 105. It is reversible error, in action for damages for alleged assaults to commit rape, for counsel for plaintiff to remark in his argument that defendant is rich.—Mortensen v. Bradshaw, 188 Mich. 436.

(1 Mich. Dig. 26)

¶ 106. In a former appeal in an action for services rendered, the Supreme Court ruled that evidence concerning a former employment of the plaintiff by a mining company, and the sale by him of his stock held therein, were inadmissible. In the second trial plaintiff's counsel in his opening statement, in cross-examination, and in his argument to the jury referred to said evidence in a way calculated to prejudice the jury against defendant as being a man of wealth. Held, this constituted reversible error.—Ruttle v. What Cheer Coal Mining Co., 161 Mich. 150.

¶ 107. Where in an action for the breach of a warranty of sale that a mare was not vicious the evidence shows the vocation of the parties, defendant's attorney in his argument to the jury may state that he wants the jury to consider that the case is between a young banker and an old farmer.—Eaton v. Hope, 177 Mich. 411.

¶ 108. Reversal must be ordered where the language used in an argument to the jury evinces a studied purpose to arouse prejudices based upon facts not in the case; as where the opposing parties, Hebrews, are repeatedly called "Men from Jerusalem," and where the speech and gestures of Jews are caricatured and their conduct satirized.—Cleutt v. Rosenthal, 100 Mich. 193.

¶ 109. Language of counsel in referring to plaintiff as a "Jew horse peddler," is improper.—Hyman v. Kirt, 153 Mich. 113.

¶ 110. It is reversible error for counsel in his argument after being warned by the court to desist, to attempt to arouse the prejudice of the jury by reference to the racial characteristics of the opposite party.—Solomon v. Stewart, 184 Mich. 506.

¶ 111. A remark by plaintiff's counsel in an action based upon the unlawful sale of liquors, that "he had been in the practice of law for a good many years and this is the first case he ever knew where counsel for liquor dealers ask the jury to go by the evidence," is improper and prejudicial.—Hilliker v. Farr, 149 Mich. 444.

§ 21. Aspersions on party or witnesses.

See also ante ¶ 52.

Sneering at or deriding corporation employees, see ante § 19.

Drawn out by other remarks, see post ¶ 157.

¶ 112. That one is the managing director of a newspaper will not justify counsel in referring to him, in garnishment proceedings for the amount of a judgment against the paper for libel, as the man "who sits in his sanctum, where nobody can see the hand that writes, nobody can see the brain that

works, and writes sensational articles against citizens of his own town, as he wrote the article on which this judgment was rendered," where the fact that such person had nothing to do with the publication of the libelous article is established by the court's having directed verdict in his favor in the original suit.—Long v. Evening News Ass'n, 113 Mich. 261.

¶ 113. Severe criticism by defendant's counsel in his argument to the jury, is justified in an action by a confessed seducer against a sheriff for being detained in jail two days without being brought before a magistrate.—Friesenhan v. Maines, 137 Mich. 10.

¶ 114. Allusion to the party's being conveniently proved to be a member of a firm was held justifiable argument of counsel to the jury, where such argument is based on the evidence.—Pelton v. Mayhew, 166 Mich. 546.

¶¶ 115, 116. In an action for personal injuries against a street railway company under the defense that the claim is fraudulent, it is not prejudicial error for the defendant's counsel to refer to the plaintiff and her family as in the business of bringing damage suits and to state that they cannot make their living that way, where testimony was admitted without objection to show that the daughter of the plaintiff had a claim against a street railway company and that the husband had two negligent injury claims pending.—Wheeler v. Detroit Electric Ry., 128 Mich. 656.

¶ 117. Remarks of counsel reflecting on the character of a witness, which are not justified by the evidence, are improper.—Atherton v. Defreeze, 129 Mich. 364.

¶ 118. Vilification of a witness and a statement that a juror, accepted by counsel, had testified on his examination that he was afraid to render a just verdict through fear of reprisal by defendant, all outside of the record, are error, where the vilification was unrebuked and the other argument was merely characterized as "unprofessional," whereupon counsel stated that the "facts remain but I shall not discuss them further."—Andrews v. Tamarack Min. Co., 114 Mich. 375, per Grant and Hooker, JJ.

¶ 119. A judgment for defendant will not be reversed because of the remark of his counsel in reference to plaintiff's chief witness, "This man is a star witness in all these cases; he would swear a hole through a two-inch plank"—where plaintiff's counsel did not bring the remark to the attention of the trial judge, who apparently permitted it to pass as unworthy of notice.—Marvin v. Ruhmohr, 115 Mich. 687.

¶ 120. To elicit from defendant's medical witness, who made an examination of plaintiff's womb, that he took a sample of pus therefrom and examined it under a microscope, and that various specific infections might be found in the womb, among them gonorrhea and syphilis, and that he took the sample in order to ascertain if there were any specific infections, and then to argue, commenting on the bias of such witness, that the sample had been unfairly and needlessly taken in order to discover if plaintiff had a venereal disease, and that the witness had unwillingly admitted such purpose, is error harmful to the defendant; where there is nothing to show that microscopical examination was needless, and no question as to those diseases had been raised and there was no reason to think that they in particular should have been looked for.—Remey v. Detroit United Ry., 141 Mich. 116.

¶ 121. In an action for damages alleged to have been caused by adulterated kerosene which exploded, where a deputy state inspector has testified and a loose system of inspection has been shown, it is not improper for counsel to comment upon the conduct of the inspector and the agent of defendant.—Stowell v. Standard Oil Co., 139 Mich. 18.

¶ 122. It is improper for counsel to denounce physicians of good standing who have testified for a railroad company in a personal injury suit, as "hirelings," and "hired servants of masters" who "are paid from their treasury and go about with a pass in their pockets."—Mott v. Detroit, G. H. & M. R. Co., 120 Mich. 127.

¶ 123. A judgment will be reversed, where counsel for plaintiff, in his argument to the jury, commented upon the wealth, character, and influence of the defendant, charged witnesses as being under the influence of defendant and not daring to testify against him, holding appointments secured by defendant; and that therefore their testimony was unreliable, and charging defendant with coercing a witness with promise of political favor, and many other statements of like character.—Holmes v. Loud, 149 Mich. 410.

¶ 124. In an action against a railroad company for negligently burning plaintiff's buildings the argument of the plaintiff's counsel asking the jury to discredit the defendant's witnesses because the defendant is a railroad company is clearly an appeal to the prejudice of the jury and will warrant the setting aside of a verdict rendered against the company.—Dolph v. Lake Shore & M. S. R. Co., 149 Mich. 278.

¶ 125. In an action against a railroad, a statement by plaintiff's counsel in argument that the jury will believe a certain witness,

although "all the railroad men in Christendom should swear the other way," while not commendable, is not ground for reversal.—Beck v. Ann Arbor R. Co., 156 Mich. 252. (Grant, J., dissenting.)

§ 22. ——Appeals for moral reprobation.

¶ 126. Language of plaintiff's counsel in closing the case to the jury, wherein the statute of frauds had been interposed, to the effect that because the defendant asks the protection of the statute he is "crawling out of his promises," held not to have been such a departure from appropriate argument as to call for a reversal of the judgment.—Mitchell v. Beck, 88 Mich. 342.

¶ 127. The fact that counsel for plaintiff charged that defendant's contention was not made in good faith is no reason for reversal, if, under the circumstances, the good faith of defendant was a proper subject of inquiry and comment.—Muncie Wheel & Jobbing Co. v. Finch, 150 Mich. 274.

§ 23. Suggesting improper elements or measure of recovery.

Appealing to sympathy, see ante §§ 18, 19.
Asking jury to award what "they would take" in like case, see post § 24.
Reference to insurance or indemnity, see post § 25.

¶ 128. A jury should not be asked by an attorney, in an action for injuries sustained by colliding with a train, to give the plaintiff compensation for the expense of litigation or for trouble in prosecuting the claim.—Britton v. Michigan Central R. Co., 118 Mich. 491.

¶ 129. Argument of counsel in an action for personal injuries urging the jury not to reduce the amount of the verdict in order to keep defendant from appealing, is improper.—Quirk v. Rapid Ry., 137 Mich. 496.

¶ 130. It was improper for plaintiff's counsel in a personal injury case to state in his argument, that he did not want the verdict to be cut down on the assumption that there would be a settlement, as the defendant always took its cases to the Supreme Court.—Selby v. Detroit Ry., 122 Mich. 311.

§ 24. ——Invoking jurors' personal knowledge or estimate.

See also ante ¶¶ 94, 98.

¶ 131. Argument by counsel in a personal injury action that the jurors would not sustain similar injuries for a certain amount of money, held prejudicial error.—Morrison v. Carpenter, 179 Mich. 207.

¶ 132. It is improper in the closing argument in an action for damages, for the plaintiff's counsel to ask the jury which one of them would accept the plaintiff's injuries for a stated sum of money.—Wells v. Ann Arbor R. Co., 184 Mich. 1.

¶ 133. It is improper for the plaintiff's attorney in an action by a servant against her mistress for damages for assault and battery to ask the jury in his argument to give the plaintiff "what you would want your mother or sister to have under like circumstances."—Gungrich v. Anderson, 189 Mich. 144.

¶ 134. In an action for damages it is improper for counsel for the plaintiff, in his closing argument, to ask a juror what he would think the plaintiff's injury worth if she were his wife.—Wells v. Ann Arbor R. Co., 184 Mich. 1.

¶ 135. In an action for personal injuries against a railroad company argument of counsel commenting on the extent of plaintiff's injuries, what the jurors would take to undergo like injuries, and the liability of the company, was improper.—Daly v. Pere Marquette R. Co., 197 Mich. 340.

¶ 136. Statements made by counsel to the jury, in an action by a father for the death of his son, as to the suffering and agony and pain occasioned to the father and mother by such death of their son, and as to how much his death was worth, and as to what the members of the jury would take for the death of a son, killed under similar circumstances, were prejudicial error, though not objected to, where the verdict for damages was grossly excessive.—McDonald v. Champion Iron & Steel Co., 140 Mich. 401.

¶ 137. An argument to the jury to the effect that no person would go through life with the plaintiff's injuries for any sum of money, held prejudicial to the defendant, where the trial court failed to instruct the jury to disregard such argument.—Jolman v. Alberts, 186 Mich. 643.

¶ 138. In a suit for personal injuries it is reversible error for plaintiff's counsel to argue to the jury that they would not for any amount of money have members of their families injured as was the plaintiff.—Hughes v. City of Detroit, 161 Mich. 283.

¶ 139. In an action for personal injuries a statement of counsel for plaintiff in his argument to the jury that he was not at liberty under the decision of the Supreme Court to say to the jury "what would you take to be changed from your present condition" to one like the plaintiff, is disapproved.—Seabury v. Detroit United Ry., 194 Mich. 423.

§ 25. Reference to insurance or indemnification.

¶ 140. Since the fact that lumber, destroyed by fire, claimed to have been started by a locomotive engine, was insured does not affect the plaintiff's right to recover, comment by an attorney as to the amount of capital stock of an insurance company, when the fact of insurance appears on the trial, is improper.—Peter v. Chicago & W. M. Ry. Co., 121 Mich. 824.

¶ 141. Remarks of counsel to the jury "you don't have to worry much about the verdict against," the defendant, held not on their face improper as referring to an attempted question implying that the defendant had insurance against accident.—Burgess v. Stowe, 134 Mich. 204.

¶ 142. In a suit to recover for property destroyed by fire from a locomotive, it is reversible error for defendant's counsel persistently to refer over objection sustained, to the fact that the property destroyed was insured.—J. H. Worden Lumber & Shingle Co. v. Minneapolis, St. P. & S. S. M. Ry. Co., 168 Mich. 74.

¶ 143. In an action against a sewer contractor for personal injuries sustained in falling into an unguarded excavation, a remark by counsel in his argument, referring to a clause in the contract with the city, from which the jury would infer that the defendant would be indemnified for the injury, held prejudicial error.—Morrison v. Carpenter, 170 Mich. 207.

§ 26. Reading papers or pleadings in case.

Use of books to refresh memory in opening statement, see ante ¶ 3.

¶ 144. A judgment for defendant will not be reversed because the trial court allowed counsel for defendant in his argument to the jury to comment on the fact that counsel for plaintiff had objected to the admission of a writing signed by one of plaintiff's witnesses, and purporting to state the particulars of the accident out of which the action grew and made soon thereafter.—Baxter v. Detroit Ry., 116 Mich. 188.

§ 27. Reading law reports, books, newspapers, etc.

¶ 145. Counsel have no right to read law to the jury, but they may state so much of the law, as they claim it to be, as may enable them to lay before the jury an intelligent idea of the force, effect and bearing of the testimony upon their case, either before or after said testimony is in the case.—Fosdick v. Van Arsdale, 74 Mich. 302; Edwards v. Common Council of Village of Three Rivers, 96 Mich. 625.

¶ 146. Counsel should not be permitted to read to the jury and comment upon cases found in the books of reports, upon the question, submitted to them as one of fact, whether a draft was presented for payment in a reasonable time.—Phoenix Ins. Co. v. Allen, 11 Mich. 501.

¶ 147. It is improper, in a second trial of an action for a negligent injury, for plaintiff's counsel to read to the jury the opinion of the Supreme Court upon a review of the first trial, and to state that said court passed favorably to plaintiff upon the question of contributory negligence.—Laughlin v. Grand Rapids Street R. Co., 80 Mich. 154.

¶ 148. Contestants in a will case offered in their opening to read to the jury a passage from a work on mental diseases, enumerating certain causes of insanity. Held, that the court properly refused to allow it. —Fraser v. Jennison, 42 Mich. 206.

§ 28. Statements called forth by adversary.

Harmlessness of erroneous arguments because of action of opposing counsel, see Harmless Error.

Proper kind of instruction to cure, see Instructions, VI.

¶ 149. The use of objectionable language in an argument to a jury cannot be complained of by the opposite party who provokes it by similar remarks.—City of Kalamazoo v. Standard Paper Co., 182 Mich. 476.

¶ 150. A judgment will not be reversed because of the improper remarks of counsel for the prevailing party, where such remarks were apparently made in reply to similar remarks by opposing counsel.—Little v. Williams, 107 Mich. 652.

¶ 151. Where, during the argument of a case to the jury, exception is taken by the opposing counsel to a statement that there is evidence of a certain fact, it is proper for the attorney, in defence of his position, to challenge the attention of the court to the particular evidence which he claims he referred to in his argument.—Pinet v. Montague, 103 Mich. 516.

¶ 152. Counsel of a railroad sued for negligence called the jury's attention, in his argument, to the fact that it was a railroad case, and said it was talked on the street that, if such a case could get by the court, the jury would "whoop it up" to defendant. Plaintiff's attorney answered that, if juries go against railroads, it is because in every case the railroads are inimical to plaintiff, and because a man whose negligence caused a husband's death would go to the widow and at least pay the funeral expenses, instead of

saying to her: "Go to hell." This retort, being called out in the heat of a trial by the aggression of defendant's counsel, was held not ground for reversal, it not appearing that the verdict was influenced thereby. —Sweet v. Michigan Cent. R. Co., 87 Mich. 559.

¶ 153. A statement by plaintiff's counsel characterizing the defence interposed as "audacious" does not justify defendant's attorney in arraigning plaintiff as a moneyed corporation, intent upon crushing defendant. —Pabst Brewing Co. v. Lueders, 107 Mich. 41.

¶ 154. Remarks of counsel in his closing argument before the jury, though referring to facts not in evidence, and commenting upon defendant's plea of the statute of limitations, and his failure to introduce certain evidence, do not justify a reversal, where appearing by the record to have been made in answer to remarks of opposing counsel.—Miner v. Lorman, 66 Mich. 530.

¶ 155. An argument to the jury that damages should not be allowed larger than plaintiff had demanded in her claim to the common council, in which claim it was stated that the amount asked for was "on the basis of a private adjustment, but without prejudice to her rights in the event of a suit," does not warrant a retort by plaintiff's counsel in his closing argument that "the city counselor himself has recommended to the council that a larger sum than this be paid," in the absence of any evidence upon which to base such statement.—Ross v. City of Detroit, 96 Mich. 447.

¶ 156. Remarks of counsel that the plaintiff must go to the poorhouse, asking the jury to send the plaintiff to the poorhouse at once rather than to disagree, are erroneous but in the light of remarks of the defendant's counsel inviting such remarks should not reverse the case.—Wilkins v. City of Flint, 128 Mich. 262.

¶ 157. Remarks of counsel derogatory to a witness and not based on the evidence, held improper, but not reversible error on account of previous improper remarks by the opposing counsel on the same subject.—Sterling v. City of Detroit, 134 Mich. 22.

ARMORIES to ARREST.

Cross-References.

Armories—
See Military and Naval Affairs.
Arms—
Right to keep and bear arms, see Constitutional Law.
Crimes relating to weapons, see Crimes, II; Homicide.
Army—
See Military and Naval Affairs.
Arraignment—
See Indictment, V.
Array of Jurors—
See Jury, V; Grand Jury.
Arrears—
See specific topics treating of the obligation in arrears, e. g., Landlord and Tenant; Taxes; Insurance; Mortgages; Foreclosure.
Arrest—
Of persons for crime, see Arrest, Commitment and Bail.
Of defendant in civil proceedings, see Civil Arrest and Bail.
Of judgment for error in procedure, see Judgments, IV; Indictment and Prosecution, X.
Liability for wrongful arrest, see False Imprisonment; Malicious Prosecution.
Resisting arrest as crime, see Crimes, II.
Assault or homicide in resistance to arrest, see Assault and Battery; Homicide.

ARREST, COMMITMENT AND BAIL.

TREATS of the apprehension of persons accused of crime, complaints for that purpose, process and examination, commitment for trial, bail and recognizance, and discharge from bail or custody, excluding civil arrest and bail (see Civil Arrest and Bail).

Analysis.

I. Authority and grounds for arrest.

§ 1. In general.
§ 2. Arrest without warrant.
§ 3. ——Belief that felony was committed.
§ 4. Arrest under warrant.

II. Immunity and privilege from arrest.

§ 5. In general.

III. Complaint of crime, and issuance of warrant for arrest.

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§ 7. Who may make complaint.
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§ 10. ——Knowledge or belief of complainant.
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§ 18. For arrest and production of convict accused of crime within prison.
§ 19. Amendment of warrant.

V. Making arrest and keeping of prisoner; recognizing to appear.

§ 20. In general; reading or producing warrant.
§ 21. Arrest by several officers.
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§ 23. Rearrest.
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VI. Seizure and keeping or disposal of property or evidence.

§ 26. In general.

VII. Examination and commitment for trial or discharge.

§ 27. In general; nature of proceedings.
§ 28. Purpose and necessity of examination.

§ 29. Waiver of examination.
§ 30. Time for examination; adjournments.
§ 31. Before whom held.
§ 32. Counsel in the examination.
§ 33. Functions and power of magistrate.
§ 34. Scope of inquiry on examination.
§ 35. ——On complaint for two or more crimes.
§ 36. Reduction of testimony to writing.
§ 37. Findings and commitment.
§ 38. Certification and return.
§ 39. ——Amendment or further return.
§ 40. Discharge of prisoner.

VIII. Admission to bail.

§ 41. Bailable offenses and right to bail.
§ 42. Who may admit to bail.
§ 43. ——After commitment or indictment.

IX. Requisites of bail and qualification of sureties.

§ 44. In general; execution and filing of the instrument.
§ 45. Statement of charge and obligations.
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X. Forfeiture of bail and entry of default.

§ 47. In general.

XI. Liability of sureties, surrender and discharge, or remission.

§ 48. Obligation and breach of conditions.
§ 49. Surrender of prisoner by bail.
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§ 51. Discharge by trial or failure to try.
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XII. Enforcement of bail bond or recognizance.

§ 53. Form of procedure and pleading.
§ 54. Pleas and objections.
§ 55. Evidence.
§ 56. Judgment and measure of recovery.
§ 57. Costs.

I. AUTHORITY AND GROUNDS FOR ARREST.

§ 1. In general.

Authority in person as essential to arrest under warrant, see post ¶ 18.
Oral deputization by sheriff, see also post ¶ 144.
Power of private person to arrest, see post § 2.
Necessity of warrant, see post § 2.
Making complaint and issuing warrant, see post III.
General powers of sheriffs and constables, see Sheriffs.
General powers of municipal policemen, see Municipal Corporations, XV.
Nature of arrest on bastardy charge, see Bastards.
Sufficiency of authority or warrant to justify arrest, see Assault and Battery, II; False Imprisonment, I.
Homicide as depending on whether accused was resisting lawful arrest, see Homicide, V.
Grounds for issuance of capias, see Civil Arrest and Bail.

§ 2. Arrest without warrant.

Informing prisoner of arrest and of charge, see post § 20.

Elements of breach of the peace, see Crimes, I, A.

For violation of municipal ordinance, see Municipal Corporations, XVI, B.

[Note. In assailing the legality of the arrest in an action for false imprisonment or a civil action for assault and battery, where the act is justified as an arrest, the question often arises whether an arrest could lawfully be made without a warrant. While in most of the cases of this kind the precedent might be as binding as if raised in a criminal case, yet as this topic relates to criminal procedure it has been deemed wiser to treat them in the topics Assault and Battery, II; False Imprisonment, I. Nevertheless they should be consulted even if not criminal precedents.]

Grades and degrees of crimes, misdemeanors and felonies, see Crimes, I, A.

¶ 1. No arrest can be lawfully made without warrant except in the cases existing at common law before a constitution was adopted.—People ex rel. Robison v. Swift, 59 Mich. 529.

¶ 2. Upon the commission of a felony or breach of the peace, a peace officer or private person may arrest without warrant.—People v. Moore, 2 D, 1.

¶ 3. Arrests may be made without a warrant for a breach of the peace committed in the presence of the officer.—People v. Rounds, 67 Mich. 482.

¶ 4. An arrest for breach of the peace cannot be made without a warrant if not committed in the presence of the officer making it.—People v. Haley, 48 Mich. 495.

¶ 5. Arrests cannot be made without warrant, except in cases of felony, or of breaches of the peace committed in the officer's presence.—In re Way, 41 Mich. 299; Robison v. Miner, 68 Mich. 549.

¶ 6. An arrest without warrant for misdemeanor is legal except in case of actual breach of peace or other misdemeanor committed in officer's presence while person was taken in the act or immediately after its commission.—People v. McLean, 68 Mich. 480; Robison v. Miner, 68 Mich. 549; People v. Johnson, 86 Mich. 175.

¶ 7. A person charged simply with a misdemeanor cannot be arrested for the crime after the commission of the act without a proper warrant.—People v. McLean, 68 Mich. 480.

¶ 8. A police officer has no authority to make an arrest without a warrant unless he has reasonable cause to believe that the person arrested is a felon, or is about to commit a felony, or a breach of the peace is committed in the presence of such officer.—Cook v. Hastings, 150 Mich. 289.

¶ 9. The right to arrest without a warrant remains, in Michigan, in a case of larceny which would be felonious at common law.—People v. Wilson, 55 Mich. 506.

¶ 10. Shouting in a village street, though a breach of the peace, is not in the presence of an officer so as to justify arrest without warrant, when the officer, being 150 feet away in another street, cannot see the offender, and has to act upon information derived from a third person.—People v. Johnson, 86 Mich. 175.

¶ 11. Before a summary arrest can be made for a breach of the peace, not only must overt acts be committed in the presence of the officer, but they must be violent or dangerous acts of some sort. The playing of baseball on Sunday is not per se such a breach. (Per Hooker, J., Montgomery and Ostrander, JJ., concurring.)—Yerkes v. Smith, 157 Mich. 557.

¶ 12. Arrests without warrant can rarely be justified in cases of vagrancy, and disorderly conduct can generally be more legally dealt with by regular process.—In re Way, 41 Mich. 299.

¶ 13. A breach of the peace is committed "in the presence of an officer," so as to justify arrest, though done at some distance from him and in the dark, if he can detect the act, and could see the person doing it if it were light.—People v. Bartz, 53 Mich. 493.

¶ 14. Where respondent followed an officer into a religious meeting for the purpose of inviting a personal controversy with him, and did enter into such controversy, and rudely took hold of the officer's coat and pulled him several feet from the place where he stood, such acts constituted an assault and battery and breach of the peace, justifying an arrest without process.—People v. Rounds, 67 Mich. 482.

§ 3. ——Belief that felony was committed.

Where warrant is outstanding in another's hands, see also post ¶ 67.

¶ 15. One cannot be arrested for felony without sufficient reasons of belief if not taken in the act.—People v. Gordon, 40 Mich. 716.

¶ 16. An arrest cannot be made without a warrant on causeless suspicion, and in the absence of actual belief of guilt, based on

actual facts that created probable cause.—People v. Burt, 51 Mich. 190; Malcolmson v. Gibbons, 56 Mich. 459.

¶ 17. The facts that a store keeper missed a barrel of oil, which had stood in his store, that the barrel being painted a light blue color, was traced on the stones where it had been rolled to the shed of respondent, and was seen there by the officer looking through the cracks in the shed, the door being locked, that upon opening the door the barrel was found partly covered with rubbish, and was identified by the storekeeper as his own, that respondent's wife deceived the officer into arresting another man as the respondent, were sufficient to justify an officer in belief that a larceny had been committed.—People v. Wilson, 55 Mich. 506.

§ 4. Arrest under warrant.

Issuance of the warrant, see post §§ 12-14.
What the warrant must show and recite, see post §§ 15-17.
Exhibition or reading of warrant, see post § 20.
Arrest by officers acting together, see post § 21.

¶ 18. To justify an arrest upon a warrant two things are necessary: First, a warrant good upon its face; second, an authority in the person who undertakes to act upon it. —People v. McLean, 68 Mich. 480.

¶ 19. A warrant for arrest for a misdemeanor cannot lawfully be held by two officers at once when they are not together; and where the sheriff takes such a warrant and starts in search of the defendant, directing his deputy to search in another place, the latter has no authority to make the arrest.—People v. McLean, 68 Mich. 480.

¶ 20. An arrest at one city at the direction of an officer when the warrant was in possession of such officer at another city, is illegal.—McCullough v. Greenfield, 133 Mich. 463 (action for false imprisonment).

II. IMMUNITY AND PRIVILEGE FROM ARREST.

§ 5. In general.

Rearrest after invalid arrest, see post § 23.
Immunity from civil arrest while in attendance obedient to process, see Civil Arrest and Bail.
Rearrest of prisoner after discharge on habeas corpus, see Habeas Corpus.
Privilege from service of civil process, see Process, II, A; Witnesses, I.

¶ 21. One who has been extradited, and is on bail for the offense, is not subject meanwhile to arrest by the same prosecuting authority for some other offense, as if he had been at liberty to withdraw from the jurisdiction.—In re Cannon, 47 Mich. 481.

¶ 22. A person arrested in another jurisdiction under a United States warrant and transferred to Michigan where the crime was committed, is not entitled to time to return to the first jurisdiction before being arrested on a state warrant for another offense.—In re Little, 129 Mich. 454.

III. COMPLAINT OF CRIME, AND ISSUANCE OF WARRANT FOR ARREST.

§ 6. Necessity for complaint.

¶ 23. A complainant is a necessary prerequisite to a valid examination by a justice of the peace upon a charge of an offense not cognizable for trial by him.—People v. Lynch, 29 Mich. 274.

§ 7. Who may make complaint.

Necessity of complaint by injured spouse to institute prosecution for certain crimes, see Indictment and Prosecution, I, A.
Who may issue warrant, see post § 14.

¶ 24. In an action for false imprisonment, it was held that, since a prosecution for adultery can be instituted only on complaint of the offender's spouse, an officer has no authority of his own motion to make an arrest for such crime.—Filer v. Smith, 96 Mich. 347.

¶ 25. One not a competent witness against the person charged is not competent to make a complaint against him; therefore the first or lawful wife cannot make complaint against husband for bigamy.—People v. Quanstrom, 93 Mich. 254.

¶ 26. A wife cannot make a complaint against her husband for an indecent assault upon his daughter's person.—People v. Westbrook, 94 Mich. 620.

¶ 27. A wife may make criminal complaint against her husband for an assault upon her person with intent to do great bodily harm less than the crime of murder.—People v. Sebring, 66 Mich. 705.

§ 8. Form of complaint; writing.

Of complaint for crime triable by justice to serve as accusation on trial, see Indictment and Prosecution, XVIII.

¶ 28. A complaint for the arrest of one charged with an offense not cognizable by a justice of the peace need not be in writing. —People v. Clark, 33 Mich. 112; Turner v. People, 33 Mich. 363; People v. Hare, 57 Mich. 505; People v. Bechtel, 80 Mich. 623.

¶ 29. A complaint for an offense not triable by a justice need not be reduced to writing or signed by the party, or filed with the justice, though the better practice is to reduce it to writing.—People v. Clement, 72 Mich. 116.

§ 9. Requisites and sufficiency of complaint.

Necessity for complaint, see ante § 6.
Necessity of writing, see ante § 8.
Competency of complainant, see ante § 7.
Positiveness and knowledge, see post § 10.
As accusation on prosecution for violating municipal ordinance, see Municipal Corporations, XVI, B.
For search warrant and seizure, see Search and Seizure.
Sufficiency to sustain indictment or information assailed as variant from complaint or as unsupported by complaint and commitment, see Indictment and Prosecution. I, D.
Objections available to quash indictment or on trial, see Indictment and Prosecution, I, D.
Sufficiency of the complaint as a judicial proceeding to sustain perjury in falsely swearing thereto, see Crimes, II.
Evidence on trial to identify person complained against, admissibility of returned testimony, see Indictment and Prosecution, VIII.

¶ 30. A complaint before a justice of the peace for a criminal offense, regularly sworn to, and ample upon its face, gives jurisdiction to issue the warrant for the arrest of the accused, and to examine him.—People v. Lynch, 29 Mich. 274.

¶¶ 31, 32. A complaint for larceny which omits the Christian name of the owner of the stolen property, will support a conviction inasmuch as such an irregularity could either be waived or cured by amendment.—People v. Pline, 61 Mich. 247.

§ 10. ——Knowledge or belief of complainant.

See also post ¶¶ 41, 47.

¶ 33. A criminal complaint must set up the facts constituting the offense on the knowledge of the person making it, or on that of some other person; it cannot rest on mere belief.—People v. Heffron, 53 Mich. 527.

§ 11. ——Describing or alleging crime.

¶ 34. A complaint for arrest need not set out in formal and distinct terms the precise criminal act to be inquired into and prosecuted.—Turner v. People, 33 Mich. 363.

¶ 35. Unlike a complaint for trial before a justice, the complaint need not set forth the essentials of the offense with the particularity necessary to an accusation for trial.—People v. Kahler, 93 Mich. 625.

¶ 36. A complaint for selling liquor to a minor, made before a justice of the peace of the city wherein the offense is alleged to have been committed, is not void because omitting the name of the county.—People v. Kahler, 93 Mich. 625.

§ 12. Reception of complaint and issuance of warrant.

Sufficiency of complaint to give jurisdiction for issuance, see ante ¶ 30.
Amendment of warrant, see post § 19.
Issuance of new warrant where higher offense is disclosed on examination, see post ¶ 90.
Necessity and sufficiency of cost bond, see post § 44.

¶ 37. A police justice of Detroit should receive and act upon complaints regularly offered for violations of the liquor law, whether the offense is or is not charged to have been committed by a party against whom a complaint is already pending, and it cannot be postponed because the complaint is a "second" one and there is a press of business.—Sadler v. Sheahan, 92 Mich. 630.

¶ 38. Where a justice of the peace refuses to issue a warrant, it is proper practice for the circuit court to issue an order to the justice to show cause why he should not receive the complaint, and issue the warrant.—Allport v. Murphy, 153 Mich. 486.

¶ 39. Where one examining magistrate invites another to sit with him in an examination upon a complaint, an information based on such examination will not be quashed for the omission of the latter to act with the former in issuing process, so long as it does not appear that the former associated the latter with him for that purpose, and that the latter, therefore, had jurisdiction to act (How. St., § 9477).—People v. Hare, 57 Mich. 505.

§ 13. Examination and proof before issuing warrant.

Matters relating to the examination of the prisoner for commitment, see post VII.
See Comp. L. 1915, § 15666.

¶ 40. The object of the examination of the complainant and his witnesses by a police justice, in a case not triable by a justice of the peace, is to enable that officer to determine from it whether there is sufficient ground for issuing a warrant.—People v. Bechtel, 80 Mich. 623; People v. Lynch, 29 Mich. 274.

¶ 41. Quere, whether an information verified on information and belief alone is sufficient as an oath to justify arrest of accused under Const. art. 6, § 26. [Note. The opinion does not state that it was on informa-

tion and belief, but it is so stated in the official syllabus, par. 4.]—People v. Stockwell, 135 Mich. 341.

¶ 42. The complaint and examination by a police justice, before issuing the warrant of arrest in cases not cognizable by justices of the peace need not be reduced to writing; and it is no objection that the warrant issued on an affidavit made the day before.—People v. Bechtel, 80 Mich. 623.

¶ 43. No stronger evidence is required for issuing the warrant for arrest than for holding the accused for trial after the arrest.—People v. Lynch, 29 Mich. 274.

¶ 44. Where there is admissible evidence tending to show the probable guilt of the accused, the jurisdiction of a justice of the peace to issue a warrant of arrest will not be reviewed upon the weight of the evidence; that is a question for the justice alone, and if it satisfies him, and he issues his warrant, his decision is conclusive.—People v. Lynch, 29 Mich. 274.

¶ 45. Where a complaint for arrest is in due form and sufficient on its face to give jurisdiction, whether it is proper after indictment to go behind it to show that no oral examination was had upon oath of the complainant before issuing the warrant, quere.—People v. Lynch, 29 Mich. 274.

¶ 46. Though evidence of the girl's statement to her father immediately after the alleged injury might not ordinarily authorize a justice to issue his warrant, still, if he thought there was reasonable cause to believe the defendant guilty, it might be his duty to issue it without waiting for the girl's testimony, if she was unable to give it from sickness or other cause, or where the delay might enable the prisoner to escape.—People v. Lynch, 29 Mich. 274.

¶ 47. Where a complaint for assault with intent to ravish is regular on its face, a showing merely that the warrant was issued upon such complaint and an oral examination of the complainant alone, and that he testified only from knowledge and information derived from his daughter, the victim of the alleged offense, is not sufficient to show that the justice acted without jurisdiction in issuing his warrant.—People v. Lynch, 29 Mich. 274.

¶ 48. A justice is justified in holding a prisoner for trial for an assault with intent to do great bodily harm less than murder, where there was testimony of a very serious bodily harm actually inflicted, and of express malice of an aggravated kind.—People v. Harrington, 75 Mich. 112.

IV. THE WARRANT FOR ARREST.

§ 14. Power to issue warrant.

Power to admit to bail, see post §§ 42, 43.
See Comp. L. 1915, § 15665.

¶ 49. The power to issue warrants of arrest involves the determination of the sufficiency of the complaint, which, being a judicial act, cannot be performed by the clerk of a court, nor can he be vested with such power by statute.—People ex rel. Robison v. Swift, 59 Mich. 529; People v. Colleton, 59 Mich. 573.

§ 15. Necessity, requisites and sufficiency.

Authority in person to whom directed or executing it, see ante § 4.
Amendment as to name, see post § 19.
Necessity for warrant to authorize arrest, see ante I.
Statutory requisites, see Comp. L. 1915, § 15667.

¶ 50. It is not necessary that the warrant should recite the evidence adduced before the magistrate, or name the witnesses examined; and the fact that it does recite the making of complaint in writing, and the examination of complaint on oath, will not exclude the presumption that other evidence was taken, if necessary to support the jurisdiction of the justice.—People v. Bennett, 107 Mich. 430.

¶ 51. A warrant for a violation of the local-option law, containing a recital of evidence before the magistrate, is not open to the objection that it not only fails to show, but negatives the fact, that the justice had legal evidence before him (1) that the law was in force within the county, and (2) that respondent was not within the exception relating to druggists and registered pharmacists.—People v. Bennett, 107 Mich. 430.

¶ 52. A warrant for commitment charging merely the driving animals away from another's possession states no criminal offense.—In re Leddy, 11 Mich. 197.

§ 16. ——Name or description of the party.

Of owner of property in complaint, see ante ¶ 31.

¶ 53. A warrant is not void because spelling respondents' proper names "Amel" and "Brailey" instead of "Amiel" and "Brearley."—People v. Gosch, 82 Mich. 22.

¶ 54. Where warrant issued upon complaint for larceny of goods of "Allen Bricker" gave name as "Allen Brinker," it was properly amended after examination to correspond with complaint and testimony.—People v. Hildebrand, 71 Mich. 313.

§ 17. ——Description and specification of charge.

Amendment to state elements, see post § 19.

¶ 55. A warrant for arrest for forgery, reciting that the accused "did utter and publish as true a certain false, forged and counterfeited promissory note" (describing it), "well knowing the same to be false, forged and counterfeited," is not bad for not averring the uttering and publishing to have been with intent to defraud.—Haskins v. Ralston, 69 Mich. 63.

¶ 56. A warrant of arrest is sufficient if it informs the accused of the nature of the accusation, and if it recites the substance of the offense, describing the crime with such accuracy as to show that it is within the jurisdiction of the officer to take bail.—People v. Kahler, 93 Mich. 625; Haskins v. Ralston, 69 Mich. 63.

¶ 57. A warrant of arrest for an offense not cognizable by a justice of the peace is sufficient if it sets out in language within the ordinary comprehension the substantial elements constituting the offense charged, leaving to the information the office describing it with technical accuracy.—People v. Pichette, 111 Mich. 461.

¶ 58. In larceny triable by a justice the value of property stolen is of the essence of the offense, and the averment thereof in the warrant a substantial allegation, for the jurisdiction depends on it and the warrant must show jurisdiction.—People v. Belcher, 58 Mich. 325.

¶ 59. In making a complaint before a justice, and in the examining witnesses before issuing of a warrant, the proceedings are not only ex parte, but general, and not confined to any particular offense; but the warrant must specify some particular offense, and the proceedings thereafter become specific and limited by the offense charged in the warrant.—Yaner v. People, 34 Mich. 286.

¶ 60. A warrant for the burning of a sawmill, which avers that the act was committed with force and arms, contrary to the form of the statute, and against the peace of the state, and which refers to such act as a felony, sufficiently charges an offense under How. St., § 9125, although it does not in terms allege that the burning was wilful and malicious.—People v. Pichette, 111 Mich. 461.

§ 18. For arrest and production of convict accused of crime within prison.

¶ 61. Pub. Acts 1893, No. 118, providing for the prosecution and punishment of convicts who commit crimes in prison by proceeding "in all ways conforming to" like offense elsewhere committed, except that examination by a justice may be had in the prison, etc., contemplates the ordinary complaint, the ordinary warrant, and the ordinary information, and in addition thereto the warrant must be directed to the warden who has the person in charge.—People v. Cook, 147 Mich. 127.

¶ 62. A warrant to produce a prisoner accused of crime in prison, is not fatally defective for failing to follow the exact language of the statute (Pub. Acts 1905, No. 184, § 65); so the use of the word "inmate" instead of "convict" to describe the person apprehended was not prejudicial.—People v. Cook, 147 Mich. 127.

¶ 63. Where a warrant on charge of crime in prison was directed to the warden of a prison, if he sees fit to produce the prisoner before the examining magistrate, and before the circuit court for trial, upon a warrant technically defective that is no concern of the prisoner. His rights are not prejudiced by the waiver on the warden's part of the technical defects in the warrant. (Pub. Acts 1905, No. 184, § 65.)—People v. Cook, 147 Mich. 127.

§ 19. Amendment of warrant.

Amendment of commitment, see post § 39.

¶ 64. A justice may, before trial for larceny, permit the warrant to be amended to show the value of the property taken; but if he does not the circuit court on appeal cannot allow such amendment.—People v. Belcher, 58 Mich. 325.

¶ 65. Respondent was arrested upon a warrant describing the property stolen as the property of one "Allen Brinker," issued on a complaint for larceny of the goods of "Allen Bricker." After the preliminary examination the justice amended the warrant so as to make it correspond with the complaint and the testimony given upon the examination. Held, that the amendment was authorized (How. St., § 9537), and was not ground for quashing an information subsequently filed.—People v. Hildebrand, 71 Mich. 313.

V. MAKING ARREST AND KEEPING OF PRISONER; RECOGNIZING TO APPEAR.

§ 20. In general; reading or producing warrant.

Possession of warrant at place of arrest, see also ante ¶ 20.

¶ 66. It is a general rule in regard to criminal arrests that bailiffs and constables, if they be sworn and commonly known as officers, while they need not show the parties to be apprehended their warrant, though demanded, are yet required to acquaint them with the substance of it; and private persons to whom a warrant is directed, and even officers, if not sworn and commonly known as such, or acting out of their precinct, must show their warrant if demanded.—People v. Moore, 2 D. 1.

¶ 67. A constable who has knowledge that a warrant has been issued for the arrest of a person for felony may himself lawfully make the arrest without having the warrant in his possession. But he should inform the person arrested of the facts, or at least of the offense for which he is arrested.—Drennan v. People, 10 Mich. 169.

§ 21. Arrest by several officers.

See also ante ¶¶ 19, 67.

¶ 68. The arrest is lawful, where two officers acting together are attempting to apprehend a prisoner who kills one of them, though the warrant is in possession of the other. —People v. Durfee, 62 Mich. 487; but see McCullough v. Greenfield, 133 Mich. 463, where an arrest while the warrant was at another place was held to be a false imprisonment.

¶ 69. A warrant for arrest for a misdemeanor cannot lawfully be held by two officers at once when they are not together; and where the sheriff takes such a warrant and starts in search of the defendant, directing his deputy to search in another place, the latter has no authority to make the arrest. —People v. McLean, 68 Mich. 480.

§ 22. Manner of making arrest.

¶ 70. An officer making an arrest for felony has some discretion as to the means of apprehending the supposed offender, and of keeping him safe—e. g., by means of handcuffing—after such apprehension.—Firestone v. Rice, 71 Mich. 377.

§ 23. Rearrest.

Privilege of prisoner arrested and brought in on another charge, see ante § 5.
As discharge of bail, see post § 50.

¶ 71. The validity of an arrest under proper proceedings does not depend on the fact that respondent is already in custody for the same offense by a void arrest without warrant.—People v. Payment, 109 Mich. 553.

§ 24. Jurisdictional and territorial limits.

See Comp. L. 1915, § 15668.

¶ 72. In the absence of a treaty with Great Britain authorizing it, the process of the United States courts in admiralty cannot be executed in Canadian waters.—People v. Tyler, 7 Mich. 161; Tyler v. People, 8 Mich. 320.

§ 25. Detention or liberation on recognisance.

Use of handcuffs, see also ante ¶ 70.
Duty to examine promptly, see post § 30.
Discharge on examination, see post § 40.
Executing the recognizance and requisites of it, see post § 44.
Validity of recognizance as prerequisite for discharge on subsequent order, see post ¶ 116.
Sureties as custodians of bailed prisoner, see also post ¶ 141.
Sufficiency of surrender by bail, see post ¶ 142.
Subsequent illegal detention as affecting leg lity of arrest, see also False Imprisonment.
On holding prisoner to answer, see Comp. L. 1915, § 15682.
Pending adjournment of examination, see Comp. L. 1915, § 15674.
See Comp. L. 1915, §§ 15670, 15672.

VI. SEIZURE AND KEEPING OR DISPOSAL OF PROPERTY OR EVIDENCE.

§ 26. In general.

Seizure under fish and game laws, see Fish and Game.
Search warrants and seizure of property thereunder, see Search and Seizure.
Admissibility of articles as evidence or of evidence that incriminating articles were found in possession of accused, see Indictment and Prosecution, VIII.

¶ 73. Police officers have no right to take and retain money found upon a person arrested, except for the purpose of using it as evidence on the trial of the proceedings instituted by the arrest.—Hubbard v. Garner, 115 Mich. 406.

VII. EXAMINATION AND COMMITMENT FOR TRIAL OR DISCHARGE.

§ 27. In general; nature of proceedings.

Purpose and necessity, see post § 28.
Complaint as prerequisite, see ante § 6.
Examination before issuing warrant, see ante § 13.
Judicial notice of character of the proceeding and time required, see Evidence, I.
Presumption that examination was regularly conducted, see Evidence, II.
See Comp. L. 1915, §§ 15677-15679.

¶ 74. The examination is not a trial, but an investigation to decide whether a crime has been committed, and whether there is probable cause to believe the accused is guilty.—McCurdy v. New York Life Ins. Co., 115 Mich. 20.

¶ 75. A preliminary examination is not a trial, and the rules that govern criminal pleadings and the scope and import of trial issues, and the relevancy of evidence, are not applicable.—Turner v. People, 33 Mich. 363.

¶ 76. The proceedings on preliminary examination are not judicial in the technical sense of the term, and when once begun, on proper complaint and arrest, do not abate before their final disposition by discharge or commitment.—Hamilton v. People, 29 Mich. 173.

§ 28. Purpose and necessity of examination.

Of examination before issuing warrant, see ante § 13.

¶ 77. The examination is designed to accomplish, to some extent, the purpose of a presentment by a grand jury; but not that the complaint or warrant shall stand in the place of a formal presentment, nor that in the circuit court the prosecuting officer should be limited by it in the mode of charging the offense.—Annis v. People, 13 Mich. 511.

¶ 78. The preliminary examination is not designed to deprive the accused of any substantial rights that existed before.—Yaner v. People, 34 Mich. 286.

¶ 79. One who was undergoing imprisonment for one crime, having previously committed another for which he had not been tried, escaped and fled to Canada. He was extradited on the untried offense. Held, that under How. St., § 9555, he was a "fugitive from justice," and could be informed against for such untried offense without having had a preliminary examination.—People v. Kuhn, 67 Mich. 463.

§ 29. Waiver of examination.

Ordering further return to show waiver, see post ¶ 113.

Waiver on arraignment or at trial, see Indictment, I, D.

¶ 80. The defendant may waive his right to have a preliminary examination before an information is filed against him, as well when called upon to plead to the information as when brought before the examining magistrate. And if, at the time of pleading, he make no objection on the ground that such examination has not been had or waived, he must be understood to admit that it has been had, or that he has waived or then intends to waive it.—Washburn v. People, 10 Mich. 372; Hicks v. People, 10 Mich. 395.

¶ 81. An omission of the justice in receiving the complaint on information and belief to examine any witness before issuing the warrant, and to hold a preliminary examination, is waived where the accused on coming before the justice waived it and when arraigned pleaded not guilty.—People v. Harris, 103 Mich. 473.

¶ 82. If a person is arrested on a warrant charging an offense including lower grades, he should not waive examination if he wishes the examining magistrate to specifically designate the offense committed.—Stuart v. People, 42 Mich. 255.

¶ 83. One who is arrested on a criminal warrant can either insist upon or waive examination, and, if he waives it, may be held for trial on the showing upon which the warrant for arrest was issued, and the information may cover any crime charged thereby. —Stuart v. People, 42 Mich. 255.

§ 30. Time for examination; adjournments.

Postponement of reception of complaint, see ante ¶ 37.

Sufficiency of the recognizance to hold for adjournments, see post § 48, ¶ 139.

Detention and custody pending adjournment, and commitment for such period, see Comp. L. 1915, §§ 15674, 15675.

¶ 84. The preliminary examination of a person charged with a crime, especially, if a nonbailable offense, must be made promptly, and should not be put off to await the mere convenience of the magistrate or prosecuting officer.—In re Peoples, 47 Mich. 626.

¶ 85. Technical nicety as to adjournments is not required, and irregularities therein cannot be considered on the subsequent trial on the merits. Where the examination continued from day to day over several days, one of which was a legal holiday, the commitment for trial, was not void.—Hamilton v. People, 29 Mich. 173.

§ 31. Before whom held.

Who may admit to bail, see post §§ 42, 43.

Power of justice to whom docket and papers are transferred to make return, see post ¶ 107.

Issuance of process by one magistrate when another is associated on hearing, see ante ¶ 39.

See Comp. L. 1915, §§ 15667, 15669, 15672, 15673.

Association of other magistrate, see Comp. L. 1915, § 15688.

¶ 86. Where, upon an affidavit by the accused that the examining justice who issued

the warrant is a material witness for him, the justice directs him to be taken before another justice, such action is illegal, and the justice who issued the warrant does not lose, nor does the other justice acquire, jurisdiction; the prisoner should be taken before and examined by the justice who issued the warrant.—People v. Duncan, 97 Mich. 632.

§ 32. Counsel in the examination.

Counsel for accused, see Comp. L. 1915, § 15678.

¶ 87. Any person may take part in behalf of the people in a criminal examination before a magistrate, if such magistrate and the prosecuting attorney do not object, and there is no good reason forbidding it.—Sayles v. Genesee Circuit Judge, 82 Mich. 84.

§ 33. Functions and power of magistrate.

Power to admit to bail, see post §§ 42, 43.
Powers of judges and assistant or substitute judges in conducting examinations, see Judges, IV.
Power to exclude spectators at certain examinations, see Comp. L. 1915, § 15700.
Summoning and binding over witnesses, see Comp. L. 1915, §§ 15680, 15683-15686.

¶ 88. The examining magistrate cannot procure the witnesses' signatures after he has made his return to the circuit court.—People v. Chapman, 62 Mich. 280.

¶ 89. Under Comp. L. 1857, chap. 194, the examining magistrate had no power to commit a witness for refusing to testify on the examination. He has no powers except as are expressly conferred on him.—In re Farnham, 8 Mich. 89.

§ 34. Scope of inquiry on examination.

Before issuing warrant, see ante § 13.
Office of the complaint for warrant and the warrant to ascertain and specify crime complained of, see ante ¶ 59.
Relaxation of technical rules of evidence and trial, see ante § 27.
Showing of the proceedings in return, see post § 38.
See Comp. L. 1915, §§ 15677, 15679.

¶ 90. An examining magistrate need not weigh evidence as a petit jury would, nor discharge the prisoner where the evidence conflicts or in case of a mere reasonable doubt of his guilt; his inquiry may extend to all the facts connected with the charge, though they show an offense different from or greater than that charged; but if it appear that a higher or different offense has been committed a new warrant should thereupon be issued charging the proper offense, upon which an examination may be had.—Yaner v. People, 34 Mich. 286.

¶ 91. The magistrate must determine whether an offense has been committed, and at the same time specify it so that it may be seen whether it is an offense which he can bail or not.—Yaner v. People, 34 Mich. 286.

¶ 91a. How. St., § 9466, requiring examination of complainant, is directory as to the quantity of testimony to be taken upon a preliminary examination, and means that the magistrate shall receive such testimony from the complainant and his witnesses as may be offered, and shall act upon it; and the objection cannot be raised on the trial that the complainant was not sworn on such examination.—People v. Curtis, 95 Mich. 212.

§ 35. ——On complaint for two or more crimes.

Effect of waiver of examination, see ante ¶ 82.

¶ 92. Where the offense charged in a justice's warrant includes one or more others of less degree, the magistrate should determine which offense, if any, has been committed, to the end that the accused may not be put upon trial for an offense greater than that for which he had been examined and held for trial.—Yaner v. People, 34 Mich. 286.

¶ 93. The rule that one should not be subject to trial for two separate and distinct offenses at the same time, has no application to a justice court proceeding in which the warrant charged the crime of a specific illegal sale of liquor, and that of keeping a place for illegal sale, and where respondent was examined and bound over on both charges and the justice declined to compel an election by the prosecution; as under Comp. L. 1897, § 5429, the specific sale was presumptive evidence of the keeping of a place where liquors were sold, and the examination therefore took no wider range than it would have taken had the charge been only for keeping the place open; and besides respondent's rights were fully protected by requiring the prosecution to elect in the circuit court on which count to proceed.—People v. Shuler, 130 Mich. 161.

§ 36. Reduction of testimony to writing.

Of testimony, affidavit or complaint and examination thereon for issuance of warrant, see ante § 13.
Use as evidence on trial, see Indictment, VIII.
See Comp. L. 1915, § 15680.

¶ 94. Where, at the preliminary examination of an accused person, the testimony given by the witnesses and reduced to writing is not signed by them, the examination is fatally defective, and does not warrant the filing of an information.—People v. Smith, 25 Mich. 497; People v. Chapman, 62 Mich. 280; People v. Brock, 64 Mich. 691.

¶ 95. While, under How. St., § 9469, the accused may insist that the testimony of a witness be read over to such witness before he signs, yet if the accused makes no objection at the time to the omission to read it, he cannot do so afterwards.—People v. Gleason, 63 Mich. 626.

¶¶ 96-98. Where the deposition taken on a preliminary examination did not show whether the testimony was or was not read over to the witness before she signed it, and neither the justice nor any one else could swear whether it was or was not so read, it could not be said that the witness did not know what she was signing.—People v. Dowdigan, 67 Mich. 95.

§ 37. Findings and commitment.

Determination which of several crimes shall be answered, see also ante § 35.
Specification of offense, see also ante ¶ 91.
Showing in the return, see post § 38.
Sufficiency of showing and description and conditions in bail bond, see post §§ 44-46.
Certification on mittimus of amount of bail, see Comp. L. 1915, § 15697.

¶ 99. No specific record of the finding by the justice of probable cause or otherwise is required.—Turner v. People, 33 Mich. 363.

¶ 100. Where the examining magistrate requires an accused person to recognize to answer the charge, he need not make or certify to the circuit court a finding that the offense has been committed.—People v. Ten Elshof, 92 Mich. 167.

¶ 101. A commitment is not bad if in terms that would be good in an indictment.—Brownell v. People, 38 Mich. 732.

¶ 102. The phrase "cause to suspect" instead of "cause to believe" is admissible in a commitment; and it has not been held necessary in practice that the commitment state that the party is to be held "for trial," as that is taken for granted.—Brownell v. People, 38 Mich. 732.

¶ 103. A commitment for trial is invalid if the magistrate fails to fix the amount of bail. —In re Leddy, 11 Mich. 197.

¶ 104. An examining magistrate, after hearing the testimony of witnesses on a murder charge, gave an oral order holding over the accused for trial. Held, this did not preclude him from later taking additional steps and binding over the accused by formal order after the testimony was written up.—Oblaser v. Wayne Circuit Judge, 159 Mich. 665.

§ 38. Certification and return.

Matters to be found or stated in commitment, see ante § 37.
Return as divesting jurisdiction and powers, see ante ¶ 88.
Return as prerequisite to filing of information, see Indictment and Prosecution, I, A.
Certification and return of examinations and recognizances, see Comp. L. 1915, § 15689.

¶ 105. A sufficient preliminary examination is shown where a sufficient complaint and warrant appear on examination of witnesses before the magistrate who issued the warrant, and a commitment by him reciting that he finds the crime charged has been committed and probable cause to believe respondent guilty.—People v. Coffman, 59 Mich. 1.

¶ 106. A certificate of an examining magistrate that "it appears to me that said offense has been committed, and there is just cause to suspect the said defendant to be guilty thereof," is sufficient to confer jurisdiction upon the circuit court to try the case, and complies with How. St., § 9471.—People v. Sutherland, 104 Mich. 468.

¶ 107. Where a justice of the peace, before whom a preliminary examination was held, has made and entered on his docket all the findings necessary to confer jurisdiction upon the circuit court if filed with the papers in the case as his return under the statute, a justice to whom such papers and docket are transferred has the right, and it is his legal duty, to certify the same to the circuit court, and an information may be filed thereon.—People v. Schick, 75 Mich. 592.

¶ 108. Where complaint was made and a warrant issued for larceny and for receiving stolen goods, and the examining magistrate certified that it appeared to him that the said offense so charged was committed, and that there was probable cause to believe the respondent to have been guilty of the commission thereof, it was held sufficient to authorize the prosecuting attorney to file an information charging respondent with a larceny of the property.—Brown v. People, 39 Mich. 37.

¶ 109. Where the justice certified that the preliminary examination of a witness on a criminal complaint was taken by him on oath and was sworn to and subscribed by the witness before him, and the deposition so certified was returned by him, with the warrant and other papers, to the clerk of a circuit court, held a sufficient compliance with How. St., § 9478, which requires it to be certified and returned.—People v. Dowdigan, 67 Mich. 95.

¶ 110. A justice need not certify to the circuit court the degree of murder of which

he returns that there is probable cause to believe the defendant guilty.—Cargen v. People, 39 Mich. 549.

¶ 111. Where the examining magistrate requires an accused person to recognize to answer the charge, he need not certify to the circuit court a finding that the offense has been committed; so held, where he certified that he found there was probable cause to believe an offense had been committed, and that there was probable cause to believe respondent guilty thereof.—People v. Whittemore, 102 Mich. 519.

§ 39. ——Amendment or further return.

Amending return or making further return, see post § 39.

Making formal commitment after oral one, see ante ¶ 104.

¶ 112. Where an examining magistrate makes a return prematurely, before the evidence is written up and signed by the witness, or his return is for other reasons invalid, he may amend the same before filing it, or write out a new one.—Oblaser v. Wayne Circuit Judge, 159 Mich. 665.

¶ 113. Where an examining magistrate fails to certify in his return that the respondent waived a preliminary examin tion, which was the fact, the circuit court has power to order a further return showing such waiver, and trial may be had upon the information filed on the basis of the original return.—People v. Wright, 89 Mich. 70.

¶ 114. An examining magistrate on a charge against relator of murder, heard the witnesses, remanded the relator for trial to the circuit court, and made his return. No formal continuance was made of the case, and ten days later the magistrate called in the witnesses in defendant's presence, and without his objection, for the purpose of signing statements of their testimony which had been reduced to writing. Relator contended that the magistrate's return did not truly present the case, and brought mandamus to compel the circuit judge to vacate an order denying a motion for an amended return. Held, the writ should be denied.—Oblaser v. Wayne Circuit Judge, 159 Mich. 665.

§ 40. Discharge of prisoner.

Privilege of arrested prisoner from arrest on another charge while within jurisdiction, see ante § 5.

See Comp. L. 1915, § 15681.

¶ 115. A person arrested on a defective warrant issued by a justice is entitled to his discharge: and the chance that it may be supplemented by facts not yet known to the justice will not justify a mandamus compelling the sheriff to serve it, where it will be necessary to take the respondent several hundred miles for his examination.—Beecher v. Anderson, 45 Mich. 543.

¶ 116. A police justice's order for release of a prisoner arrested for violation of a city ordinance is void, when founded on an invalid recognizance to appear for trial, it having been taken contrary to law in the prisoner's absence.—Couzens v. Sellers, 199 Mich. 457.

VIII. ADMISSION TO BAIL.

§ 41. Bailable offenses and right to bail.

Sufficiency of recitals in bond, see post §§ 45, 46.

Habeas corpus to admit to bail, see Habeas Corpus.

Pending review on exceptions or pending error after conviction, see Indictment and Prosecution, XVI, A.

Constitutional right, see Const., art. 2, § 14.

Amount, excessiveness, see Const., art. 2, § 15.

§ 42. Who may admit to bail.

After commitment, see post § 43.

Generally, see Comp. L. 1915, §§ 15690, 15691.

Certification on warrant where arrested and bailed in another county, see Comp. L. 1915, § 15671.

¶ 117. Under Const., art. 6, § 29, which provides that "all persons shall, before conviction, be bailable by sufficient sureties, except for murder and treason when the proof is evident or the presumption great," and How. St., § 9479, which authorizes justices of the peace to let to bail in all cases where the punishment for the offense charged shall be less than imprisonment for life in the state prison, a justice may admit to bail a person charged with a crime the punishment for which is imprisonment for life or for any number of years, as in case of rape.—People v. Burwell, 106 Mich. 27.

¶ 118. Circuit judges have power, independently of statutory provisions, to take bail in criminal cases at chambers; and the same power may be conferred by the legislature upon circuit court commissioners.—Daniels v. People, 6 Mich. 381.

§ 43. ——After commitment or indictment.

Continuance of recognizance pending exceptions, see Comp. L. 1915, § 15842.

After commitment, see Comp. L. 1915, § 15687.

By clerk when amount is certified on mittimus, see Comp. L. 1915, §§ 15697, 15698.

¶ 119. A circuit court commissioner has power, under How. St., § 9476, to admit a prisoner to bail in a less sum than that fixed by the examining magistrate.—People v. Robb, 98 Mich. 397.

¶ 120. After a person charged with crime has been bound over to the recorder's court for trial, a police justice of Detroit cannot admit him to bail (How. St., § 6591g1).—Mills v. Chambers, 91 Mich. 521.

¶ 121. R. S. 1846, Chap. 163, § 26, How. St., § 9479, does not confer authority upon the officers therein named to take recognizance of persons in custody, charged with offenses, after indictment found.—People v. Rutan, 3 Mich. 42.

¶ 122. A circuit court commissioner has power to admit to bail a respondent committed for trial upon a charge of murder in the first degree, except where the proof is evident or the presumption great.—Elder v. Garner, 97 Mich. 617.

IX. REQUISITES OF BAIL AND QUALIFICATION OF SURETIES.

§ 44. In general; execution and filing of the instrument.

Necessity of fixing amount in commitment, see ante § 38.
Describing the crime, conditions and reason, see post §§ 45, 46.
Necessity of renewing recognizance when trial is continued, see also post ¶ 140.
Reduction of amount fixed by committing magistrate, see post § 43, ¶ 119.
Invalidity of order for discharge when recognizance is void, see ante ¶ 116.
Recognizance to keep the peace, see Indictment and Prosecution, XVIII.
Authority to administer oath to bail, see Jud. Act, Chap. XX, § 2; Comp. L. 1915, § 12738.
Requiring new sureties, see Comp. L. 1915, § 15699.

¶ 123. A recognizance is an obligation of record with condition to be void on performance of some act specified. It is entered into either before some court of record, or before a magistrate out of court and afterwards enrolled in a court of record; but in the latter case it is the acknowledgment that gives the recognizance its force as a record, and the enrolment is for safe custody and notifying it to others.—See Lang v. People, 14 Mich. 439, per Cooley and Martin, JJ., affirming lower court by equal division.

¶ 124. A recognizance is a common-law obligation, and the sureties may be bound separately from their principals.—People v. Dennis, 4 Mich. 609.

¶ 125. A recognizance (to keep the peace) must be executed by the accused in person before the magistrate.—In re Fowler, 49 Mich. 234.

¶ 126. Under Detroit Charter of 1914-1916, p. 472, § 10, giving to the police justices, the clerk of the police court, or the clerk of the recorder's court power to take recognizances for appearance to answer any charge that may be made under certain ordinances, and providing that it shall be the duty of the officer having a person in custody to produce him before "any of said officers for the purpose of giving bail when required to do so," and that the recognizance shall be filed in the office of the clerk of "the court before whom such person is brought for trial," a recognizance cannot be taken by a police judge in the absence of the prisoner.—Couzens v. Sellers, 199 Mich. 457.

¶ 127. A recognizance signed by the sureties before the arrest of the principal, and on the next day certified by the justice in due form as and for a recognizance taken before him, is not valid and creates no liability.—Clute v. Ionia Circuit Judge, 131 Mich. 203.

¶ 128. Bonds for costs in criminal cases, signed in blank by a surety and left with a justice of the peace to fill in and use as he sees fit after an alleged offender is arrested, are not valid under Comp. L. 1897, § 1061, which provides that no warrant shall issue "unless security for costs shall have been filed with said justice."—Hutchinson v. Board of Supervisors of Ionia Co., 130 Mich. 62.

¶ 129. The failure of the clerk to file a recognizance which is estreated and produced on trial of action thereon, is no objection under How. St., § 9485, which provides that no such action shall be barred or defeated "by reason of any defect in the form of the recognizance, if it sufficiently appear from the tenor thereof at what court the party or witness was bound to appear."—People v. Robb, 98 Mich. 397.

§ 45. Statement of charge and obligations.

¶ 130. A recognizance need not set out the offense with the same particularity as an indictment. If described with such certainty as to show that the case is one in which the officer is empowered to take bail, it is sufficient.—People v. Rutan, 3 Mich. 42; Daniels v. People, 6 Mich. 381.

¶ 131. In the recognizance of a person charged with an offense that has a definite and well-understood general name, naming the offense by such is a definite description of it.—People v. Dennis, 4 Mich. 609.

¶ 132. The recital of a charge that the principal "did set fire to and wilfully burn a building situate," etc., "known as the Canal Mills," and stating the ownership, was held sufficient to state that it was a mill building.—People v. Rutan, 3 Mich. 42.

¶ 133. The description of the offense as "the crime of incest" is sufficient; and the facts constituting the offense need not be set out in the recognizance. So, also, where the description is "the crime of attempt to procure an abortion."—Daniels v. People, 6 Mich. 381.

¶ 134. An information charged the felonious breaking and entering in the nighttime of a shop not adjoining to or occupied with a dwelling house, with intent to commit larceny. The next count charged larceny. The respondent entered into a recognizance before the court in which the information was pending, conditioned for his appearance to "answer to an information on file against him for burglary." Held, that the recognizance sufficiently identified the offense charged, and that an action thereon was maintainable under How. St., § 9485, providing that no action brought upon any recognizance shall be barred or defeated by reason of any defect in the form of the recognizance, if it sufficiently appear therefrom at what court the party was bound to appear, and that the court before whom it was taken was authorized by law to take it.—People v. Hanaw, 106 Mich. 421.

¶ 135. Where defendant has been committed for want of bail by the examining magistrate, and subsequently, on his own application, is let to bail by a commissioner, it is not necessary that the recognizance should show upon its face that the offense was committed within the jurisdiction of the magistrate. The entering into such recognizance being a voluntary act of defendant, of which he can only avail himself on his own showing of a legal commitment, the presumptions are in favor of its validity.—Daniels v. People, 6 Mich. 381.

§ 46. Statement of reason or cause for bail.
See also post ¶ 150.

¶ 136. The special circumstances under which the recognizance is taken need not be recited, if it is conditioned for some act warranted by the law, and is taken before a court or officer authorized thereto.—People v. Dennis, 4 Mich. 609.

¶ 137. It is not necessary that the condition of a recognizance taken by a justice of the peace for appearance at a future day for further examination of a person charged with an offense should state that probable cause appears for holding to bail.—People v. Freeman, 20 Mich. 418.

X. FORFEITURE OF BAIL AND ENTRY OF DEFAULT.

§ 47. In general.
Recording forfeiture, see also post ¶ 155.
Effect of failure to file bond, see ante ¶ 129.
Necessity of judgment on forfeiture, see post § 56.
Mode of enforcement and procedure to enforce, see post XII.
Minutes as evidence of forfeiture, see post ¶ 155.
Remission of forfeiture, see post § 52.
Attachment of property by bail to reimburse himself, see Attachment.
Right of third person to intervene on attachment, see Attachment, XI.
For default to appear to adjourned examination, see Comp. L. 1915, § 15676.

¶ 138. The forfeiture may be declared by the court before which the act constituting the condition is to be done, when there is a default of which it can take judicial notice such as nonappearance; but a trial and proof of the facts is requisite where the breach cannot be judicially known, such as on a recognizance to keep the peace.—Lang v. People, 14 Mich. 439, per Cooley and Martin, JJ., affirming lower court by equal division.

XI. LIABILITY OF SURETIES, SURRENDER AND DISCHARGE, OR REMISSION.

§ 48. Obligation and breach of conditions.
Requisites and validity of the recognizance or bail bond to hold sureties, see ante IX.
Sufficiency to require appearance over a continuance, see also post ¶ 143.
Amount of liability, see post § 56.
Several liability, see also ante ¶ 124.
Satisfaction by surrender, appearance, arrest, or trial, see post §§ 49-51.
Pleading defenses, see post § 54.
On bastardy recognizance, see Bastards.

¶ 139. A recognizance requiring the accused to appear from day to day for examination and not depart the court without leave is enough to bind him to remain in attendance during the whole examination, whether continued from day to day or adjourned over to any time and place within the jurisdiction of the magistrate to specify.—People v. Gordon, 39 Mich. 259.

¶ 140. Where the case of a party who is under recognizance to appear and answer is called for trial and continued without any requirement that the recognizance be renewed, he cannot on a subsequent day be called and defaulted, and have judgment against him on the recognizance.—Townsend v. People, 14 Mich. 388.

§ 49. Surrender of prisoner by bail.

¶ 141. The bail of an accused person are entitled to his custody, and may deliver him to the authorities at any time; the legal duress does not cease until the prisoner is discharged.—In re Cannon, 47 Mich. 481.

¶ 142. A request to a deputy sheriff, by a surety in a recognizance in a criminal case, to take the principal into custody if he should interpose a plea of not guilty to the charge preferred against him, is not a sufficient surrender of the principal.—People v. Robb, 98 Mich. 397.

§ 50. Discharge by appearance or arrest of prisoner.

Appearance at day defeated by lack of session, see also post ¶ 146.
Discharge on civil satisfaction of wrong, see Comp. L. 1915, § 15692.

¶ 143. A recognizance requiring the principal "to appear at the next term of the court, and not depart therefrom without leave until discharged," requires his attendance from day to day and term to term until discharged; and sureties are not discharged by a continuance of the case to the following term, granted upon the application of the principal at the term at which he was bound to appear.—People v. Hanaw, 106 Mich. 421.

¶ 144. A sheriff having no power to constitute a deputy for a particular act except by warrant in writing, the arrest on a bench warrant of a person indicted and under recognizance to appear, by one having only oral authority from the sheriff, is illegal and does not discharge the recognizance.—People v. Moore, 2 D. 1.

¶ 145. The arrest of the principal in a recognizance entered into in a criminal case, on another charge, to which he pleads guilty, and his subsequent detention for a few moments, at the place where he is required to appear by the terms of the recognizance, while he is paying the fine imposed, will not discharge the sureties in the recognizance.—People v. Robb, 98 Mich. 397.

§ 51. Discharge by trial or failure to try.

¶ 146. Where a convict's bail has been extended from time to time by successive orders suspending sentence and directing him to appear at a stated time to receive it, his sureties are released if court should not be in session at such time, and the convict himself is under no further obligation to present himself.—People v. Kennedy, 58 Mich. 372.

¶ 147. The destruction of an indictment before the term at which the accused is recognized to appear is no defense to an action upon the recognizance.—People v. Dennis, 4 Mich. 609.

§ 52. Remission of forfeiture.

¶ 148. The sum recovered in an action of debt upon a recognizance of appearance bail is a penal forfeiture, and may be remitted like a fine.—Courtright v. Attorney General, 43 Mich. 411.

XII. ENFORCEMENT OF BAIL BOND OR RECOGNIZANCE.

§ 53. Form of procedure and pleading.

Forfeiture and entry of same, when sufficient or proper, see ante § 47.

¶ 149. In addition to the common-law remedies of scire facias or debt on the record, and the statutory remedies of assumpsit or debt (R. S., chap. 128 § 30), judgment might be entered after two days after due entry of forfeiture on the record, unless good cause to the contrary be shown, and execution might be ordered on such judgment (Laws 1861, p. 136); and no process or notice was required.—Lang v. People, 14 Mich. 439, per Cooley and Martin, JJ., Campbell and Christiancy, JJ., dissenting on the ground that the latter statute was unconstitutional and the judgment being affirmed by equal division.

¶ 150. Where a recognizance has a condition to do some act, for the doing of which it may properly be taken, and the court or officer before whom it is taken has authority therefor, the recognizance is valid although it does not recite the special circumstances under which it is taken; and in declaring upon such recognizance it is not necessary to aver facts showing that the court or officer had authority to take it.—People v. Dennis, 4 Mich. 609.

¶ 151. In declaring on a recognizance, an omission to state that the principal was a party to it, cannot be available on a motion in arrest of judgment.—People v. Dennis, 4 Mich. 609.

¶ 152. There is no substantial variance between a declaration charging respondent with having "feloniously and burglariously broken and entered," and a recognizance reciting that he "did break and enter."—People v. Gordon, 39 Mich. 259.

§ 54. Pleas and objections.

Effect of failure to file bond, see ante ¶ 129.
Sufficiency of description of crime and conditions of bond, see ante § 45.
Ground to arrest judgment, see ante ¶ 151.
Effect of failure to note default, see Comp. L. 1915, § 15696.

¶ 153. The rule that in actions ex contractu the nonjoinder of a co-contractor, unless appearing on the face of the declaration, can only be taken advantage of by plea in abatement, applies to actions on recognizances.—People v. Dennis, 4 Mich. 609.

¶ 154. In any case where there is a general jurisdiction to let to bail, and a recognizance is accepted, the objection that the

recognizance was extorted from the prisoner in violation of his right, must be made by way of defense, if at all.—People v. Robb, 98 Mich. 397.

§ 55. Evidence.

¶ 155. A minute made by the police justice upon the files of a case, stating the non-appearance of the accused and the forfeiture of his recognizance, and ordering his re-arrest, is sufficient evidence of his default in an action on the recognizance, even though the clerk had neglected to transfer it to the record of the court.—People v. Gordon, 39 Mich. 259.

§ 56. Judgment and measure of recovery.

Ground for arrest of judgment, see ante ¶ 151.
Remission of forfeiture, see ante § 52.
First questioning on error the sufficiency of the recognizance, see Saving Questions for Review.

¶ 156. The mere entry of forfeiture on default is not of itself a judgment.—People v. Stimer, 82 Mich. 17.

¶ 157. The measure of recovery on a recognizance of bail is the whole amount of the obligation without reference to the merits.—Courtright v. Attorney General, 43 Mich. 411.

¶ 158. Under How. St., § 8457, providing that the judgment upon a forfeited recognizance shall be for the amount of the penalty thereof, interest from the date of forfeiture cannot be included in the judgment.—People v. Hanaw, 106 Mich. 421.

§ 57. Costs.

¶ 159. An action upon a recognizance of bail for the appearance of a person charged with a crime is not such a civil action as authorizes costs to be taxed against the state under How. St., § 8984.—Courtright v. Attorney General, 43 Mich. 411.

ARRIVAL to ASPORTATION.

Cross-References.

Arrival; Arrive—
Insurance or sale of property "to arrive," see Insurance; Sales.
Arson—
For the substantive law of arson, see Crimes, II.
For the procedural law of crimes as applied in prosecutions for arson, see Indictment and Prosecution, which includes indictment or information, arraignment, evidence, trial, sentence and review on error.
Art; Artists—
Terms of art, interpretation, see Contracts, VI.
Artists' contracts, see Contracts, VI, VII; Damages, II.
Museums of Art, see Charities; Taxes, III (exemptions).
Articles—
Of association or incorporation, see Associations; Corporations, IV; Partnership; Joint Stock Companies.
Writings of contract, see Contracts; Frauds, Statute of; Sales; Assignments; Landlord and Tenant; and the like.
Exempted from levy, see Exemptions.
Artificial Dangers on Highways—
Snow, ice, building materials, etc., who liable, see Highways, XII.
Artificial Waterways—
See Canals; Navigable Waters; Drains; Waters.
As boundaries, see Boundaries.
Ascending Heirs—
Course of descent in general, see Descent; and see also Wills.
Asphalt Paving—
Street improvements in general, see Local Improvements.
Asportation—
Element in larceny or conversion or trespass de bonis, see Larceny; Conversion; Trespass.

ASSAULT AND BATTERY.

TREATS of unlawful menace or attempt with force or violence to do corporal hurt to another and of battery consummating such menace or attempt, whether as a tort or as a crime. Assaults aggravated by the existence of an intent to commit some felony or to do great bodily harm are treated in connection with the crime intended to be accomplished, since they generally are cognate to such crimes in legal sense more nearly than to simple assaults (see Crimes; Homicide; Rape). Torts to the person by carriers (see Carriers, IV, E), railroads (see Railroads, VIII) and street railways (see Street Railways, IV), and the liability of a master to his servant for personal injuries (see Master and Servant, III) are treated in the topics parenthetically named. The doctrine of respondeat superior is treated in Agency, II, B; Master and Servant, IV.

Analysis.

I. The Crime.

§ 1. In general; nature and elements and grades.
§ 2. Intention without action; menacing words.
§ 3. Unwarranted or excessive force in asserting right.
§ 4. Aggravated and specific statutory assaults.
§ 5. Assaults with intent to commit specific felony.
§ 6. Defenses, excuse or justification.
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§ 10. Sufficiency of evidence.
§ 11. Questions of fact and instructions.

II. The Tort.

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§ 16. ——Self defense.
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§ 19. Parties to the tort; responsibility.
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§ 22. Presumptions and burden of proof.
§ 23. Admissibility of evidence.
§ 24. ——Intent, purpose or malice.
§ 25. ——Indecent or carnal assaults.
§ 26. ——Justification or excuse.
§ 27. ——Quarrelsome character or threats.
§ 28. ——Claim of title or belief in right.
§ 29. Weight and sufficiency of evidence.
§ 30. Questions for court or jury.
§ 31. Instructions.
§ 32. ——On justification or excuse.

I. THE CRIME.

§ 1. In general; nature and elements and grades.

Unconsummated intent, see post § 2.
Violence inflicted in defense or justification by other cause, see post §§ 6, 7.
Of the tort, see post § 12.
Indictment for higher as including lower degrees of crime, see Indictment and Prosecution, I, E, and see also Homicide, VI; Rape.
[Note. Because of the similarity of the elements in the crime and those in the tort, an exception has been made from the policy of treating in Crimes and in Indictment and Prosecution all matters of criminal law and procedure. Such matters as are peculiar to Assault and Battery are treated in this topic, but all criminal law points which depend on rules equally applicable to other crimes will be found in Crimes or in Indictment.]
Punishments for simple assault prescribed, see Comp. L. 1915, § 15220.
Right to discharge from commitment on making civil satisfaction, see Comp. L. 1915, §§ 15692, 15693.

¶ 1. An assault is an inchoate violence to the person of another with the present means of carrying the intent into effect; threats are not enough; there must be violence actually offered, and within such distance that harm may follow it if the assailant is not hindered. —People v. Lilley, 43 Mich. 521.

¶ 2. An assault involves "every attempt or offer, with force and violence, to do a corporal hurt to another."—People v. Sheffield, 105 Mich. 117.

¶ 3. Where an attempt is made with an intent to do bodily hurt to another under circumstances making the accomplishment of the attempt possible, an assault may result without any actual contact.—People v. Carlson, 160 Mich. 426.

¶ 4. A common assault is indictable.—Elliott v. Van Buren, 33 Mich. 49.

¶ 5. It is an assault upon a person to intentionally shoot him with a pistol loaded with ball.—People v. Mortimer, 48 Mich. 37.

¶ 6. Assaults are by the statute substantially divided into degrees, and an indictment for any of the aggravated assaults, or assaults and batteries, includes the simple assault or assault and battery.—Hanna v. People, 19 Mich. 316.

¶ 7. A., being engaged in a dispute with B., struck him with a short birch stick, the blow falling on his hat, which was a stiff Derby one, and which was not broken or cut, though B.'s scalp was broken so as to bleed somewhat. Held, that it was at worst no more than a simple assault. When the intent is shown merely by the deed, it cannot well be stretched beyond it.—People v. Ross, 66 Mich. 94.

¶ 8. Respondent having been, with his family, grossly insulted, expostulated with the offender the next morning, and in a fight which ensued struck him on the head, inflicting a slight wound, after shooting to scare, without intending to hit him. Held, that, whoever began the assault, respondent was guilty of nothing more than assault and battery.—People v. Lennon, 71 Mich. 298.

§ 2. Intention without action; menacing words.

Menace without contact, see also ante ¶ 3.
Civil liability where person is struck, though not intended object, see post § 13.

¶ 9. A mere intent to commit violence, accompanied by acts preparatory thereto will not sustain conviction for an assault if it goes no further. There must be present ability to carry out the intent, and the act done must be criminal and sufficiently proximate to the deed intended; and it is for the jury, under proper instructions, to determine whether it has proceeded far enough.—People v. Lilley, 43 Mich. 521.

¶ 10. Where an act is done with intent to commit an assault, but the intent is voluntarily abandoned, or is prevented while the distance between the parties is too great to commit an actual assault, there can be no conviction as for an assault.—People v. Lilley, 43 Mich. 521.

§ 3. Unwarranted or excessive force in asserting right.

Civil liability, see post § 1, ¶ 85, § 16.
Civil liability where additional force is attributable to injured person's own acts, see post ¶ 69a.

¶ 11. Ejection of a passenger from a station on his refusal to leave on demand of defendant, a station attendant, is an assault unless there was a violation of some rule known to the passenger or some offense against proper conduct.—People v. McKay, 46 Mich. 439.

¶ 12. In a criminal prosecution for assault and battery alleged to have been committed upon a child by an adoptive parent, it is not necessary to sustain a conviction to show that the punishment inflicted by the parent was such as to cause permanent injury or disfigurement to the child; but it is sufficient to show that the punishment was cruel and unreasonably severe, and such as in its very

nature would negative the idea of good faith on the part of the parent.—People v. Green, 155 Mich. 524.

§ 4. Aggravated and specific statutory assaults.

[Note. Various statutory crimes exist in which a technical assault is contained, but which are specially characterized by the intent, manner or circumstances, so as not to be simple assaults. See generally Crimes, II.]

See Statutory Definitions, Comp. L. 1915, §§ 15203, 15205-15209, 15212, 15219, 15228, 15503, 15505, and see generally chaps. 256, 259.

Wilful assault on or resistance of officers of the law, see Crimes, II; Indictment.

Indecent touching or liberties with children, see Crimes, II.

What constitutes assault on officer, see also Arrest, Commitment and Bail, ¶ 14.

§ 5. Assaults with intent to commit specific felony.

The principal felonious assaults are those with intent to kill or do great bodily harm (see Homicide, IV), to rape (see Rape), to rob (see Robbery in Crimes, II). All these are treated in connection with the crime which is the principal object.

Intent to ravish as aggravation of personal trespass, see post ¶ 40.

§ 6. Defenses, excuse or justification.

Abandonment of wife as bearing on right to protect her, see also post ¶ 27.

Evidence as to, see also post ¶ 28.

In civil cases, see post §§ 15, 17, 18.

Defense of members of family or of habitation, see post §§ 17, 18.

¶ 13. One cannot be held guilty of assault and battery if, when violently attacked, he chastises the offender within the natural limits of the provocation received, even though he uses force beyond the necessity of self defense.—People v. Pearl, 76 Mich. 207.

¶ 14. A railway station-keeper was held criminally liable for assaulting a passenger who did not leave the waiting-room when ordered to do so on account of his spitting on the floor.—People v. McKay, 46 Mich. 439.

¶ 15. Where a person unnecessarily and carelessly or maliciously drives upon grass growing on the unused part of a public highway, the fee of which belongs to respondent's father, respondent, being engaged at the time in harvesting such grass for his father, is not guilty of assault if he uses sufficient force to compel the trespasser to desist.—People v. Foss, 80 Mich. 539.

¶ 16. An assault upon one who had been invited to attend a spiritualistic seance for the purpose of investigating the same cannot be justified upon the ground that he was disturbing a religious meeting, if he was doing nothing not reasonably calculated to carry out the purpose for which he was invited.—People v. Hughes, 116 Mich. 80.

¶ 17. The fact that the law prohibited certain kind of work to be done on Sundays does not justify an assault upon a person who is about to do such work.—People v. Tubbs, 147 Mich. 1.

¶ 18. A respondent in an assault and battery prosecution cannot be held to be a trespasser in going upon the premises of the complaining witness when invited so to do by the wife of said witness.—People v. Upton, 169 Mich. 81.

§ 7. ——Self defense.

Admissibility and sufficiency of evidence, see post §§ 9, 10.

Instructions, see post § 11.

In civil cases, see post § 16.

¶ 19. One who commits an act of unlawful force, and thereby brings on a conflict in which he assaults another, cannot excuse the assault by showing that the person assailed was reputed to be violent, and that he acted in self defense.—People v. Miller, 49 Mich. 23.

§ 8. Indictment and trial.

The rules of criminal procedure are not ordinarily peculiar to any one crime. Hence, for the general requisites of indictments or informations, the manner of trial, the presumptions and the competency of evidence, the topic Indictment and Prosecution should be consulted. Such precedents on evidence and instructions and jury questions as seem to be peculiarly applicable in this place follow. See post §§ 9-11.

§ 9. Burden of proof and evidence.

See generally Indictment and Prosecution, VIII.

Right of aggressor to show other's violence, see also ante ¶ 19.

In civil actions, see post §§ 23-28.

¶ 20. In a trial for assaulting a person who, as it is shown, had on the same day assaulted the defendant's father, and where such person offered as an excuse for his assault that the defendant's father used threatening language about him several years before, the prosecution cannot be allowed to prove such threats.—People v. Pearl, 76 Mich. 207.

¶ 21. In a prosecution for assault and battery the quarrelsome disposition of the complaining witness is as much in issue as that

of respondent, and it is error to permit a full cross-examination of the latter on the subject and refuse it as to the former.—People v. Kenyon, 93 Mich. 19.

¶ 22. In a prosecution for an assault and battery which grew out of a visit by the assaulted person to respondent's home to present to him a petition to lay out a drain, such person testified on cross-examination that he presented the same petition to the drain commissioner and that he afterwards filed another. Held, that he cannot be asked further by respondent's counsel whether the commissioner did not refuse to act upon the first petition.—People v. Kenyon, 93 Mich. 19.

¶ 23. On the trial of a person charged with assault and battery in a case where the trouble grew out of the presenting to the defendant for signature a petition by the complaining witness who subsequently filed another petition, it is error to permit the prosecution to show, after proof of this, why the first petition was abandoned and another drawn up and circulated.—People v. Kenyon, 93 Mich. 19.

¶ 24. In a prosecution for assault by shooting, it is not error to refuse to instruct the jury to consider on the question of provocation the alleged fact that the prosecuting witness had boasted of his intention to betray the fiancee of accused, where such matter was known to him a month before the assault, and he and complainant had parted good friends the night before, and the defense was that he thought complainant was about to shoot him.—People v. Townsend, 120 Mich. 661.

¶ 25. In an action for assault and battery, the defendant setting up self-defense, evidence of a previous altercation over the same matter is admissible as bearing upon defendant's belief that an assault was about to be made upon him.—People v. Tillman, 132 Mich. 23.

¶ 26. In a criminal prosecution for assault and battery, a letter written by defendant to the assaulted person two years before is admissible to show the extent of ill-will entertained previously by defendant, where the existence of such ill-will is not disputed on the trial.—People v. Reycraft, 156 Mich. 451.

¶ 27. In a prosecution for assault and battery the evidence indicated that the complaining witness ordered respondent's wife off of certain premises where she had been at the invitation of said witness' wife; and that respondent resented said action, went upon said premises, and used physical violence toward said witness. Respondent was refused permission to introduce evidence showing that said complaining witness had abandoned his home, the premises in question, for the purpose of showing that respondent was not bound to leave said premises at the demand of said witness and was not therefore the aggressor. Held, it was error to exclude such evidence.—People v. Upton, 169 Mich. 31.

§ 10. Sufficiency of evidence.

Different rule in civil action, see post § 29.

¶ 28. Conviction for assault and battery was set aside where the evidence tended to show that the act complained of was the forcible ejection of a tortious intruder by employees of the respondent, who was an agent in charge of the premises.—People v. Adams, 52 Mich. 105.

¶ 29. In a prosecution for assault and battery committed upon an adopted daughter, evidence showing that the defendant removed the girl's clothing and whipped her severely with a small riding whip so that her body was bruised and lacerated, and then left her tied up with nothing but a night robe on for two days, was sufficient to justify a conviction, the only justification claimed being a desire to procure a confession to a petty theft of which she was suspected.—People v. Green, 155 Mich. 524.

§ 11. Questions of fact and instructions.

See generally Indictment and Prosecution, IX, D. E.

Instruction on self-defense, see also ante ¶ 24.

In civil cases, see post §§ 30-32.

¶ 30. In a prosecution for an assault alleged to have been made upon one of several men who were at the time taking up a drain, it appeared that the work was being done under the direction of the highway commissioner; that respondent, upon his arrival asked by whose authority the work was being done; that the commissioner replied that it was being done by his authority; and thereupon respondent made the demonstration claimed to have amounted to an assault towards said employee, as the supposed instigator of the work. Held, that the court did not err in instructing the jury that the evidence failed to show that said demonstration was made to prevent the taking up of the drain.—People v. Sayers, 105 Mich. 708.

¶ 31. Defendant arrived first at the hospital with a patient injured by a street car. The street car company's surgeon, Dr. Oven, came to take charge of the case, an altercation ensued, and defendant pushed or threw Oven down. On a criminal prosecution for assault and battery, the court on the matter of the defendant's justification, instructed

that defendant had no right to begin the assault; that if defendant reasonably and honestly believed himself in danger of personal violence from Oven, he was not liable if he resisted only with reasonable and necessary force; or, if he acted for the protection of the injured man, he was not liable if, after requiring Oven to leave, he applied only reasonable and necessary force in removing him. Held, the charge was not erroneous on the ground that it assumed defendant began the assault.—People v. Reycraft, 156 Mich. 451.

II. THE TORT.

§ 12. In general; nature and elements of tort.

Unintended results of act, see post § 13.
Justification or excuse defeating liability, see post §§ 15-18.
Use of excessive force in self-defense or other justified violence, see post §§ 15-18.
Of the crime, see ante § 1.
Accidental or negligent injuries not resulting from direct violence, see Negligence, and specific topics treating of negligence in particular relations or occupations or in respect of particular things or places.
The technical assault and battery involved in a false arrest and imprisonment is treated in False Imprisonment.

¶ 32. An assault involves every attempt or offer with force and violence to do a corporal hurt to another.—Drew v. Comstock, 57 Mich. 176; Gillespie v. Beecher, 85 Mich. 347.

¶ 33. An assault and battery is committed where a man, without sufficient cause, excuse or justification, intentionally assaults and beats the person of another, inflicting upon him bodily injury.—Newman v. Bowman, How. N. P. 46.

¶ 34. An assault was not proven where the defendant in an action for personal injuries dressed himself in woman's clothes and went to the house of plaintiff, a woman neighbor, between daylight and dark, in a spirit of fun, and where, although plaintiff claimed that she was frightened, it appeared that defendant made no demonstration other than to tap the end of his parasol on the ground or floor.—Nelson v. Crawford, 122 Mich. 466.

¶ 35. One cannot be held guilty of assault and battery if, when violently attacked, he chastises the offender within the natural limits of the provocation received, even though he uses force beyond the necessity of self-defense.—People v. Pearl, 76 Mich. 207.

§ 13. Intent or purpose.

Purpose as participant in tort, see post § 19.
Admissibility of evidence as to, see post § 24.
Instructions, see post § 31.
As element in crime, see ante § 2.

¶ 36. One who throws a stick at a trespasser intending to inflict an unwarrantable injury upon him, and hits another, is liable to the latter.—Talmage v. Smith, 101 Mich. 370.

¶ 37. Shooting in the dark towards a fleeing person whom the defendant, an officer, had no authority to arrest, is wanton and wilful conduct, though he has no intention of hitting such person.—Johnson v. Mack, 141 Mich. 99.

¶ 38. One participating in a game, called "rush," which is inherently dangerous because it consists in forming a line with each rushing the one in front until the impulse is carried forward to a participant without previous intimation, may be liable as for an assault to a bystander pushed by the play; although defendant did not anticipate the consequence which happened and was himself pushed and made to go forward by others.—Markley v. Whitman, 95 Mich. 236.

¶ 39. One rightfully in possession of property (a railroad track) may lawfully arm himself to intimidate trespassers, and hence the mere possession of a weapon will not, of itself, render him liable to a trespasser (on the property, a person endeavoring to destroy it under color of an ordinance) injured by the accidental discharge thereof.—Shriver v. Bean, 112 Mich. 508.

¶ 40. A charge of ravishment in a civil action for assault and battery does not change the nature of the action, but is only a matter of aggravation bearing on the measure of damages.—Totten v. Totten, 172 Mich. 565.

§ 14. Voluntary fighting.

Acts of aggression, see also post ¶ 55.
As to participation by party, see also ante ¶ 73.
Admissibility of evidence of quarrelsomeness to show aggression, see post ¶ 112.
Court and jury questions, see post § 30.
Instructions, see post § 31.

¶ 41. One who voluntarily engages in a fight for the sake of fighting, and not in self-defense, cannot recover in an action of assault and battery against his adversary unless beaten excessively or unreasonably.—Galbraith v. Fleming, 60 Mich. 403.

¶ 42. Plaintiff cannot recover for assault where it appears that she first attacked defendant, unless it also appears that defendant used more force than was necessary in

repelling the attack.—Drinkhorn v. Bubel, 85 Mich. 532.

¶ 43. Where one person starts an affray by assaulting another but there is a cessation of active hostilities upon the intercession of a third person and the aggressor offers to shake hands with his opponent, and, upon the aggressor finally turning around and going away after refusal of the opponent to be friendly, he is hit on the back of the head with a stone by the opponent, the latter is guilty of assault and battery.—Cornell v. Fidler, 194 Mich. 509.

¶ 44. Where one who had leased a shop to another went into the shop to prevent the carrying off, by other parties, of some iron he had sold to his lessee, but the title to which he was to retain until it was paid for, which had not then been done, and such lessee assaulted him at once upon his entering, and he in resistance to this assault struck his assailant a blow, his liability in trespass would depend on whether the force employed by him in resisting the assault upon him was greater than was necessary to his own protection. If the iron in the shop belonged to the defendant he clearly had a right to take possession of it to prevent its being taken away unlawfully; and the arrangement between the parties in reference to the title to the iron had a material bearing upon the damages for which the defendant should be held liable for his assault. as tending in some degree to excuse, if not to justify, him in his endeavor to prevent the iron being taken away. The fact that an officer was present with a writ of replevin for this very iron could not make defendant a trespasser in entering the shop to look after it, nor render him liable to be put out by force unless he should refuse to leave on request.—Ayres v. Birtch, 35 Mich. 501.

¶ 45. Even though the plaintiff in an action for damages for assault and battery committed the first assault, the one first assaulted was not entitled to use more force than was necessary to repel the assault.—Newman v. Bowman, How. N. P. 46.

§ 15. Defenses; justification or excuse.

Defensive force augmented by injured person's own acts, see also post ¶ 69a.
How pleaded, sufficiency of general issue, see post § 21.
Instructions, see post § 32.
Process as justification to sheriff, deputy or constable, see Sheriffs, IV, F.

¶ 46. An assault may be entirely lawful as either excusable or justifiable.—Drew v. Comstock, 57 Mich. 176; Gillespie v. Beecher, 85 Mich. 347.

¶ 47. It is not competent as an excuse for a battery to prove that several days before it was committed plaintiff had used insulting language to defendant's wife, or had threatened the defendant.—Heiser v. Loomis, 47 Mich. 16.

¶ 48. One cannot claim exemption from responsibility by reason of excitement, when his anger is unreasonable and results from a neglect to use ordinary self-control.—Welch v. Ware, 32 Mich. 77.

¶ 49. Advice of counsel as to his client's right to occupy premises cannot give the client any greater right than he has already, and thereby justify an assault committed in assertion of a right of possession.—Taylor v. Adams, 58 Mich. 187.

¶ 50. Force in removing one from his own premises where he is opposing the unauthorized making of a sewer trench is assault and battery, though defendants are policemen; since there is no offense justifying an arrest.—Zube v. Weber, 67 Mich. 52.

¶ 51. The doctrine of contributory negligence is not involved in a wilful injury.—Labarge v. Pere Marquette R. Co., 134 Mich. 139.

§ 16. ——Self defense.

Voluntary fighting and renewing assault, see ante § 14.
Presumptions and burden of proof, see post § 22.
Admissible evidence, see post §§ 26, 27.
Sufficiency of proof, see post § 29.
Court and jury questions, see post § 30.
Instructions, see post § 32.

¶ 52. The right to resist an assault includes all necessary and lawful means to make such resistance effectual, even to committing a battery upon the assaulting party.—Gillespie v. Beecher, 85 Mich. 347.

¶ 53. One who is threatened with an immediate attack by another armed with a deadly weapon is authorized to use necessary force to repel his assailant.—Newman v. Bowman, How. N. P. 46.

¶ 54. One assaulted may justly exercise such reasonable force as may be, or as appears to him at the time to be, necessary to protect himself from bodily harm in repelling the assault.—Anders v. Clover, 198 Mich. 763.

¶ 55. The fact that a landowner, repelling an intruding section foreman who tried to lay a track on such owner's land, pushed the foreman, did not necessarily make him an aggressor, and as such deprived of the right of self-defense.—Drew v. Comstock, 57 Mich. 176.

§ 17. ——Defense of other person.

¶ 56. One who, while rightfully on the premises of plaintiff's husband, is interfered with in his work by plaintiff's mother, has a right to rid himself from her annoyance; and if in doing so he exercises reasonable care, plaintiff has no right to assault him in defense of her mother.—Drinkhorn v. Bubel, 85 Mich. 532.

§ 18. ——Defense or protection of property or rights.

See also ante ¶ 44.
Allegations of right and variance in proofs, see post § 21, ¶ 82.
Presumptions and burden of proving right or authority, see post § 22.
Evidence bearing on title or claim, see post § 28.
Sufficiency of evidence, see post § 29.
Court and jury questions, see post § 30.
Instructions, see post § 32.
Justification for crime, see ante § 6.
Rights of landlord and tenant in premises, see Landlord and Tenant.
Licenses to enter, and revocation of same, see Licenses to Enter.

¶ 57. Plaintiff being in arrears for rent the landlord's agent declared the lease forfeited and took possession of the house wherein plaintiff had ceased to dwell. Plaintiff thereafter opened a door and got inside, but was carried out, in spite of his resistance, by the agent with the aid of his son and wife. Held, in an action for assault and battery, that the agent's entry was rightful, and that he could forcibly hold possession.—Marsh v. Bristol, 65 Mich. 378.

¶ 58. Where, after a lease has been surrendered, the lessee denies the lessor's right to peaceable entry and possession, and attempts to expel him by force, he commits an unlawful assault which the lessor is justified in resisting with sufficient force to repel it. —Gillespie v. Beecher, 85 Mich. 347.

¶ 59. Getting into the back kitchen of an occupied house through an open door when no one is in the room, and boarding up the rest of the house on failing to secure an entrance thereto, does not establish such a constructive possession of the entire premises as will justify committing assault and battery upon the occupants if they attempt to remove obstructions.—Soule v. Hough, 45 Mich. 418.

¶ 60. An agent's right to defend his principal's possession of premises pleaded as justifying his alleged assault on one seeking to enter is not affected by what he has said in the latter's absence about the latter's title, so long as he did not speak as agent, and has given no license to occupy the premises.—Taylor v. Adams, 58 Mich. 187.

¶ 61. An attorney has a right to enter the business office of his client's creditor and to make a tender of the amount he conceives to be due, but after refusal of such tender he has no further business there, and if he remains after being told to go the creditor may eject him, using no unnecessary force.—Breitenbach v. Trowbridge, 64 Mich. 393.

¶ 62. A station-master is not guilty of assault and battery in enforcing with no more violence than is necessary, reasonable regulation of company in regard to hack-drivers.—Cole v. Rowen, 88 Mich. 219.

¶ 63. A push given by a landowner to a section foreman undertaking without apparent authority to relay a disused track in part on the land did not give the section foreman the right to resort to force in asserting his right to make the repairs.—Drew v. Comstock, 57 Mich. 176.

¶ 64. One has a right to go upon another's premises and to take away chattels there which belong to himself if he can do so without breaking the peace; and if assaulted while doing so he can recover damages.—Stuyvesant v. Wilcox, 92 Mich. 233.

¶ 65. A city had built a sewer in an alley on plaintiff's land. The statutes and ordinances allowed sewer connections to be made only with consent of the council under supervision of the board of public works. One of the defendants, for the purpose of connecting it with his premises, across the alley, opened a trench in the alley and on the premises of plaintiff, who had forbidden the excavation, and who placed herself in the trench. While quietly there she was removed by two other defendants, who were police officers. The consent of the common council to make the connection had not been obtained. Held, that all the defendants trespassed in removing plaintiff from the trench, and were liable for injuries sustained by her in such removal.—Zube v. Weber, 67 Mich. 62.

¶ 66. In a suit for assault and battery, defendant is not justified in his attack by the fact that the plaintiff, in passing the defendant, drove out of the highway and trespassed upon defendant's cultivated land.—Ulmer v. Seelman, 159 Mich. 253.

¶ 67. The lack of information as to the authenticity of a proxy cannot be pleaded in a defense of an action of trespass for unlawful eviction of the holder from a stockholder's meeting where no such reason was given at the time of the eviction.—Noller v. Wright, 138 Mich. 416.

¶ 68. The failure of the holder to transfer stock on the books of a corporation in ac-

cordance with Comp. L. 1897, § 7052, is not a defense to an action of trespass for being evicted from stockholder's meeting as an intruder where the failure to transfer is due to the defendant's fault.—Noller v. Wright, 138 Mich. 416.

¶ 69. A mistress is not justified in using force to eject a servant whom she has discharged until she has given her reasonable time to collect her belongings and prepare for removal.—Gungrich v. Anderson, 189 Mich. 144.

¶ 69a. The clandestine entry of a claimant upon premises of which another has been given possession by legal process makes him a tortious intruder whom the lawful possessor may expel by force, if need be, and if the intruder is accidentally injured in the process of expulsion, his own contributory negligence should be considered in fixing the responsibility therefor since the force attributable to his own acts is not excessive.—Taylor v. Adams, 58 Mich. 187.

§ 19. Parties to the tort; responsibility.

Pleading joint act, see post § 21, ¶ 77.
Court and jury questions, see post § 30.
Responsibility of master or principal as responsible superior, see Agency, § 49; Master and Servant, IV.
Assumption as to agency of special policeman in committing assault, see Agency ¶ 32.
Attempted ratification of act not done in alleged principal's interest, see Agency ¶ 342.
Liability of grand lodge for injuries inflicted in initiation by local lodge, see Fraternal Associations, I.
Liability of party for acts of sheriff or officer, see Sheriffs, IV, F.

¶ 70. The intent of a person present at an assault as to complicity therein is not determined by his failing to express disapproval or opposition.—Miller v. Sweitzer, 22 Mich. 391; Kuney v. Dutcher, 56 Mich. 308.

¶ 71. An assault committed by an officer under color of process is not chargeable to the person causing it to be issued and served, if the abuse or misbehavior of the officer was not authorized or participated in by the other.—Sutherland v. Ingalls, 63 Mich. 620.

¶ 72. All of defendants in concert in the making of an assault by policemen are liable, as well as those who did the beating.—Zube v. Weber, 67 Mich. 52.

¶ 73. In a suit in trespass vi et armis there was evidence that defendant stood by and shouted to members of his sect to "kill" the plaintiff and others. The court instructed that if the defendant, while the assault was going on, did employ such language for the purpose of instigating, abetting, and counseling the assault, he was liable. Held, the instruction was proper.—Brink v. Purnell, 162 Mich. 147.

Liability of master for injury by sportive act of servant, see note, 1 N. C. C. A. 178-183.
Assault as accident under Workmen's Compensation Act arising out of and in course of employment, see note, 6 N. C. C. A. 1010-1030.
Whether injury by sportive act of another arises out of and in course of employment, see note, 5 N. C. C. A. 798-801.
Injury or death from assault as compensable under compensation acts, see note, 11 N. C. C. A. 235-254; 14 N. C. C. A. 86-105.

§ 20. Procedure and damages.

For the general law of practice and procedure, see such topics as Evidence; Pleading; Trial; Instructions; Verdicts and Findings; and see also post this topic §§ 22-32.
Allowable arguments of counsel, see Argument of Counsel.
Damages generally, see Damages.
Survivability of cause and procedure for revival of action, see Abatement and Revival.
Limitations of actions, see Limitations of Actions.
Rule as to costs, see Costs, I, III, and see also Comp. L. 1915, § 13689.

§ 21. Pleading and variance.

General law of pleading, including joinder, amendments and variance, see Pleading.
Rules for pleading damages, see Damages, XII.

¶ 74. In an action for an assault and battery an averment in one count of an attempt to ravish does not change the nature of the action.—Elliott v. Van Buren, 33 Mich. 49.

¶ 75. The simplest kind of a declaration in trespass vi et armis sufficiently pleads an assault by defendant's conductor on a passenger without allegations of the facts that plaintiff had been ejected for nonpayment of fare and his attempt to re-enter in the course of which it was done.—Lindsay v. Wabash Ry. Co., 141 Mich. 204.

¶ 76. Negligence of defendant's conductor in failing to discover that a passenger, struck by the conductor in an altercation over the passenger's attempt to re-enter after being ejected for nonpayment of fare, was mentally disordered must be specially pleaded and cannot be proved under general allegations of trespass vi et armis.—Lindsay v. Wabash Ry. Co., 141 Mich. 204.

¶ 77. A declaration charging three persons with an assault sufficiently charges a joint act.—McDonald v. Hall, 193 Mich. 50.

¶ 78. In trespass for a personal injury all the circumstances of the transaction may be shown under the general issue, to have such effect as they deserve in determining the verdict by mitigation or otherwise.—Sutherland v. Ingalls, 63 Mich. 620.

¶ 79. A plea of the general issue, in an action for damages for assault and battery, puts in issue the fact of an assault and battery having been committed.—Newman v. Bowman, How. N. P. 46.

¶ 80. Evidence that the defendant's horse became frightened at a bunch of hay lying beside the road, and shied towards the plaintiff, is admissible as an affirmative defense under the general issue in an action predicated on the malicious driving of the horse against the plaintiff.—Luckhurst v. Schroeder, 183 Mich. 487.

¶ 81. One who intends to justify his conduct in committing an assault and battery upon another by showing that he was first assailed and that he was subject to great bodily injury and that he, in order to protect himself, had used only force sufficient to repel the aggressor, must, in order to make out that justification, give plaintiff notice of his defense by a notice attached to his plea of general issue.—Newman v Bowman, How. N. P. 46.

¶ 82. In an action sounding for trespass to the person of plaintiff in repelling her attempted entry into premises claimed by her, it is an immaterial variance that she alleged her right to be that of a purchaser under a contract whereas her proof was of a tenancy under lease.—Smith v. Detroit Loan & Building Ass'n, 115 Mich. 340.

§ 22. Presumptions and burden of proof.

¶ 83. Where two persons attack each other the one who makes the first assault, if not justified in the law in making it, has the burden of proving, in his action for the counter assault in resistance to him, that the force employed by the defendant in resisting and defending his person was excessive.—Ayres v. Birtch, 35 Mich. 501.

¶ 84. A plaintiff who sues for an assault and battery, accompanied with ravishment resulting in the birth of a child, need not show that the assault was committed with such force and violence as to constitute the crime of rape.—Schenk v. Dunkelow, 70 Mich. 89.

¶ 85. A section foreman on a railroad undertook to repair a disused track that lay in part upon land of a private owner, who ordered him off, pointed out his own boundary, and gave the intruder a push, and afterwards a blow. There was some question as to whether the blow was not in self-defense, or was not, perhaps, given in the attempt to ward off a counter attack. There was nothing tending to show that the intrusion to relay the track was authorized by the railroad company, or by any officer of the company who could represent it in such a matter. Held, that, as such authority could not be presumed, the trespass was apparently without justification.—Drew v. Comstock, 57 Mich. 176.

§ 23. Admissibility of evidence.

Competency of evidence generally, such as best and secondary, hearsay, admissions, documents, and parol, see Evidence.
Hearsay as to provocative statements, see Evidence, VII, A.
Admission made on criminal trial, admissibility in civil trial, see Evidence, VII, C.
Character evidence generally, see Evidence, VII, B.
Examination of accused as a witness, and proper cross-examination thereon, see Examination of Witnesses.
Evidence of damages and in mitigation or aggravation thereof, see Damages, V, XI.
Order of proofs on trial and reception of offers and objections, see Trial, V.
Impeachment and credibility of witnesses, see Witnesses, VI.
Matter admissible where indecent or carnal assault is alleged, see post § 25.
As to evidence of intent, malice, justification, threats, or quarrelsomeness, see post §§ 24, 26-28.

¶ 86. All testimony leading up to the assault which tends to explain the relation or the rights of the parties is admissible.—Gillespie v. Beecher, 85 Mich. 347; Pokriefka v. Mackurat, 91 Mich. 399.

¶ 87. Evidence that the defendant, in a case of assault and battery, had voluntarily paid the physician who had attended on the injured party, and had sought an interview with said party himself, was held unimportant, as being matter ex post facto, which could not change the quality of the act.—Johnson v. McKee, 27 Mich. 471.

¶ 88. Defendant in case for assault offered to show how he was dressed, but the testimony was ruled out. Held, that the question was proper enough, but the ruling was not error so long as the record did not show that it was important.—Kuney v. Dutcher, 56 Mich. 308.

¶ 89. In an action for assault and battery, plaintiff cannot show that at the time

of the assault the bystanders asked a policeman to arrest defendant, nor are the opinions and comments of the bystanders admissible.—Kuhn v. Freund, 87 Mich. 545.

¶ 90. Where a landlord's agent is sued for an assault committed in maintaining possession of the leased premises, evidence of plaintiff's struggles and poverty, and of his attempts to induce defendant to relieve him from the conditions of his lease and of a mortgage held by him to secure rent in arrears, is irrelevant.—Marsh v. Bristol, 65 Mich. 378.

¶ 91. In an action for assault and battery, it is error to admit on behalf of defendant, the testimony of a doctor that defendant had been in ill-health for a year, due to the death of a son.—Ulmer v. Seelman, 159 Mich. 253.

¶ 92. In action for assault and battery, evidence of violence or of the consequences of violence committed by one who is not a party to the suit is admissible when circumstances tend to show that the person committing it was co-operating with defendant. Whether there was co-operation is a question of fact for the jury, and if they find that there was, it may properly be considered in making up the verdict.—Miller v. Sweitzer, 22 Mich. 391.

¶ 93. Evidence of defendant's good character is not admissible in action for trespass vi et armis.—Pokriefka v. Mackurat, 91 Mich. 399.

¶ 94. On the trial of an action for assault and battery committed by a police officer in removing plaintiff from a place on her own land, because she was there preventing the doing of an act claimed to be authorized by the city, testimony by defendant that he has never been arrested is irrelevant.—Zube v. Weber, 67 Mich. 52.

§ 24. ——Intent, purpose or malice.

Hearsay as to character of weapons, see Evidence, VII, A.

¶ 95. Where one has committed a personal assault aggravated by a bad purpose, evidence that he left his own house with a proper purpose is not pertinent.—Elliott v. Van Buren, 33 Mich. 49.

¶ 96. The question whether defendant, after the assault, did not call plaintiff "a damned police court shyster," is not competent on his cross-examination for the purpose of showing malice at the time of the assault, and, therefore, as having a tendency to prove that he used more force than was necessary in ejecting plaintiff from his office.—Breitenbach v. Trowbridge, 64 Mich. 393.

¶ 97. In an action for assault and battery it is error to exclude evidence offered by the plaintiff to show that the defendant entertained malice and ill-will towards the plaintiff and his brother.—Ulmer v. Seelman, 159 Mich. 253.

§ 25. ——Indecent or carnal assaults.

¶ 98. In an action by a woman for an indecent assault, it is error to exclude plaintiff's testimony that before the act defendant had addressed her in unchaste language and had solicited sexual indulgence, to explain the surrounding circumstances and show the defendant's antecedent manner and state of mind towards the plaintiff.—Mawich v. Elsey, 47 Mich. 10.

¶ 99. Where a woman in disordered health sues defendant for indecently assaulting her it is entirely proper to show that persons so afflicted are subject to hallucinations, even though there has been no showing that she herself is; a good deal of latitude is allowable in drawing out the facts upon the trial of such cases. It is also proper to ask her if she has not made similar charges against others, and if, shortly after the assault alleged, she had not told a friend of a previous one, without mentioning this; and to show the facts if she denies them.—Derwin v. Parsons, 52 Mich. 425.

¶ 100. In a civil action for assault and ravishment of plaintiff it is proper to show the acts, conduct and appearance of plaintiff after the assault and before the birth of a child.—Schenk v. Dunkelow, 70 Mich. 89.

¶ 101. In a civil action for assault and ravishment the jury may take into consideration her fear of defendant and her sense of shame for the purpose of rebutting any unfavorable inferences from her not making outcry at the time and her subsequent silence.—Schenk v. Dunkelow, 70 Mich. 89.

¶ 102. The plaintiff in an action for an assault with intent to ravish showed that the outrage was attempted in an upper room of a certain hotel, and that defendant had told her that he was in the habit of going there with women; that the keeper of the house expected him, and that it would be of no use to make any noise. Held, that the testimony of another witness that defendant had tried to get her to go with him to the same house, and had then told her that he was in the habit of taking girls there, and that all was arranged there, was relevant and admissible as corroborating plaintiff's story, and showing that her danger was real and not feigned.—Fay v. Swan, 44 Mich. 544.

¶ 103. In an action for damages caused by an assault with intent to ravish, the physician was properly allowed to testify that

after the assault he found her in a condition for which he could not account until he heard of the attempted outrage, and that he was satisfied that if the fact was true it would account for her state.—Fay v. Swan, 44 Mich. 544.

¶ 104. In action for damages for assault and battery and carnal knowledge, evidence of prompt complaints made by the plaintiff to her husband as to the alleged acts is admissible as tending to show the genuineness of the charge.—Totten v. Totten, 172 Mich. 565.

¶ 105. In civil actions for damages for assault and battery and carnal knowledge failure of the female to complain and continued friendly relations between the parties are admissible to show the falsity of the charge.—Totten v. Totten, 172 Mich. 565.

§ 26. ——Justification or excuse.

Evidence as to malice or purpose, see also ante § 24.
On prosecution for crime, see ante § 9.

¶ 106. A defendant in a civil suit for assault and battery who claims to have acted in self-defense must satisfy the jury that he acted honestly in using force to repel plaintiff's attack, and in determining that question they are to consider the reasonableness of the means made use of.—Kent v. Cole, 84 Mich. 579.

¶ 107. A railway station-keeper assaulted a passenger for not leaving the waiting-room when ordered, the passenger having enraged him by spitting on the floor. Held, that in defending an action for the assault and battery a question as to the plaintiff's smoking was irrelevant, where his smoking had not been objected to.—People v. McKay, 46 Mich. 439.

¶ 108. Evidence in action for trespass vi et armis that plaintiff had been ejected from defendant's cars and persistently tried to re-enter, though he had been put off for nonpayment of fare, that he clung to the hand rails after the train was in motion and was struck by the conductor in an altercation, is competent and may tend to show justification.—Lindsay v. Wabash Ry. Co., 141 Mich. 204.

¶ 109. Assuming that in action of trespass vi et armis for an assault by a conductor on plaintiff it is proper to show his previous condition and appearance as bearing on the reasonableness of the conduct and force applied by the conductor; yet it was error to give evidence of his condition two days later, or, plaintiff having been mentally deranged, to permit a physician to state that a blow on the head would be likely to aggravate his derangement.—Lindsay v. Wabash Ry. Co., 141 Mich. 204.

¶ 110. In an action for assault, evidence of the plaintiff's acts and purposes in a matter which the defendant has pleaded as provocation, and in mitigation of it, is relevant to explain the circumstances.—Welch v. Ware, 32 Mich. 77.

¶ 111. In a suit for assault and battery, plaintiff testified on cross-examination that he had not stated that defendant was cheating a certain person. Defendant then sought to show by witnesses that plaintiff had gone about making such statements. Held, such testimony was inadmissible, as being immaterial and irrelevant.—Mills v. Warner, 167 Mich. 619.

§ 27. ——Quarrelsome character or threats.

See also ante ¶ 47.
As to good character, see Evidence, VII. B, and see also this topic ante ¶¶ 93, 94.

¶ 112. Testimony that a person is quarrelsome is inadmissible for the purpose of showing that he probably began a fight in which he was hurt; it may be given, perhaps, for the purpose of showing that one who knew it feared an assault from him.—Kuney v. Dutcher, 56 Mich. 308.

¶ 113. One sued for assault and battery may show, in order to prove that he believed he was acting in self-defense, the situation at the time of the assault, the quarrelsome disposition of plaintiff as known to himself, and previous attacks upon himself by plaintiff.—Galbraith v. Fleming, 60 Mich. 403.

¶ 114. Plaintiff's quarrelsome character cannot be shown unless brought to defendant's knowledge before the assault; where it is pleaded in justification by way of self-defense, in an action for assault and battery.—Culley v. Walkeen, 80 Mich. 443.

¶ 115. In a suit for assault and battery where the defendant sets up self-defense, it is improper to permit defendant to prove either directly or by cross-examination that on another occasion plaintiff had some words with the defendant over another matter.—Mills v. Warner, 167 Mich. 619.

¶ 116. In an action for assault and battery, it is error to permit defendant under a plea of self-defense to prove by witnesses that plaintiff subsequent to the acts complained of threatened to arrest defendant and put him in the cooler.—Mills v. Warner, 167 Mich. 619.

¶ 117. The court, in a case of assault and battery, having properly excluded evidence of previous threats by the plaintiff, permitted the plaintiff to prove the negative—that at

the time in question the plaintiff made no threats. Held to be error, and well calculated to prejudice the defense with the jury.—Heiser v. Loomis, 47 Mich. 16.

¶ 118. Evidence of threats made against plaintiff by defendant three or four years before the assault may be introduced to show defendant's malice in making such assault.—Peterson v. Toner, 80 Mich. 350.

¶ 119. Where the defendant, in an action for assault and battery testified that he knew plaintiff to be a powerful and dangerous man, that he was afraid of him, and that he had previously seen a fight between him and a policeman in which plaintiff was the aggressor, such policeman's testimony as to what occurred was admissible, for the purpose of showing the disposition and strength of plaintiff.—Culley v. Walkeen, 80 Mich. 443.

¶ 120. Where, on the trial of a civil suit for assault and battery, plaintiff testifies that defendant stated when he first assailed him that he would fix him for the money he pulled out of his pocket, it is not error to admit in evidence, as explanatory of the statement, the record of a judgment recovered by plaintiff against defendant, prior to the assault, for alienating his wife's affections.—Scheel v. Reimer, 98 Mich. 126.

§ 28. ——Claim of title or belief in right.

Former adjudication as settling right, see Former Adjudication, VI.

¶ 121. A. was on land, claiming it under contract of purchase. The vendor and his wife attempted forcibly to eject A., who forcibly resisted. In a suit for assault and battery, brought by the vendor's wife, held that it was error to ignore the fact that A claimed title.—Franck v. Wiegert, 56 Mich 472.

¶ 122. In a tenant's action of assault and battery for a forcible eviction, evidence of his struggles and poverty, and of his attempts to get defendant, the landlord's agent, to relieve him from the conditions of his lease and mortgage, are irrelevant.—Marsh v. Bristol, 65 Mich. 378.

¶ 123. A receipt for a permit to make a sewer connection in a part of an alley on plaintiff's land is immaterial in an action for assault and battery on plaintiff by policemen in removing plaintiff from a trench made without her consent or the statutory consent of the city council for such work.—Zube v. Weber, 67 Mich. 52.

¶ 124. Where policemen are sued for assault and battery in preventing plaintiff from opposing one who was about to make a sewer connection on plaintiff's land for which they had not obtained the necessary consent from the city council, testimony as to the practice of the board of public works in making connections, and as to the payment of assessments, and as to the refunding roll, is immaterial.—Zube v. Weber, 67 Mich. 52.

¶ 125. In an action for an assault which grew out of plaintiff's attempt to remove from defendant's premises a chattel claimed by both parties, plaintiff may show that the chattel is his.—Stuyvesant v. Wilcox, 92 Mich. 233.

¶ 126. In an action of trespass vi et armis by an alleged stockholder for being ejected from a stockholder's meeting, proof of previous attempts by the corporation to cancel the stock is immaterial, where the evidence shows that subsequently the stock was issued to the plaintiff's assignor by order of a court of chancery.—Noller v. Wright, 138 Mich. 416.

¶ 127. A notice of a stockholder's meeting to the plaintiff's assignor is admissible in trespass for assault on the question of the plaintiff's right to attend the meeting where the secretary testified that in issuing the notice he was governed by the corporation records.—Noller v. Wright, 138 Mich. 416.

¶ 128. In an action of trespass by an alleged stockholder for being ejected from a stockholder's meeting, testimony as to a conversation between the plaintiff and defendant's representative before the plaintiff bought the stock, is inadmissible to show that the stock was worthless; as the value of the stock does not determine the right to vote it or to show the stock invalid, where its validity has been established by a decree in a previous equity proceeding obedient to which decree it was issued.—Noller v. Wright, 138 Mich. 416.

¶ 129. In an action for injuries received from an assault and battery committed while the defendants were attempting to retake cattle impounded by the plaintiff's husband, the defendants could not show facts from which it could be inferred that the cattle were let into the husband's inclosure and were therefore not trespassing when impounded, unless such facts were connected with the husband.—Cox v. Klein, 149 Mich. 162.

¶ 130. Plaintiff assigned a contract for purchase of land to defendants, and defendants raised a crop of potatoes on the land. Plaintiff, after tendering back the money paid him by defendants, attempted to dig the potatoes, and defendants resisted. Held, in an action for assault and battery, that testi-

mony was material and admissible to show whether the assignment was an absolute sale or was given as a security for money advanced by defendants.—Robinson v. Stimer, 154 Mich. 244.

¶ 131. Plaintiff assigned a contract for purchase of land to defendants, and defendants raised a crop of potatoes on the land. Plaintiff, after tendering back the money paid him by defendants, attempted to dig the potatoes, and defendants resisted. Held, in an action for assault and battery, that, assuming the transaction to be a loan, testimony was admissible to show that the use of the land was given as a consideration for the loan.—Robinson v. Stimer, 154 Mich. 244.

¶ 132. Plaintiff assigned a contract for purchase of land to the defendants, a father and son. The defendants raised a crop of potatoes on the land, and plaintiff after tendering back the money paid him by defendants attempted to dig the potatoes when defendants resisted. Held in an action for assault and battery that testimony was admissible to show a tender by the plaintiff to the father of the money advanced to plaintiff by the son, a minor, as bearing upon what the parties knew and understood at the time.—Robinson v. Stimer, 154 Mich. 244.

§ 29. Weight and sufficiency of evidence.

As to self defense, see also ante ¶ 106.
Proof as to intent to ravish, see also ante ¶ 84.

¶ 133. In an action for damages for assault and battery plaintiff must produce a preponderance of the evidence in support of his claim before he can recover.—Newman v. Bowman, How. N. P. 46.

¶ 134. In a civil action for assault with intent to ravish a preponderance of evidence suffices.—Schenk v. Dunkelow, 70 Mich. 89.

¶ 135. In an action for an assault and battery accompanied by an attempt to ravish, such attempt need not be made out beyond a reasonable doubt, and failure to prove it does not preclude a verdict for such damages as are made out.—Elliott v. Van Buren, 33 Mich. 49.

¶ 136. Verdict and judgment for defendant, upon competent evidence tending to show that plaintiff began the affray or was at least a willing participant therein, were not disturbed by the Supreme Court.—White v. Whittal, 113 Mich. 493.

¶ 137. It is incumbent on the one starting an affray to show, in an action by him against his opponent for assault and battery, by a preponderance of evidence that defendant in repelling such assault employed more force than was necessary.—Anders v. Clover, 198 Mich. 763.

¶ 138. In an action of trespass vi et armis for damages caused by truckmen in removing a piano which the wife claims as her own as against the husband, who had given the order for removal, the fact that the husband made the contract of purchase in his own name with the defendant does not irrevocably fix ownership in the husband.—Canton v. Grinnell, 138 Mich. 590.

¶ 139. Evidence that the defendant, employer of the plaintiff, had rudely and insolently laid hands on her person under circumstances implying an accusation of dishonesty, leading her by the hand through the store during business hours to the basement, and there taking from her purse $4.20 and never returning it, although there was no personal injury and the plaintiff returned to work after these incidents, was sufficient to sustain a verdict for assault and battery.—Henderson v. Agon, 148 Mich. 252.

¶ 140. In an action for damages for assault and battery where it appeared that plaintiff was originally the aggressor and struck the defendant but that there was a cessation of hostilities and that plaintiff was subsequently struck by defendant with a stone, evidence held sufficient to sustain a finding that defendant was the aggressor after the cessation of hostilities.—Cornell v. Fidler, 194 Mich. 509.

¶ 141. In an action for damages for assault and battery, in which it appeared that plaintiff was the aggressor, an instruction that the fact that defendant pleaded guilty in a criminal proceeding started against him by his own procurement was not conclusive against his contention that he was acting in self-defense, and that it should be given such weight by the jury as they believed it entitled to, held proper.—Anders v. Clover, 198 Mich. 763.

§ 30. Questions for court or jury.

In general see Trial, VI.

¶ 142. In an action for assault and battery, where there is evidence tending to show that the persons committing the assault were acting at the request of one of the defendants, although he was not present and directing, such defendant should not be discharged on motion, but the evidence should be submitted to the jury.—Zube v. Weber, 67 Mich. 52.

¶ 143. Where there is no evidence that injuries received by plaintiff in a voluntary fight were the result of excessive cruelty on

defendant's part, the question of such cruelty should not be allowed to go to the jury.—Smith v. Simon, 69 Mich. 481.

¶ 144. It is error to allow the jury to find from the testimony that there was a common purpose between all three of the defendants to assault and beat plaintiff, where one defendant was not present until the fight was over and the injury done, and where there is no testimony tending to show a previous understanding or concert of action to assault and beat plaintiff.—Smith v. Simon, 69 Mich. 481.

¶ 145. In an action for assault and battery it was not error to submit to the jury the disputed question whether one of the injuries complained of was inflicted by defendant or resulted from plaintiff's action after the affray; where testimony was introduced tending to show that when plaintiff was being taken by the officer to the lock-up, as he was passing some kerosene barrels, being very angry, he struck the barrel in such a manner as might have caused the injuries complained of.—Culley v. Walkeen, 80 Mich. 443.

¶ 146. In an action for assault and battery committed by a constable on plaintiff's wife while she was resisting the removal of certain exempt property which he claimed to have seized under an attachment in favor of his co-defendant and against plaintiff, the question whether the officer was acting under the creditor's instructions should have been submitted to the jury, where the creditor admitted directing the officer but the evidence was not conclusive that it was on the same occasion.—Schroder v. Morehouse, 92 Mich. 602.

¶ 147. At least nominal damages are recoverable for an assault and battery, and verdict ought to have been directed accordingly, where defendant testified that he caused complaint to be made against himself for it, that he was convicted and fined, that though plaintiff had provoked him and struck the first blow, he had continued the fight long after necessity for self-defense ceased and "because he wanted to lick" plaintiff; such testimony itself is an admission that excessive force was used.—Hetrick v. Crouch, 141 Mich. 649.

¶ 148. Where the evidence in an action for assault and battery is conflicting, whether the plaintiff, at the time she was assaulted by the defendant was attempting by force to prevent him trespassing upon her land, and also whether her plea of guilty to a criminal charge of having assaulted the defendant with a dangerous weapon, was intelligently made with full knowledge of the nature of the proceeding and her rights, were questions for the jury.—Nay v. Dickinson, 182 Mich. 684.

¶ 149. In an action to recover damages for assault and battery where it appeared that plaintiff was the aggressor and struck the defendant, but, upon the intercession of the father of the defendant, agreed to be friendly with the defendant but defendant refused, held on conflicting evidence that it was a question for the jury whether plaintiff was leaving the place when hit with a stone by defendant or whether he renewed the attack upon the defendant.—Cornell v. Fidler, 194 Mich. 509.

§ 31. Instructions.

As to evidentiary force of plea of guilty in criminal prosecution for same assault, see also ante ¶ 141.

General law of instructions, and instructions general to all causes, see Instructions.

¶ 150. In an action for an assault it is error, in the absence of supporting proof, so to charge the jury as to give them to understand that the assault was necessarily unlawful.—Drew v. Comstock, 57 Mich. 176.

¶ 151. In an action for assault and battery by one who was shot while trespassing, where the defence was that the discharge of the weapon was accidental, it was error to charge that the intent must be "proved by some credible witness, and by a preponderance of testimony," such statement being calculated to exclude the idea that the intent might be found from circumstances shown by different witnesses; especially if the testimony showed that defendant, almost simultaneously with the shooting, threatened to shoot the first man that laid a hand on his property, and the jury was instructed that the intent could not be inferred from a general threat, not relating to plaintiff, which defendant might have made "some time before the shooting took place."—Shriver v. Bean, 112 Mich. 508.

¶ 152. It is not error to charge that, while the voluntary act on the part of the plaintiff, in a case out of which an action for assault and battery arises, would not preclude the state from punishing either of the parties for a breach of the peace, it nevertheless prevents his bringing a civil action to recover compensation for injuries received by his own seeking, and in violation of law.—Galbraith v. Fleming, 60 Mich. 403.

¶ 153. In trespass to recover for assault and battery, where plaintiff's testimony tended to show that defendant threw her to the ground without provocation and inflicted injuries resulting in a miscarriage, and defendant claimed that he did nothing except to repel an assault by plaintiff, an instruction conveying the impression that plaintiff could not recover unless a miscarriage resulted from her injuries, was clearly erroneous.—Frederickson v. Nelson, 185 Mich. 246.

¶ 154. The refusal to give specific instructions stating defendant's theory in an action for assault was not error, where the issue was not involved and the jury was told that if the facts were as testified to by the defendant and his witnesses, there could be no recovery.—Lee v. Longwell, 136 Mich. 458.

¶ 155. In an action against three persons for damages for assault and battery an instruction to the effect that the evidence was uncontradicted that the plaintiff and one of the defendants voluntarily engaged in a physical encounter, and that there was no evidence that such defendant unreasonably or excessively injured plaintiff, and that the verdict should be for such defendant, held properly refused where it appeared from the testimony that all the defendants had a common understanding that such defendant should go ahead and assault plaintiff, and that the others would help him out, if necessary, which they subsequently did, using excessive and unreasonable force.—Foster v. Krause, 187 Mich. 630.

¶ 156. In an action for damages for assault and battery an instruction that in considering whether defendants assaulted the plaintiff the jury might take into consideration all the proven facts and circumstances in the case, including the plea of guilty and their former conviction, held proper where the evidence showed that the defendants admitted having pleaded guilty to a criminal complaint for assault and battery, and there was no evidence of any other instance of assault and battery, as the same offense was thus evidently referred to.—Foster v. Krause et al., 187 Mich. 630.

¶ 157. In an action for a criminal assault upon plaintiff the instructions, taken as a whole, were held to have conveyed clearly to the jury that there could be no recovery unless the intercourse was effected by force and against plaintiff's will, and whether this would or would not amount to the crime of rape is not important.—Hart v. Walker, 100 Mich. 406.

§ 32. ——On justification or excuse.

¶ 158. Where there is no evidence tending to prove justification of an assault, no charge should be given on the subject, but if given, it is not an error that the defendant can complain of.—Johnson v. McKee, 27 Mich. 471.

¶ 159. The court on request should charge that there was no legal justification for beating plaintiff, where it appears that defendant policemen did it in removing her from her own property which she was defending against a trespass under color of an insufficient permit to make a sewer connection there.—Zube v. Weber, 67 Mich. 52.

¶ 160. An instruction that if plaintiff was removing defendant's property "with no manifestation of force, then defendant would not be excusable in using force, or legally allowed to do so," is not misleading and prejudicial error where the court also charged clearly that he might use force sufficient to reclaim the property, or to prevent its removal, and where the evidence tends to show the use of excessive force.—Hamilton v. Arnold, 116 Mich. 684.

¶ 161. In an action of trespass vi et armis for injuries inflicted by defendant seeking to reclaim his personal property, an instruction that the only question for the jury is whether the defendant used more force than was necessary to reclaim his property need not also give the rule as to the use of force necessary to repel an attack, where there was no attack shown.—Miller v. Sadowsky, 138 Mich. 502.

¶ 162. In a suit for assault and battery provoked by mere words, it is proper to instruct that "no assault is justified unless by some assault performed by the other party."—Goucher v. Jamieson, 124 Mich. 21.

¶ 163. In an action for maliciously and wilfully shooting plaintiff while fleeing, a charge that the jury may determine whether the defendant officer was negligent in so shooting should be taken with the rest of the charge, which fully and properly submitted the law on the right of an officer to make an arrest without warrant where no felony had been committed; and so construed is not erroneous, where the officer claimed that he shot without intent to hit but only to make plaintiff stop.—Johnson v. Mack, 141 Mich. 99.

¶ 164. In an action for assault and battery committed while defendants were attempting to retake cattle impounded by plaintiff's husband, an instruction that plaintiff could not recover unless the cattle were trespassing in the husband's field at the time they were impounded is sufficiently favorable to the defendants.—Cox v. Klein, 149 Mich. 162.

¶ 165. In an action for assault and battery, evidence held to justify a charge that the punishment inflicted upon plaintiff was unwarranted and leaving only question of damages to the jury.—Sievers v. Barton, 180 Mich. 59.

¶ 166. In an action to recover damages for assault and battery, where it appeared that plaintiff was the aggressor and struck defendant but upon the intercession of a third person, plaintiff made overtures to defendant which were rejected, and the evidence was conflicting as to whether plaintiff was leaving the place when he was hit

by a stone thrown by defendant or whether he had renewed the attack upon the defendant, an instruction that, while the striking of the defendant by the plaintiff was unjustifiable and constituted an assault, the question for the jury was whether or not an assault was made by the defendant upon the plaintiff at the time when the stones were thrown, that they should determine what the parties were doing just before the stones were thrown, after plaintiff had struck defendant and a third person had interceded, and determine who became the aggressor in the next move that was made, and that, if plaintiff was retreating and had turned around, as was claimed, and was going back towards his wheel and was not renewing the attack or quarrel but was going away from the defendant at the time the latter threw a stone and struck him, the defendant committed an assault and battery upon him and the plaintiff would be entitled to recover, but if they found that plaintiff came towards defendant having a pair of shears in his hand and if he renewed the attack or quarrel then he could not recover, providing defendant did no more than was necessary in self-defense, was not erroneous. —Cornell v. Fidler, 194 Mich. 509.

ASSEMBLAGE to ASSIGNMENT.

Cross-References.

Assemblage; Assembly—
- Right of assembly, see Constitutional Law.
- Criminal disturbances of lawful assemblage, see Crimes, II.
- Unlawful assembly, see Crimes, II.

Assent—
- To contracts generally, see Contracts, III.
- As affecting adverse claim of title, see Adverse Possession, III; Easements.
- To act as affecting criminality or tortiousness of same, see Assault and Battery; Rape; Crimes; Conversion; Trespass.
- As element in election or estoppel, see Election and Waiver; Estoppel, III.
- As admission receivable in evidence, see Evidence, VII; Indictment, VIII.
- For other uses of the word "assent," see generally topics treating of the act or deed assented to, and see also references under headings "acknowledgment," "admission," "approval," "consent," etc.

Assessment—
- Of damages, see Damages; Eminent Domain, V; Highways, II, B.
- Of taxes or benefits, see Taxes, V; Local Improvements, VI.
- For drains, see Drains, II.
- On stockholders, associates, policy holders, partners, etc., see Corporations, VII, XXIV; Associations; Joint Stock Companies; Joint Adventures; Partnership; Insurance, VI; Fraternal Associations, III.
- Liability or duty to pay assessments as between several joint or successive owners, see cross-references preceding, and see also Life Estates; Mortgages; Dower; Estates of Decedents; Landlord and Tenant.
- As incumbrance on or imperfection in title, see Covenants for Title; Vendors and Purchasers, III.

Assets—
- Of decedents' estates, see Estates of Decedents, V.
- Of insolvent or liquidating estates, see Corporations, XXIII; Partnership, IV, VII; Assignments for Creditors; Bankruptcy; Receivers; and see also Creditors' Suits; Fraudulent Conveyances.
- Marshalling assets to work out equities, see Marshalling Assets, and cross-references there found.

Assignation Houses—
- As disorderly houses, see Crimes, II; Indictment.

Assignment; Assignments—
- Of choses in action, see Assignments.
- Of counsel for prosecution or defense of crime, see Attorneys, III; Indictment, IV.
- Of errors on writ of error, see Appeal, VI, E, XI, C; Indictment, XVI.
- For benefit of creditors, see Assignments for Creditors.

ASSIGNMENTS.

TREATS of transfers inter vivos by one of the parties entitled of rights against a third person resting in action (choses in action), excluding transfers of personal property in possession (Sales; Chattel Mortgages; Bailments; Executions; etc.) and transfers of Negotiable Instruments, which see, and of rights against parties thereto, and also excluding the transfer of real property and interests therein (see Deeds; Real Property).

Analysis.

I. Nature and requisites of assignments, and rights assignable.

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§ 28. In general; right of action or defense.
§ 29. Combining and splitting actions.
§ 30. Proper party; name of plaintiff.
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§ 32. ——Sufficiency of allegations as to assignment.
§ 33. ——Bill of particulars.
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§ 35. Burden of proof and evidence.

I. NATURE AND REQUISITES OF ASSIGNMENTS, AND RIGHTS ASSIGNABLE.

§ 1. In general.

Particular kinds of contract rights, see post §§ 4-8.
Tort causes of action, see post §§ 9-11.
As to contingent and future rights assigned, see post § 4.
Effect to vest legal ownership of assigned right, see post § 15.
Effect of executory assignment, see post § 21.
Survivability of cause of action (test of assignability), see Abatement and Revival §§ 16, 17.
Public policy as to provisions regarding assignments, see Contracts, IV, B.
Assignments for creditors, see Assignments for Creditors.
Assignability of particular rights and obligations involves the nature of the right or obligation assigned, and for that reason is treated in topics treating of the particular right, e. g., Bonds; Building and Construction Contracts; Chattel Mortgages, IV; Corporations, XXIV, B (stock); Covenants for Title, II; Divorce, X, A (alimony); Dower, I, VI; Estates of Decedents, V, D (widow's allowance), XIII, A (distributive shares); Fraternal Beneficiary Associations, II; Fraud, III, A; Guaranty, I; Insurance, XI; Judgments, IX; Landlord and Tenant, III, IV, B; Licenses to Enter Land; Liens; Mechanics' Liens, VI; Mortgages, VI; Negotiable Instruments, V et seq.; Non-negotiable Paper; Pledges; Patents; Railroads, V (bonus subscriptions); Vendors and Purchasers.
Of judgments and decrees, see Judgments, IX.
Of license to enter to cut timber, see Licenses to Enter Land.
Of mortgages, see Mortgages, VI.
Rights under public contracts, see Public Contracts, IV.
Interest in or location on public lands, see Public Lands.
Assignment by agent or officer to himself, see Agency; Corporations, XVII, G; Estates of Decedents, X; Partnership, V; Trusts, VIII; and see also Fraud, II.

¶ 1. Under § 10054, Comp. L. 1897, § 12704, How. St., 2nd Ed., a cause of action may be lawfully assigned.—Barlow v. Lincoln-Williams Twist Drill Co., 186 Mich. 46.

¶ 2. Where a plaintiff's cause of action is one that would survive upon his death, he has a right to assign an interest in it.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 3. The right to assign an accrued cause of action is statutory and cannot be defeated.—Roger Williams Ins. Co. v. Carrington, 43 Mich. 262.

¶ 4. An assignment requires the existence of some substantial interest to be assigned.—Ely v. State Land-Office Commissioner, 49 Mich. 17.

¶ 5. A right of action either at law or in equity is not assignable if it does not, directly or indirectly, involve a right of property.—Dayton v. Fargo, 45 Mich. 153.

¶ 6. Where a deed is taken as security for money loaned and a contract to reconvey is given back, the deed is personalty and will pass by assignment.—Keller v. McConville, 175 Mich. 479.

§ 2. Requisites and sufficiency of assignment.

Necessity of indorsement, see also post ¶ 25.
Security deed assignable as personalty, see also ante ¶ 6.
Interpretation and effect of terms, see post III.
Rights passing as incident to assignment, see post § 18.
Delivery of the choses in case of voluntary assignments, see post ¶ 24.
Consideration and sufficiency thereof, see Contracts, V.
Operation of the Statute of Frauds to require writing, see Frauds, Statute of.
Detachment of promise to guaranty assigned contract as alteration, see Alteration of Instruments, ¶ 20.
Mode of assignment by collective owners, see Associations; Corporations; Partnership.
Mode in which agent should sign to bind principal, see Execution of Instruments, II.
Assignments by associations, corporations, or partnerships, see Associations; Corporations; Partnership.
Persons, corporations and representatives competent to assign, see Agency; Corporations; Estates of Decedents; Guardianship; Infants; Insane Persons; Husband and Wife; Partnership; Trusts.

¶ 7. The statute permitting assignees of non-negotiable choses in action to sue thereon in their own names, does not require any particular method of assignment; a parol assignment, when good in equity, is, under this statute, made equally good at law.—Draper v. Fletcher, 26 Mich. 154; Hyma v. Three Rivers National Bank, 79 Mich. 167.

¶ 8. Assignments of things in action, being originally creatures of equity, have never, except under the statute of frauds, been required to be in writing.—Draper v. Fletcher, 26 Mich. 154.

¶ 9. An oral assignment of a claim for goods sold and delivered is valid.—Harris v. Chamberlain, 126 Mich. 280.

¶ 10. The general rule is that choses in action may be transferred by written assignment, without any manual delivery of them.—In re Smith, 191 Mich. 694.

¶ 11. Where, on the purchase of goods, the vendee gives for the price a non-negotiable note payable to the order of the vendor, an assignment of the contract with the vendee is not effected by the vendor's writing his name across the back of the note.—Altman v. Fowler, 70 Mich. 57.

¶ 12. A third party cannot question the sufficiency of an assignment between partners, where there is no evidence of hostile title, and they have acted on and recognized it as between themselves.—Woods v. Ayres, 39 Mich. 345.

§ 3. Notice of assignment to debtor or obligor.

Giving notice as implying an assignment, see post ¶ 44.

¶ 13. Where a notice to a defendant employer of an assignment of an employee's wages to plaintiff does not embody the full terms of the assignment, the defendant may pay the employee in accordance with the terms of the notice until he is later notified as to the full terms of the assignment.—Weinberg v. Stratton, 163 Mich. 408.

§ 4. Contingent and future rights.

Necessity of subsisting right, see also ante ¶¶ 4, 5.
Executory contracts, see post § 6.
Of accrued rights under executory contract, see also post ¶ 20.
Effectiveness of assignments of future right as equitable assignments, see post § 13.
Executory assignments, see post § 21.
Award for alimony, see Divorce, X, A.
Expectancies of heirs, legatees and distributees, see Estates of Decedents, X, A.
Insurance policies, see Insurance, XI.
Of rents, see Landlord and Tenant, IV, G.
Validity of assignment of rights in public office, see Contracts, IV.
Immaturity of right of beneficiary in policy during life of insured, see Fraternal Beneficiary Associations, VI; Insurance, XI
Right of assignee of railroad property and franchises to sue upon accruing subscription included in such property, see Railroads, V.

¶ 14. A mere possibility of future indebtedness, without any subsisting engagement upon which it shall accrue, is not assignable —Neumann v. Calumet & H. Min. Co., 57 Mich. 97.

¶ 15. Future as well as existing book accounts are the subject of assignment.—Dunn v. Michigan Club, 115 Mich. 409.

¶ 16. A mere possibility is not the subject of assignment; but the assignment of wages to be earned in the future under an existing employment is valid, the possibility of future earnings in such case being coupled with an interest. So of wages under an employment for piece-work expected to be continuous.—Kane v. Clough, 36 Mich. 436.

¶ 17. An assignment of wages to be earned in the future, under an existing contract, is valid.—Duluth, S. S. & A. Ry. Co., v. Wilson, 200 Mich. 313.

¶ 18. An assignment of rents made more than a year before the rents in question became due, was effectual although the rents in suit fell due after the expiration of the lease; where the relationship of landlord actually continued by the holding over of the tenants after the expiration of the lease.—Brownson v. Roy, 133 Mich. 617.

§ 5. Accrued contract rights.

Rights to accrue, see ante § 4.
Assignability of money earned and due for personal services, see ante ¶ 20.
Subjection to equities and defenses, see post §§ 16, 17.
Labor claims against corporation, see Corporations, XXIV, E.
Of rents, see Landlord and Tenant, IV, G.
Right to recover money improperly paid for taxes, see Taxes, X, C.
Rights acquired by assignment of particular contract or obligation, see topic treating of the thing assigned, e. g., Building and Construction Contracts; Chattel Mortgages, IV; Corporations, XXIV, B (stock); Insurance, XI; Judgments, IX; Landlord and Tenant, IV, B; Mortgages, VI; and the like.

¶ 19. The right of action upon a contract for breach of the warranty therein is assignable (How. St., § 7344).—Felt v. Reynolds Rotary Fruit Evaporating Co., 52 Mich. 602.

¶ 20. The right to recover money that has already become due under a contract is assignable although the obligations are such that defendant cannot be required to rely upon an assignee to perform that part of the contract remaining executory.—Rodgers v. Torrent, 111 Mich. 680.

¶ 21. Where the amount due on a stock subscription has been regularly called in by assignment and stands as a liquid debt demand on which suit will lie, it seems that the claim can be assigned as well before judgment as afterward, though the assignment, like all assignments of things in action, would be subject to equities and could not deprive the debtor of any stockholder's rights.—Wells v. Rodgers, 50 Mich. 294.

¶ 22. A right of action for money paid as consideration accruing to a bank on account of rescission for fraudulent representations in the sale of commercial papers made by the president to the bank may be assigned to a third person.—Hicks v. Steel, 126 Mich. 408.

§ 6. Executory contracts.

Personal contracts, see post § 7.

Note payable in chattels, transferability, see Non-negotiable Paper, and see also Conversion, I.

¶ 23. Where an executory contract is not necessarily personal in its character, and can, consistent with the rights and interests of the adverse party, be fairly and sufficiently executed as well by the assignee as by the original contractor, and when the latter has not disqualified himself for the performance of the contract it is assignable.—Detroit, T. & I. R. Co. v. Western U. Tel Co., 200 Mich. 2.

¶ 24. The right to enforce an agreement not to engage in a particular business may be passed by assignment.—Up River Ice Co. v. Denler, 114 Mich. 296.

¶ 25. A promise to pay for goods which contains a provision leaving it optional with the payee to reclaim the goods if they are not paid for by a certain day is assignable after maturity as a chose in action, and may be sued upon without being indorsed by the assignor.—Bannister v. Rouse, 44 Mich. 428.

§ 7. ——Contracts involving personal relations, service or skill.

See also ante ¶¶ 23, 24.

Letter of credit, see post ¶ 35.

Contract for deposit with individual banker, see Banking and Money Affairs, II, A.

¶ 26. A contract contemplating personal association is not assignable.—Litka v. Wilcox, 39 Mich. 94.

¶ 27. A contract between a nurseryman and a farmer, by the terms of which the former is to plant fruit trees on the latter's land, to prune and care for them, and to receive in payment half the fruit grown for a period of ten years is made in part consideration of the skill and honesty of the nurseryman, and, in the absence of a special provision in the contract it cannot be assigned by him without the consent of the other party.—Edison v. Babka, 111 Mich. 235

¶ 28. A right to the possession and use of a building on the grounds of a college for conducting a school as a department of such college and for furnishing dormitories for students and teachers is personal and not transferable.—Hillsdale College v. Rideout, 82 Mich. 94.

¶ 29. A personal lease on shares is not assignable.—Randall v. Chubb, 46 Mich. 311.

¶ 30. A contract for the sale of stamp-vending machines made between the manufacturer and an individual, being a personal one, held not assignable without the consent of the manufacturer.—Detroit Postage Stamp Service Co. v. Schermack, 179 Mich. 266.

¶ 31. The rule that a contract personal in its nature is not assignable, had no application where the defendants in an action to recover taxes paid under protest, had agreed with plaintiff's assignor to furnish and lease certain lands for their factory for ten years and as long thereafter as such assignor "its successors or assigns" might use the site for manufacturing purposes, on the same terms and conditions, except that the taxes should be paid, and that for the first ten years defendants should keep said assignor free from taxes.—Northwestern Cooperage & Lumber Co. v. Byers, 133 Mich. 534.

¶ 32. A contract whereby a navigation company agrees to carry sand and gravel during a certain season at certain prices, the bills to be paid monthly and the contracts of sale to be assigned to the carrier as security, if demanded, is not personal but may be assigned where the carrier has had no dealings with the assignee and there is no claim that the assignee is less responsible than the assignor.—C. H. Little Co. v. Cadwell Transit Co., 197 Mich. 481. (Kuhn, C. J., and Bird, J., dissenting.)

¶ 33. A contract for a term of 25 years between a railroad company and a telegraph company for the construction, maintenance and operation of a telegraph line on the railroad right of way requiring the telegraph company to furnish poles, wire and other materials for the construction of the line, and a foreman to direct its construction, and the railroad company to grant an easement over its right of way for the line and to furnish labor to construct, maintain and operate the same, and to furnish office room at the various stations in which to operate the telegraph, is not personal and is assignable.—Detroit, T. & I. R. Co., v. Western U. Tel. Co., 200 Mich. 2.

§ 8. Instruments for payment of money.

Indorsement and transfer of negotiable instruments, including assignments of rights, see generally Negotiable Instruments.

See also Non-negotiable Paper.

Check or bill as assignment of fund, see post § 14.

Transfer of negotiable and non-negotiable instruments generally, see Negotiable Instruments; Non-negotiable Paper.

¶ 34. A claim for the amount unpaid on debt evidenced by a promissory note, which note has been surrendered to the maker on his paying part of the note and agreeing to pay the rest, is assignable.—Hanselman v. Doyle, 90 Mich. 142.

¶ 35. A letter addressed to a bank suggesting advances and stating among other things that the writers guarantee payment of drafts drawn on them by a produce dealer was not assignable so as to enable partners who purchased the bank and succeeded it to hold the writers liable for the draft drawn by the produce dealer and refused by the writers.—Lyon v. Van Raden, 126 Mich. 259.

§ 9. Rights of action for tort.

Survivability of causes of action, see Abatement and Revival, § 16.
Fraud as personal right of defense, see Fraud, III, A.
The rule that fraud is not assignable does not prevent assignment of a right and the enforcement of a cause of action for fraud which is collateral to and not a part of the thing assigned. See Fraud, III.

¶ 36. Courts of equity do not countenance the assignment of a cause of action for a tort.—Morris v. Morris, 5 Mich. 171.

¶ 37. Under our statute authorizing suits by assignees of rights in action, the general doctrine is that of causes of action for torts only such as survive to the personal representatives of the injured party can be sued for by an assignee.—Final v. Backus, 18 Mich. 218.

¶ 38. A right of action for a tort is not generally assignable; but such rights of action as would survive to personal representatives are in general assignable.—Finn v. Corbitt, 36 Mich. 318.

§ 10. ——Conversion.

Proper plaintiff, see post § 30.
Right to sue without alleging assignment, see post § 31.

¶ 39. A right of action in trover for property converted is assignable.—Final v. Backus, 18 Mich. 218; Brady v. Whitney, 24 Mich. 154; Grant v. Smith, 26 Mich. 201; Dayton v. Fargo, 45 Mich. 153; Smith v. Thompson, 94 Mich. 381; Boynton v. Roe, 114 Mich. 401; Perkett v. Manistee & N. E. R. Co., 175 Mich. 253.

¶ 40. The right of action for a tort like that of the wrongful cutting of timber on one's lands and its conversion, is assignable. Final v. Backus, 18 Mich. 218; Upham v. Dickinson, 38 Mich. 338; Grant v. Smith, 26 Mich. 201.

§ 11. ——Trespass.

For cutting and conversion of timber, see ante ¶ 40.
Proper plaintiff, see post § 30.
Necessity and sufficiency of allegation of assignment, see post §§ 31-33.

¶ 41. A right of action in trespass for injury to the assignor's property is assignable.—Finn v. Corbitt, 36 Mich. 318.

¶ 42. A right of action for trespass to land by cutting timber therefrom is assignable.—Gates v. Comstock, 107 Mich. 546.

¶ 43. One who has joined in unlawfully cutting another's timber cannot take from him an assignment of his right of action and sue his co-trespassers thereon, even if he might sustain an action for contribution against them.—Upham v. Dickinson, 38 Mich. 338.

II. IMPLIED OR CONSTRUCTIVE ASSIGNMENTS.

§ 12. In general; inferred from conduct of parties.

Corporate successor as implied assignee, see Corporations, XXII.

¶ 44. Notice by an agent to the other party to a contract made between them that accounting under it is to be made to the principal is equivalent to an equitable assignment of it.—Dustin v. Radford, 57 Mich. 163.

¶ 45. Acceptance of pay upon and delivery of goods on a subcontractor's orders drawn in favor of laborers cannot be treated as an assignment by them of their claims against a railroad company.—Martin v. Michigan & O. R. Co., 62 Mich. 458; Dudley v. Toledo, A. A. & N. M. R. Co., 65 Mich. 655.

§ 13. Equitable assignments.

Voluntary assignments as equitable assignments, see post § 24.
As to equitable liens or mortgages, see Liens; Mortgages, II, C. As to equities established to work out trusts, see Trusts.

¶ 46. An assignment of demands having no actual existence, though invalid at law, may be valid in equity as an agreement, and take effect as an assignment, when the demands intended are subsequently brought into existence; and the assignee of future wages would have a right in equity, when the

wages were earned, to protect his interest to the extent to which they were earned.—Kane v. Clough, 36 Mich. 436.

¶ 47. Successive assignments and deliveries of an aid-note drawn to the order of a railroad company were sufficient to create an equitable assignment of the contract embodied in it, and to authorize the final holder to sue on it in his own name as equitable assignee.—Toledo & A. A. R. Co. v. Johnson, 55 Mich. 456 (How. St., § 7344).

¶ 48. The doctrine of equitable assignment is inapplicable to a case where others beside the assignor and assignee are interested in the fund.—Morse v. Allen's Estate, 99 Mich. 303.

§ 14. Bill of exchange, check or order as assignment of fund.

¶ 49. An unaccepted check upon funds in a bank does not amount to an equitable assignment of the sum it calls for.—McIntyre v. Farmers' & Merchants' Bank, 115 Mich. 255.

¶ 50. An unaccepted check or draft does not operate as an equitable assignment of the amount named in it in the drawee's hands.—Grammel v. Carmer, 55 Mich. 201; Brennan v. Merchants' & Manufacturers' Nat. Bank, 62 Mich. 343.

¶ 51. A check not accepted by the bank at the time of the drawer's death does not operate as an assignment of the fund to the payee.—Second Nat. Bank of Detroit v. Williams, 13 Mich. 282.

¶ 52. A draft drawn in the ordinary form by a bank upon its New York correspondent in favor of the bank from whom it has received certain paper for collection does not operate as an equitable assignment pro tanto of an indebtedness owing by the correspondent.—Sunderlin v. Mecosta County Sav. Bank, 116 Mich. 281.

¶ 53. A bank becomes the assignee of a debt by discounting a draft for the exact amount of it, to which the bill for the indebtedness is attached; and the debtor is released by such assignment from liability as garnishee. The case differs from that of an ordinary bank draft or bill of exchange, and the fact that the draft is negotiable in form does not affect the apparent intent to assign the debt.—Moore v. Davis, 57 Mich. 251.

III. INTERPRETATION, OPERATION AND EFFECT.

§ 15. In general.

Form and sufficiency of assignment, parol assignments, see ante § 2.
Right of third person to question sufficiency of assignment, see also ante ¶ 12.
Check or bill as assignment of fund, see ante § 14.
Right of assignee to sue in own name, see post § 30.
Variance as to contract assigned and sued on and that proved, see post § 34.
Validity of assignments by or to trustees, executors and other fiduciaries, see Estates of Decedents, X, A; Trusts, VIII; Guardianship, VI; Fraud, II.

¶ 54. Under § 10054, Comp. L. 1897, § 12704, How. St., 2nd Ed., an assignee of a cause of action becomes the legal owner thereof.—Barlow v. Lincoln-Williams Twist Drill Co., 186 Mich. 46.

¶ 55. A writing in terms assigning all damages sustained on account of flooding of specified land on a stated day, was sufficient to transfer a right of action sustained on account of the flooding in question.—Hovey v. Grand Trunk W. Ry. Co., 135 Mich 147.

§ 16. Equities and defenses of the parties.

On stock subscription, see also ante ¶ 21.
As to right under executory portion of contract, when accrued right is assigned, see ante ¶ 20.
Necessity of notice to debtor, see ante § 3.
Right of assignor's creditor to sue on covenant to pay debt as incident to assignment, see post ¶ 102.
Assignments against law or public policy, see Contracts, IV.
Rights of garnishee under assignment, see Garnishment, IX, X, XII.
Setoff or recoupment by or against assignee, see Setoff.
Right of assignee of rent to accrue as affected by subsequent conveyance of premises, see Landlord and Tenant, IV, G.
Doctrine of notice and bona fide purchase as applied to assignee in possession of landed rights, see Notice and Record of Title, I, B.
Assignments as fraudulent conveyances, see Fraudulent Conveyances.
Effect as estoppel of recognition of assignment withdrawn before action, see Estoppel, III.
Under assignments of building contracts, see Building Contracts, I.
Assignment of outstanding liens as vesting entire contract right under building contract, see also Building Contracts, IX.

¶ 56. The assignee of a non-negotiable chose in action takes it subject to all equities existing between the parties at the time of the assignment.—Bloomer v. Henderson, 8 Mich. 395; Spinning v. Sullivan, 48 Mich. 5; First National Bank of Port Huron v. Carson, 60 Mich. 432; Kinney v. Tabor, 62 Mich. 517.

¶ 57. The seller (assignor) or pledgor of property other than negotiable securities can convey no greater rights than he himself has.—Township of Washington v. First National Bank of Huntington, 147 Mich. 571.

¶ 58. The assignee of a non-negotiable chose in action takes it subject not merely to equities at the inception of the debt or contract assigned, but to all at the time of assignment.—Warner v. Whittaker, 6 Mich. 133.

¶ 59. Inasmuch as the assignee of a non-negotiable chose in action takes it subject to all antecedent equities the right to sue upon it in his own name makes no difference.—Spinning v. Sullivan, 48 Mich. 5.

¶ 60. Assignees of a contract take it subject to all the rights and equities existing between the original parties.—Edson v. Gates, 44 Mich. 253.

¶ 61. A mere assignee of securities is bound by any equities that would affect the original holder if it does not appear that they were delivered to him for value.—Matteson v. Morris, 40 Mich. 52.

¶ 62. The assignee of a township order on the treasurer for payment of a claim has no greater rights than had the assignor.—First Nat. Bank of Traverse City v. Township Clerk of Union Township, 141 Mich. 404.

¶ 63. The assignee of a non-negotiable chose in action does not take subject to latent equities that some third person may have against the debtor or party bound by the instrument.—Bloomer v. Henderson, 8 Mich. 395.

¶ 64. An assignee cannot sue where his assignor could not.—Learned v. Ayres, 41 Mich. 677.

¶ 65. The assignee of a contract takes such rights only as belonged to his assignor. —Seligman v. Ten Eyck's Estate, 49 Mich. 104.

¶ 66. The assignee of the right of action on a contract is entitled to recover exactly as the assignor might if no assignment had been made.—Howell v. Medler, 41 Mich. 641.

¶ 67. The assignee of an order for payment for work done on a drain is subject to all defenses which the public officials could make against the contractor for improper performance of the work.—Van Akin v. Dunn, 117 Mich. 421.

¶ 68. In an action for breach of contract for the exchange of stamp-vending machines brought by the assignee of the contract, held, that as the assignor could not have enforced the contract without complying with its terms as to the cash payment of the difference in price, his assignee would have no right to do so.—Detroit Postage Stamp Service Co. v. Schermack, 179 Mich. 266.

¶ 69. The assignee of property already assigned by his assignor to a third party, under an illegal contract, is in no better position than the assignor, and cannot recover the property on the ground that the contract was illegal.—Benson v. Bawden, 149 Mich. 584.

§ 17. ——Where assignment is not on full consideration.

Assignments for security, see post § 23.
Assignment for small consideration but subject to outstanding claim, see also post ¶ 83.
Impeachment of recital of consideration as against voluntary assignee, see also post ¶ 91.
Irrelevancy in action on assigned contract of the consideration for assignment, see post § 35.
Effect of voluntary assignments, see post § 24; and see also Gifts.
Right of assignee of corporate debt to enforce same against stockholders for face amount, see Corporations, XXIV, E.

¶ 70. In an action by the assignee of a claim for an amount unpaid on a stock assessment the defendant, if a stockholder in the assigning company, may have a right to know whether or not he is to be sued by a purchaser for value, and he can therefore show the consideration of the assignment.—Wells v. Rodgers, 50 Mich. 294.

¶71. That the assignment was gratuitous is no defense to an action against a debtor by an assignee of the claim sued upon.—Coe v. Hinkley, 109 Mich. 608.

¶ 72. A plaintiff declaring upon a written obligation which recited a settlement of accounts gave evidence of an assignment to him, but did not show any consideration therefor. Held, that he could not rely on equities that were not available to his assignor, and that the defendant was not estopped by the recital from contesting the settlement.—Ferguson v. Millikin, 42 Mich. 441.

§ 18. Rights passing as incidents.

See also post ¶ 137.
To assignment for security, see post ¶ 87.
Transfer of guaranty of paper as an incident thereof, especially when indorsed thereon, see Negotiable Instruments, IV, V; Non-negotiable Paper.

Guaranty indorsed on paper as incident passing with it, see Bonds; Negotiable Instruments, IV.

¶ 73. The assignment after maturity of a note given in pursuance of a contract does not necessarily transfer to the assignee a right of action for a breach of the contract, or entitle him to base a claim thereon in order to cancel a set-off against the note. An action on the note by the assignee would not bar an action by the assignor for breach of contract.—Wetmore v. Neuberger, 44 Mich. 362.

¶ 74. An assignment of a non-negotiable note does not transfer a claim for goods sold and delivered.—Altman v. Fowler, 70 Mich. 57.

¶ 75. An assignment by a replevin defendant of all his right, title and interest in the suit conveys his right, title and interest in the goods taken under the writ, and is admissible in evidence in a suit by the assignee against the plaintiff in replevin and another person who has converted such goods. —Cadwell v. Pray, 86 Mich. 266.

¶ 76. The right to recover property, the title to which never passed by reason of the fraudulent representations of the purchaser as to his financial condition, passes to an assignee of the vendor's business and book accounts.—Reeder Bros. Shoe Co. v. Prylinski, 102 Mich. 468.

¶ 77. An assignment of all the stock, property, and effects of a business, or the exclusive right to manufacture a given article carries with it the exclusive right to use a fictitious name in which such business has been carried on, and such trade-marks and trade-names as have been in use in such business.—Williams v. Farrand, 88 Mich. 473.

§ 19. Assignee as agent for assignor.

Of principal's property by agent to himself, see Agency, ¶ 504.

Assignee's agent as agent of assignor in making payments due on subject of assignment, see Agency, ¶ 26.

¶ 78. A man bought an interest of $600 in a mortgage for $1,000, and agreed that in case of its prompt payment, when due, he would pay his assignor $400 and interest, with a right to be reimbursed for expense or delay in collecting. But the mortgagor refused to pay it unless $200 was deducted and it appeared that the property was only good for $800, and that the deficiency could not be collected. The assignee accordingly accounted for only $200. Held, in a suit for the rest of the $400, that he was no more than a collecting agent for plaintiff, and that he had discharged his obligation.—Reed v. Northrup, 50 Mich. 442.

§ 20. ——Liability to third persons.

¶ 79. Permission by the assignor of a claim to use his name in collecting it gives the assignee no authority to use any but lawful processes.—Park v. Toledo, C. S. & D. R. Co., 41 Mich. 352.

¶ 80. The assignor of a chose in action is not liable for unlawful acts done by the assignee in collecting the demand if the assignor himself had no interest in it and did not direct or countenance them. So held, where the assignee, suing in the assignor's name, improperly began suit by capias, the affidavit for which was made by the assignor's agent but not in his behalf.—Park v. Toledo, C. S. & D. R. Co., 41 Mich. 352.

§ 21. Executory assignments.

¶ 81. An executory contract to assign "whatever should remain uncollected or unsecured" of a debt, does not pass any title to notes which have not been assigned, title being retained until actual assignment is made, and the holder may sue on such notes whatever the rights as to assignment might be under the contract.—National City Bank v. Torrent, 130 Mich. 259.

§ 22. Absolute or qualified assignments.

Assignment of personalty reserving life use of income, see Life Estates, IV.

Assignments and transfers for particular purposes, see Assignments for Creditors; Bankruptcy; Chattel Mortgages; Fraudulent Conveyances: Mortgages; Pledges; Trusts; and the like.

¶ 82. An assignment may be absolute or qualified, as the parties choose, so long as no one else is injured or defrauded, and the refusal to charge "that, when a chose in action is assigned by parol, it must be shown, in order to enable the assignee to maintain an action upon it, that the original owner surrendered all control over it and made an absolute appropriation of it," is not error.—Herbstreit v. Beckwith, 35 Mich. 93.

¶ 83. The assignee of a lumber contract of the value of over $1,000, who obtained an assignment for $10 subject to an outstanding claim as a bona fide purchaser, was not subject to garnishment as a mortgagee where after service of process and upon repayment of his $10 and attorney's fees expended, he assigned the contract to such claimant pursuant to the prior agreement.—Merchants' Nat. Bank of Toledo v. Barrett, 122 Mich. 650.

¶ 84. An assignment of a certificate of bank stock absolute in form may be shown

to be for security merely.—May v. Genesee County Savings Bank, 120 Mich. 330.

§ 23. Assignments for security.

See also ante ¶ 88.
Absolute in form but for security, see ante ¶ 84.
Proper plaintiff, see post § 30.
Pledges as collateral security in general, see Pledges.
Assignment to obligor as extinguishment of debt, see Contracts, VIII; Judgments, XI; Mortgages, VI-VIII.
Reduction of amount of damages recoverable by reason of partial assignment, see Damages, IV.

¶ 85. One who as security for money lent to a subcontractor takes from the latter an assignment of the first charge upon a stipulated drawback on the contract price of his work stands in no better position than if the contract had been assigned to him; and on being sued by him the contractor may set up in defense any matter that would have been available in a suit on the contract, except voluntary payments to the subcontractor after notice of the assignment; nor would the contractor, by requiring the subcontractor's certificate of the correctness of amounts paid for labor and materials to complete the work, be precluded from offsetting such payments if shown to have been necessarily made.—Fisken v. Milwaukee Bridge & Iron Works, 86 Mich. 199, rehearing denied 87 Mich. 591.

¶ 86. One holding an assignment of a policy professing to be in consideration of a promise of support of insured, the assignor, and also of an indebtedness presently due from the assignor to the assignee, which indebtedness is by terms of the assignment declared to be "cancelled by it," cannot claim that the assignment was absolute and not for security; where he has petitioned for administration declaring himself a creditor.—McDonald v. Birss, 99 Mich. 329.

¶ 87. Where a corporation had assigned to a bank $150,000 of accounts as security, it was held that within the terms of such assignment were included accounts for goods sold under special contracts, which provided that title to the goods should remain in the corporation until paid for, and that any notes taken should not be considered as payment, but only as evidence of indebtedness, and should not constitute a waiver of the right to a mechanic's lien.—Preston Nat. Bank v. Smith Middlings Purifier Co., 102 Mich. 462.

¶ 88. Where, in a suit for reformation against the assignor and persons holding the contract under assignment for security of a debt and not as bona fide holders, the reformation of the contract reduces the amount due the assignor thereon, and it appears that the mortgagees, as a part of the consideration for the assignment, surrendered to the assignor certain notes and mortgages which they held as collateral and additional security for the mortgage debt, they will have the right to demand of the complainants an amount sufficient to meet the balance of their claim, if any, remaining after exhausting their securities aside from the contract, and applying the proceeds on said debt, not exceeding, however, the amount of complainants' indebtedness on the contract before its reformation.—Burns v. Caskey, 100 Mich. 94.

¶ 89. Where a contract is assigned for the sole purpose of enabling the assignees to collect and apply certain moneys coming due to the assignors thereon, and then to be reassigned, the assignees are not authorized, without the consent of the assignors, to assume the performance of the contract, or to change its terms by agreement with the contracting party.—Litchfield v. Garrett, 10 Mich. 426.

§ 24. Voluntary assignments.

See also ante ¶¶ 71, 72, post ¶ 96.
Assignments by way of gift, see Gifts.
Effect of assignment as gift to one having meretricious relations with donor, see Gifts, IV.

¶ 90. Assignments by writing without consideration are neither more nor less than a branch of voluntary gifts and settlements; and in the case of choses in action they fall generally under the doctrine of trusts and equitable assignments, and the only doubt as to the requirements of delivery relates to delivery, not of the securities, but of the memorandum of transfer.—Ellis v. Secor, 31 Mich. 185.

¶ 91. As against an assignee without consideration and therefore without equities one is not estopped by recital of a full settlement of account leaving a balance payable which was assigned but was subject to setoff or recoupment.—Ferguson v. Millikin, 42 Mich. 441.

¶ 92. The right of an assignee of claims against a railroad for injuries to cattle, to sue thereon is not affected by the fact that the consideration for the assignments was an agreement by the assignee to turn over to the assignors whatever he should recover on the claims.—Henderson v. Detroit & M. Ry. Co., 131 Mich. 438.

§ 25. Assignment to or by joint party.

Assignment of diverse rights to one assignee, see post § 26.
Joinder of co-owner and assignee in suit, see post § 30.
How proved, see post ¶ 144.

Right of indemnification of joint tort feasor making satisfaction and taking assignment, see Indemnity and Contribution, II, B; Release.

¶ 93. An assignment by one joint contractor to another of his interest in a right of action on the contract does not affect their joint liability.—Hart v. Summers, 38 Mich. 399.

¶ 94. A joint owner of a cause of action cannot introduce a new joint owner into the contract by individual assignment.—Learned v. Ayres, 41 Mich. 677.

§ 26. Assignment of diverse rights.

Combining for suit, see post § 29.

Aggregating claims to make jurisdictional amount, see Courts, V.

¶ 95. Several non-negotiable causes of action may be united by assignment in one ownership so as to enable the assignee to bring a single action.—Watertown Fire Ins. Co. v. Grover & Baker Sew. Mach. Co., 41 Mich. 131; Mercantile Ins. Co. v. Holthaus, 43 Mich. 423; Crippen v. Jacobson, 56 Mich. 386.

¶ 96. Assignments of choses in action, though made by way of gift, pass the right of action as well as if founded on a consideration; and the fact that the assignments were made for the purpose only of enabling the assignee to have several like claims adjusted in a single suit does not impair the validity of the transfers nor prejudice the debtor.—Briscoe v. Eckley, 35 Mich. 112.

¶ 97. Where a corporation which had assigned to a bank $150,000 of accounts as security, treated certain accounts as within said assignment, and obtained from the bank the loans the assignment was made to secure upon the representation, relied upon by the bank, that said accounts were within the meaning of the word "account" as used in the assignment, such corporation is subsequently estopped from asserting the contrary.—Preston National Bank v. Smith Middlings Purifier Co., 102 Mich. 462.

§ 27. Conflicting assignments.

As to conflicting rights of assignees and others under specific contracts, see Building Contracts, I; Insurance, XI; Mortgages, V, VI; Chattel Mortgages, III, IV; Liens; Marshalling Assets; and other specific topics dealing with the subject-matter of the assignment.

Of insurance for security and assignment of it to wife, see Insurance, IX.

¶ 98. A bridge company with a contract to build a bridge for a township, without delivering the contract assigned it to a bank as security with the understanding that the company should collect the money thereon as it became due and remit it to the bank. After receiving an order for the balance due from the township the company sold it to another bank, which received it without notice of the previous assignment. In an action to determine the title to the money, the township having interpleaded, held that the prior assignee having left the indicia of ownership in the company was estopped from asserting its prior title to the money, and the equities of the second bank must prevail where the order had been purchased in good faith.—Township of Washington v. First National Bank of Huntington, 147 Mich. 571.

IV. ACTIONS AND PROCEDURE.

§ 28. In general; right of action or defense.

See also ante ¶ 64.

On qualified assignment, see also ante ¶ 82.

Right of assignee for collection only to sue, see ante ¶ 92.

Subjection to equities and defenses good against assignor, see ante §§ 16, 17.

Public policy as to provisions denying right to assignee to sue, see Contracts, IV, B.

Disability of joint tort feasor to take assignment and sue other tort feasor, see ante ¶ 43; and see generally Releases, II (release of one as releasing all).

Setoff or recoupment by or against assignee, see Setoff.

Appearance as waiving objection that assignment was made to enable suit in wrong county, see Appearance, § 10, ¶ 42.

General law of procedure, see topics treating of the stages and proceedings in an action or suit, e. g., Evidence; Pleading; Instructions; Trial; Judgments; Appeal and Error.

Actions by assignee of negotiable or non-negotiable instrument, see Negotiable Instruments, XIV; Non-negotiable Paper.

Conclusion of assignee by accord with assignor, see Accord and Satisfaction, § 13, ¶ 62.

Effect of assignment to abate action by assignor, see Abatement, §§ 6, 7.

Suits against stockholders on labor claims, see Corporations, XXIV, E, 2.

Injunction or other equitable remedy to protect assignment, see Injunctions; Creditors' Suits; and other topics treating of remedies in equity.

¶ 99. An assignee of a chose in action cannot sue where his assignor could not.—Learned v. Ayres, 41 Mich. 677.

¶ 100. A right of action for a conversion of one's property is not barred by an assignment of the claim to his attorney.—McGuire v. Galligan, 57 Mich. 38.

¶ 101. Certain building contractors agreed that when they got the payment on the contract they would pay a certain sum to a specified person on an order from the painter. Held, that an action for this money could not be brought until after the order had been presented or some demand made.—Smith v. Ross, 51 Mich. 116.

¶ 102. A covenant in the assignment of a contract, by which the assignee agrees to pay certain specified liabilities of the assignor under the contract, does not enable a party to whom the assignor is indebted to bring an action for such indebtedness against the assignee.—Turner v. McCarty, 22 Mich. 265.

¶ 103. In an action on an assigned judgment, it cannot be contended that the assignee, an attorney, is proceeding in violation of How. St., § 7185, prohibiting the transfer of claims so that suits may be brought, where there is nothing to show that the purpose for which the judgment was assigned is the one prohibited by the statute.—Belden v. Blackman, 118 Mich. 448.

§ 29. Combining and splitting actions.

Assignment by one of joint parties, see ante § 25.

Combining rights by assignment to bring one action, see ante § 26.

Right to take assignments and aggregate claims to make jurisdictional amount, see Courts, V.

Splitting causes of action by partial assignment, see also Actions.

Judgment on split cause as bar, see Former Adjudication.

¶ 104. A perfected claim for labor will not support separate actions for the different amounts into which it may be divided, even though portions of it have been assigned and the division of the claim corresponds to the periods for which the laborer was hired.—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231.

¶ 105. Several interests or claims may be united by assignments so that assignee can bring one action.—Watertown Fire Ins. Co. v. Grover & Baker Sew. Machine. Co., 41 Mich. 131; Mercantile Ins. Co. v. Holthaus, 43 Mich. 423; Crippen v. Jacobson, 56 Mich. 386.

¶ 106. Three persons transferred to P., one of its creditors, certain stock which they separately owned in a corporation, in consideration of his agreement with them to pay the debts thereof. This agreement they assigned to B., another creditor of the corporation Held, that B. could not bring assumpsit against P. on his failure to pay the corporation's debt to B.; the damages to the assignors from the nonpayment of that one debt, being incapable of ascertainment at law or of severance from the entire transaction.—Pratt v. Bates, 40 Mich. 37.

§ 30. Proper party; name of plaintiff.

Name in which to sue on negotiable or non-negotiable paper, see Negotiable Instruments, XIV; Non-negotiable Paper.

Assignment of firm contract to partner as enabling him to sue, see Partnership, VI, A.

Rule of practice on assignment of subject-matter of chancery suit, substitution of plaintiffs, see 1916 C. C. Rule 57.

See Comp. L. 1915, § 12353; Jud. Act, Chap. XII, § 2, enabling real party in interest to sue.

¶ 107. At common law an assignee of a chose in action could not pursue remedies thereon in his own name.—Michigan Sugar Co. v. Moffett, 183 Mich. 589.

¶ 108. Section 10054, Comp. Laws 1897, How. St., 2nd Ed., § 12704, permits the assignee of a chose in action to sue thereon in his own or the name of the assignor.—Michigan Sugar Co. v. Moffett, 183 Mich. 589.

¶ 109. Comp. L. 1857, § 4959, and Sess. L. 1863, p. 102 (How. St., § 7344), permitting assignees of choses in action to sue in their own names, reaches every right in property that was ever assignable in equity or capable of survivorship to executors.—Cook v. Bell, 18 Mich. 387.

¶ 110. Assignees need not sue in the names of their assignors even in cases where the right of action for a tort is assignable. Nor is it necessary to bring an action in the name of one person for the use and benefit of another.—Watson v. Watson, 49 Mich. 540; and see Dayton v. Fargo, 45 Mich. 153.

¶ 111. The purchaser of a claim under a contract can pursue his remedy in the name of his assignor whether he purchased before suit was brought or afterwards.—Moon v. Harder, 38 Mich. 566.

¶ 112. A written contract for the sale of land can be sued on by the assignee in his own name.—Cook v. Bell, 18 Mich. 387.

¶ 113. Under the statute the assignee of a right of action for the conversion of logs obtained by trespass on the land conveyed by the assignor to the assignee may sue thereon in his own name.—Final v. Backus, 18 Mich. 218; Grant v. Smith, 26 Mich. 201; Upham v. Dickinson, 38 Mich. 338.

¶ 114. A right of action for the wrongful cutting of timber on the assignor's land is enforceable in the assignee's name.—Final v.

Backus, 18 Mich. 218; Grant v. Smith, 26 Mich. 201; Upham v. Dickinson, 38 Mich. 338.

¶ 115. Under Comp. L. 1897, § 10054, authorizing the assignee of a chose in action to sue thereon in his own name, the original of two lessors and the assignee of the interest of the other lessor may join in an action for rent.—Bly v. Bliss, 123 Mich. 195.

¶ 116. An assignment of a claim as security did not prevent recovery in the name of the claimant, where the suit was carried on with the knowledge and without the objection of the assignee; as in such case the judgment would be conclusive upon the assignee.—Lamson v. City of Marshall, 133 Mich. 250.

§ 31. Pleading.

Issues under the pleading, and variance, see post § 34.
Pleading one assignor and proof of another, see post § 34.
Pleading one contract and proof of another, see post § 34.
Necessity of pleading assignment in special counts, when pleaded in general counts, see Assumpsit, IV; Pleading.

¶ 117. Where a claim arising on contract has been assigned, action may be brought thereon in the assignor's name without stating that it is for the assignee's use and benefit.—Peters v. Gallagher, 37 Mich. 407; and see Clay Fire and Marine Ins. Co. v. Huron Salt & Lumber Mfg. Co., 31 Mich. 346.

¶ 118. While under the statute the assignee of non-negotiable choses in action may sue thereon in his own name, he must still allege in his declaration an assignment and prove the same upon the trial to enable him to recover.—Blackwood v. Brown, 32 Mich. 104.

¶ 119. In cases where an assignee may sue in his own name, it is necessary for him to allege an assignment in his declaration and prove the same.—McKnight v. Lowitz, 176 Mich. 452.

¶ 120. An assignee cannot recover in his own name under a declaration upon the common counts that does not allege an assignment to him.—Pierce v. Closterhouse, 96 Mich. 124. See Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191.

¶ 121. An agent cannot recover in his own name upon an order given to him in his individual character to procure a machine of his principal, to whom the purchase price is to be paid, and whose warranty he countersigns as agent, and delivers to the orderer, without averring an assignment of the contract.—Weston v. Card, 96 Mich. 373, per Long and Grant, JJ., others concurring in result.

¶ 122. The right to sue upon a contract as assignee must be positively averred, and an allegation of the assignment in the consolidated common counts will not support a recovery upon a special count in which it is not averred. Nor would a mere additional allusion to the assignment in the special count be sufficient.—Rose v. Jackson, 40 Mich. 30.

¶ 123. Evidence of the mutual assignment of interests among several plaintiffs for the purpose of bringing joint suit is inadmissible in an action on the common counts, such assignment not being averred in the declaration.—Cilley v. Van Patten, 58 Mich. 404.

¶ 124. A declaration in trespass by the assignee of a right of action for cutting timber on land is fatally defective if it does not set up the assignment.—Gates v. Comstock, 107 Mich. 546.

¶ 125. An assignee declaring in trover need not aver the assignment to himself of the right of action.—Warren v. Dwyer, 91 Mich. 414.

¶ 126. A plaintiff in trover for conversion described himself as "assignee," and the court ruled that he could not recover on proof of a conversion subsequent to the assignment, as the declaration purported to be for a cause of action that had accrued before. Held, error; the term "assignee" is here treated as simply descriptive.—Bloom v. Sexton, 33 Mich. 181.

§ 32. ——Sufficiency of allegations as to assignment.

¶ 127. An assignment may be set forth by its legal import and effect without reference to its form or phraseology.—Martin v. McReynolds, 6 Mich. 70.

¶ 128. The right to sue upon a contract as assignee must be positively averred, and an allegation of the assignment in the consolidated common counts will not support a recovery upon a special count in which it is not averred. Nor would a mere additional allusion to the assignment in the special count be sufficient.—Rose v. Jackson, 40 Mich. 30.

¶ 129. In averring the assignment to plaintiff by a firm of the account sued upon, the individual members comprising the firm need not be specified.—Wyckoff, S. & B. Co. v. Bishop, 98 Mich. 352.

¶ 130. In a declaration by one partner on an account assigned to him by his co-partner for goods sold and delivered by the firm

to defendants, it is sufficient to aver the sale and delivery of the goods, the assignment of the account, defendants' promise to the firm to pay the account, and their failure to pay as agreed either the firm or plaintiff; a promise by defendants to pay plaintiff need not be averred.—Robinson v. Watson, 101 Mich. 406.

¶ 131. A declaration on the common counts by an assignee upon an open account sufficiently avers the assignment when to it are attached the account and the assignment, copies of the papers being served on defendant.—Morrill v. Bissell, 99 Mich. 409.

§ 33. ——Bill of particulars.

¶ 132. A bill of particulars under a declaration on the common counts renders unnecessary a special averment of an assignment in the declaration.—Kelly v. Waters, 31 Mich. 404; Snell v. Gregory, 37 Mich. 500.

¶ 133. In an action on the common counts to recover the price of fruit trees sold and delivered, the admission of evidence of an assignment of the claim is held not error under a statute permitting an assignee to sue in his own name; all needful notice of the nature of the demand may be obtained by a bill of particulars, and an amendment to cure the want of averment of an assignment would be matter of course.—Kelly v. Waters, 31 Mich. 404.

§ 34. Issues and variance.

See also ante ¶ 123.

¶ 134. In trover by an assignee of the owner of the property the question of the extent of the assignee's beneficial interest is rendered immaterial by a charge that the assignee could have no rights different from those of the owner, and would be affected with all his equities.—Hake v. Buell, 50 Mich. 89.

¶ 135. Suit was brought in the name of parties to a written contract for the benefit of assignees of such contract, and was sought to be supported by proof of labor done by the assignees in pursuance of an arrangement between them and the contracting party modifying the terms of the contract, which arrangement was not shown to have been authorized or assented to by the assignors. Held, that the action could not be maintained, as the modified contract was not a contract between the parties to the record.—Litchfield v. Garratt, 10 Mich. 426.

¶ 136. One declaring on an assignment from a consolidated corporation cannot prove and recover on an assignment made by one of the constituent corporations.—Rodgers v. Wells, 44 Mich. 411.

¶ 137. Where an assignee of a chose in action brings suit in his own name he must allege the assignment in his declaration; and as an assignment of a non-negotiable note does not transfer a claim for goods sold and delivered; recovery for articles must be had, if at all, under the appropriate count and not upon the note.—Altman v. Fowler, 70 Mich. 57.

¶ 138. A plaintiff in trover for conversion described himself as "assignee," and the court ruled that he could not recover on proof of a conversion subsequent to the assignment, as the declaration purported to be for a cause of action that had accrued before. Held, error; the term "assignee" is here treated as simply descriptive.—Bloom v. Sexton, 33 Mich. 181.

¶ 139. A declaration based upon an assignment of choses in action alleged to have been made by certain specified persons as co-owners does not support a claim of title based on a finding that the assignment was made by one of them in the name of a firm composed of both, after the other had withdrawn from the partnership.—Seeley v. Albrecht, 41 Mich. 525.

¶ 140. It is immaterial whether recovery might have been had by an assignee on a quantum meruit, where one who under a contract had sawed and piled lumber for another, assigned all his "right, title, and interest in, to, and under the contract" to plaintiff, and in an action by the latter to recover what was due on the contract the verdict represented the full contract sum less recoupment noticed and proved by defendant.—Reynolds v. Sweet, 104 Mich. 252.

¶ 141. A judgment in favor of the assignee of an account is valid if not appealed from, though proof of the assignment was admitted without an averment of such fact in the declaration.—Webster v. Williams, 69 Mich. 135.

§ 35. Burden of proof and evidence.

For the law of evidence as applied to the various contracts or liabilities passing under the assignment, see specific topics treating of such contract, tort or chose in action, e. g., Contracts; Conversion; Insurance. It is not intended to place here anything but evidence relating peculiarly to the assignment.

For the general law of evidence, whether on the issue of assignment or not, see Evidence.

Presumption on appeal as to assignability of cause sued on, see Appeal, ¶ 1533.

Presumption of assignment or other transfer from fact of possession, see Evidence, II.

¶ 142. One claiming by assignment from the successor corporation a claim for unpaid subscriptions due the predecessor must show that the requisites of a consolidation were substantially complied with, or he cannot recover the claim.—Rodgers v. Wells, 44 Mich. 411.

¶ 143. In an action on an assigned contract the consideration for the assignment cannot concern the defense, and the introduction of testimony which would suggest superior equities in a bona fide purchaser of the claim would mislead.—Seligman v. Ten Eyck's Estate, 49 Mich. 104.

¶ 144. An assignment from one joint promisee to another is not made out by the former's testifying on trial of a suit solely brought by the latter that he was willing the latter should so sue.—Howe v. Hyde, 88 Mich. 91.

ASSIGNMENTS FOR CREDITORS.

TREATS of assignments by debtors of their property to another for the purpose of paying the debts out of the property or its proceeds. Mortgages or trusts for the benefit of creditors, but not amounting to assignments for creditors, are treated in other topics which are referred to throughout the body of this topic; but see particularly Trusts; Mortgages; Chattel Mortgages. Bankruptcy is treated in a topic of that name; insolvency of corporations in Corporations, XXIII; and settlement of insolvent decedent's estates in Estates of Decedents.

Analysis.

§ 1. Nature, requisites and validity in general.
§ 2. Right or duty to assign.
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§ 22. Administration of estate, sales and disposal.
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§ 31. Compensation, expenses and allowances.
§ 32. Liability of assignees, and sureties on bond.
§ 33. Rights under invalid assignment.
§ 34. ——Right to question validity.
§ 35. Partnership and corporation assignments.
§ 36. Actions and suits.
§ 37. ——Bar or abatement of actions pending assignment.
§ 38. ——Supervisory jurisdiction of chancery.
§ 39. ——Petition or bill by creditors in aid of assignment.
§ 40. ——Suits to avoid levies or transfers of property.
§ 41. ——Pleading assignment and debt.

§ 1. Nature, requisites and validity in general.

[Note. A common-law assignment does not have the same effect on the rights of the parties as a statutory assignment. The distinctions are pointed out in the various paragraphs throughout the topic. It is impracticable to differentiate them in separate section lines without inviting confusion.]

Requisites of the assignment deed, see post § 4 et seq.

Acknowledgment, delivery and recording, see post § 5.

Transfers and incumbrances amounting to common-law assignments, see post §§ 11, 12.

Effect of preferences, hindrance, coercion, or fraud, see post §§ 9-16.

Necessity that assignee actively assume trust, see post § 17.

Rights under invalid assignment, see post § 33.

Right of creditors to waive invalidating provisions, see post § 34.

Bankruptcy and proceedings under or in respect of the Federal Bankruptcy Law, and effect on pending assignments, see Bankruptcy.

Trusts for creditors not amounting to general assignments, see Mortgages; Chattel Mortgages; Trusts.

Assignment as withdrawing offer of contract, see Contracts, III, A.

¶ 1. An assignment of all one's assets to an assignee for the benefit of creditors is within the definition of a general assignment. —Kendall v. Bishop, 76 Mich. 634.

¶ 2. A chattel mortgage does not constitute per se a common-law or other assignment for the benefit of creditors.—Wineman v. Fisher Elec. Mfg. Co., 118 Mich. 636.

¶ 3. Where a corporation conveys by mortgage all its property to trustees to pay all its creditors, the transaction is an assignment for benefit of creditors.—Wheeler v. Ocker & Ford Mfg. Co., 162 Mich. 204.

¶ 4. If an assignment contains illegal provisions it is absolutely void; and the statute which makes fraud a question of fact has no application to the case.—Pierson v. Manning, 2 Mich. 445.

¶ 5. Where an assignment for the benefit of creditors was in full harmony with the act of 1879 (How. St., §§ 8739-8749), the fact that it purported to refer to the void statue of 1883 (How. St., §§ 8749a-8794l) did not defeat it so long as it was not repudiated or set aside by the assignor, who was bound to know the law.—Gott v. Hoschna, 57 Mich. 413.

¶ 6. A bill of sale of a portion of a debtor's property held not a statutory assignment for the benefit of his creditors under ch. 260, Comp. Laws 1897, § 14165 et seq., How. St., 2nd Ed., where no bond or inventory was filed with the county clerk as the statute requires.—Youghioghney & Ohio Coal Co. v. Anderson, 186 Mich. 349.

§ 2. Right or duty to assign.

Assignment as condition of discharge under Fraudulent Debtors' Act, see Civil Arrest and Bail.

¶ 7. The right to make a general assignment of all a man's property results from that absolute ownership which every man claims over what is his own. Every debtor has a legal right to assign property for the security of debts due by him.—Cook v. Rogers, 31 Mich. 391.

¶ 8. Any person, whether insolvent or not, may legally execute a conveyance of his property to a trustee or assignee to pay his indebtedness, if he have any, and such assignment will be valid, unless creditors can successfully attack it upon the ground of being made with intent to hinder, delay and defraud them.—Munson v. Ellis, 58 Mich. 331.

¶ 9. There is no law in this state that compels one to assign for the benefit of his creditors.—Austin v. First Nat. Bank, 100 Mich. 613.

¶ 10. There is no law compelling a debtor to make an assignment for the benefit of his creditors.—Sheldon v. Mann, 85 Mich. 265.

§ 3. ——Insolvency as condition.

See also post ¶ 94.

¶ 11. An assignment is not void merely because the assets as shown by the inventory far exceed the debts, since a person may be insolvent though his assets exceed his liabilities.—Munson v. Ellis, 58 Mich. 331.

§ 4. The instrument of assignment.

Assignment referring to invalid statute, see ante ¶ 5.
Requisites and terms of instrument, see post §§ 5-8.
Acceptance and assumption of trust by assignee, see post § 17.

¶ 12. The scope of an assignment must be gathered from the whole instrument; no single clause is conclusive.—Price v. Haynes, 37 Mich. 487.

¶ 13. An assignment for the benefit of creditors or by way of security will be regarded as honest and lawful, if possible, and will not be adjudged fraudulent as a conclusion of law drawn from its form unless that construction is necessary.—Palmer v. Mason, 42 Mich. 146.

¶ 14. An assignment to be valid must definitely fix the rights of the parties beneficially interested, leaving nothing subject to the future direction or control of the assignor. —Pierson v. Manning, 2 Mich. 445.

§ 5. ——Delivery, acknowledgment and recording.

Bond and the filing thereof, see post § 17.
Approval of bond and indorsement thereof, see post § 17.
To defeat intervening attachment, see post § 26.
Effect on priorities of creditors, see post § 23.
General law of acknowledgments, see Acknowledgments.
Statutory provisions, see Jud. Act, Chap. XLII, § 1; Comp. L. 1915, § 13604.

¶ 15. How. St., § 8739, which prescribes how assignments for the benefit of creditors shall be made, and requires that no preferences shall be given, makes it necessary to their validity that they shall be acknowledged and filed with a proper inventory and bond, within ten days after the making, in "the office of the clerk of the circuit court of the county where the assignor resides," or in case of nonresidence, in the county of the assignee, if a resident. Other action of the assignees must be filed in the same office. —Scott v. Wayne Circuit Judges, 58 Mich. 311.

¶ 16. The failure of an assignee for the benefit of creditors to file with the county clerk the original assignment or a duplicate thereof, an inventory of the assigned property, a list of creditors of the assignor, and a bond for faithful performance, duly approved by the clerk, within ten days after the making of the assignment, as required by 3 How. St., § 8739, renders the proceedings invalid.—McCuaig v. City Sav. Bank, 111 Mich. 356.

¶ 17. The filing with the county clerk of a document purporting to be a "copy" of an assignment for the benefit of creditors is not a compliance with 3 How. St., § 8739, requiring the assignment itself, or a "duplicate" thereof, to be so filed.—McCuaig v. City Sav. Bank, 111 Mich. 356.

¶ 18. A storekeeper in Western Michigan executed an assignment for the benefit of creditors to a member of a Detroit firm to which he was indebted, the latter having previously agreed to settle up his business for him in case he had to suspend. The storekeeper delivered the assignment to an agent of the firm, who left him in possession, notified his principals by telegraph, and took the assignment to Detroit, where he delivered it next day to the partner named as assignee, who was out of town when he arrived, but who, on returning and receiving it, immediately indorsed his acceptance and set out to take possession. But on the day when the assignment was executed, after the agent had left the place, an attachment was levied on the debtor's goods by another creditor. In view of the previous understanding and the representative character of the agent, it was held that the assignment, being unconditional, took effect as soon as the agent started for Detroit, and it was beyond the assignor's control, and that it was sufficiently perfected by acceptance and delivery to defeat the levy.—Stamp v. Case, 41 Mich. 267.

¶ 19. An assignment for the benefit of creditors is not avoided by a subsequent attachment levied before the assignment could be put on record.—Palmer v. Mason, 42 Mich. 146.

§ 6. ——Schedules and description.

Schedule showing solvency, effect on assignment, see ante ¶ 11.
Bill of sale without inventory as assignment, see also ante ¶ 6.
Effect of reservations, omissions and preferences, see post §§ 9-12.
As measuring the property which passes, see post § 19.

Words necessary to pass fee, see post ¶ 139.
Sufficiency to include realty, see also post ¶ 140.
Inventory and list of creditors, see Jud. Act, Chap. XLII, § 1; Comp. L. 1915, § 13604.

¶ 20. A schedule detailing at large the property conveyed is not necessary to the validity of an assignment.—Hollister v. Loud, 2 Mich. 309; Nye v. Van Husan, 6 Mich. 329; Stamp v. Case, 41 Mich. 267.

¶ 21. An assignment for the benefit of creditors, if in terms that would clearly transfer the title to all the debtor's property, is not invalid for want of a schedule.—Coots v. Chamberlain, 39 Mich. 565.

¶ 22. A clause reserving to the assignors power to perfect the schedules attached to the assignment does not impair or restrict the instrument itself.—Nye v. Van Husan, 6 Mich. 329.

¶ 23. An assignment which clearly manifests an intention on the part of the assignors to transfer all their property to the assignees, and that it shall have immediate operation, will have that effect, though to the general terms describing the property are added the words, "as the same is more particularly described in a schedule proposed to be hereafter annexed," and which schedule is not annexed. —Nye v. Van Husan, 6 Mich. 329.

¶ 24. The necessity or effect of a schedule, if one is referred to in an assignment, is to be determined by the intent of the parties as gathered from the whole instrument, and which, when ascertained, is to govern in the construction of assignments as in the case of other written instruments.—Nye v. Van Husan, 6 Mich. 329.

¶ 25. The following description of lands in an assignment, viz.: "Fourteen and a half lots of land in Kankakee city, Kankakee county, Illinois, valued at $5,400; two-sevenths of sixteen hundred acres of land in Green county, Illinois, at $2,500, and one hundred and twenty acres of land in Chickasaw county, Iowa, valued at $600," held too uncertain and vague to make the assignment operate as a transfer of title, at least without clear evidence that the assignor owned certain lands in the city or counties named which might fall within the description used, and that these were the only lands owned by them in such places.—Ryerson v. Eldred, 18 Mich. 12.

§ 7. ——Term of trust, and powers and duties.

¶ 26. It is no objection to an assignment that no time is limited for closing the trust. —Hollister v. Loud, 2 Mich. 309.

¶ 27. Where, in a voluntary assignment for the benefit of creditors, it is provided that the assignees shall proceed to sell the property and pay the debts within such time as to them shall seem meet, this does not render the assignment void, but puts the execution of the trust under the control of the court of chancery, which will compel the assignee to use reasonable diligence.—Hollister v. Loud, 2 Mich. 309; but see Sutton v. Hansford, 11 Mich. 513.

¶ 28. A clause in an assignment, by which the assignors nominate and appoint the assignees, "their executors, administrators, or assigns, their or each of their true and lawful attorneys, irrevocable, with full power and authority to do and perform all acts, matters or things which can or may be necessary in the premises, as fully and completely as the said assignor might or could do were these presents not executed; and attorney one or more under them to make, nominate and appoint, as they may deem necessary, with full power of substitution and revocation," etc., does not confer upon the assignees the power to delegate their trust, and is proper and unobjectionable.—Nye v. Van Husan, 6 Mich. 329.

¶ 29. A clause in an assignment authorizing the assignees to "sell and dispose of the" assigned property, "either at public or private sale, as they in their judgment may deem best, and upon such terms and conditions as they may deem most advisable, and for the best interests of the creditors, converting the same into money," etc., is not objectionable. It will not be considered as conferring a power to sell upon credit.—Nye v. Van Husan, 6 Mich. 329; Booth v. McNair, 14 Mich. 19.

¶ 30. A general assignment is not invalid because it authorizes the assignee to compromise bad debts and submit disputes to arbitration.—Watkins v. Wallace, 19 Mich. 57.

§ 8. ——Name or form of instrument.

¶ 31. Whether an instrument is a general assignment depends on its character, and not on the name which parties see fit to give it.—Kendall v. Bishop, 76 Mich. 634.

¶ 32. An instrument that purports to give a security by way of mortgage, and that does not show an intention to make an absolute conveyance of the property described therein, cannot be declared upon its face to be a common-law assignment.—Fitzgerald v. McCandlish, 89 Mich. 400.

¶ 33. A conveyance by bill of sale of all one's property as security for a debt, no creditor save the grantee being named in the instrument or provided for by outside agreement, cannot be construed as a general assignment for the benefit of creditors.—Canfield v. W. J. Gould & Co., 115 Mich. 461.

¶ 34. A man gave an indemnity mortgage to his two brothers, and another mortgage to one of them to secure some notes, and on the same day he confessed judgment in their favor severally for the amounts. The sheriff afterwards sold the mortgaged property in bulk under these executions to one of the brothers, subject to certain sums remaining due on the mortgages. Held, that these multifarious dealings cannot be treated as an assignment, joint or otherwise.—Rollins v. Van Baalen, 56 Mich. 610.

§ 9. Preferences and reservations.

See also ante ¶ 14, post ¶¶ 64, 65, 66.
Reservation of power to perfect schedule, see also ante ¶ 22.
Reservation of exempt property and that already disposed of, see post § 10.
Effect of preferential intent to make mortgages operate as common-law assignments, see post § 12.
Hindrance to creditors as invalidating assignment, see post § 13.
Priorities of creditors among themselves, see post § 23.
Who entitled to complain, see post § 34.
Right of creditors to waive invalidity, see post § 34.
Preference of individual debts on firm assignment, see post § 35.
Right to select exemptions reserved in general terms, see post § 19.
Right of assignee to reduce outstanding or concealed property to possession, see post § 20.
Preferences or reservations making conveyances fraudulent as to creditors, see Fraudulent Conveyances.

¶ 35. Preferences in common-law assignments are void only because forbidden by statute.—Dwight v. Scranton & Watson Lumber Co., 67 Mich. 507; Sheldon v. Mann, 85 Mich. 266.

¶ 36. A debtor in assigning for the benefit of creditors may make preferences if there is no statute forbidding it.—How v. Camp, W. 427 (wherein individual creditors were preferred to firm creditors); Town v. Bank of River Raisin, 2 D. 530 (where a corporation assigned with preferences).

¶ 37. An assignment for the benefit of creditors, executed prior to the passage of the statute regulating the making of such assignments, which prefers creditors without naming them either in the body of the assignment or in a schedule annexed at the time of its execution, is void upon its face as to nonconsenting creditors.—Wolf v. O'Conner, 88 Mich. 124, reversing 83 Mich. 301.

¶ 38. One cannot assign to a trustee for creditors unless he assigns all of his property, and he must not in such case prefer creditors, and, if he does, his attempt will be a failure regardless of his intentions.—Austin v. First Nat. Bank, 100 Mich. 613.

¶ 39. An assignment is fraudulent if property is withheld that should be put into it, and if the assignors give away or place excessive liens on property that should not be so disposed of.—Hubbard v. McNaughton, 43 Mich. 220; Farrington v. Sexton, 43 Mich. 454.

¶ 40. An assignment to be valid must definitely fix the rights of the parties beneficially interested, leaving nothing subject to the future direction or control of the assignor. If it provides for a part only of the creditors, and makes no provision for the application of the surplus, if any, the assignment is void as to the creditors not provided for, since at law such surplus would revert to the assignor, and the assignment consequently contains a resulting trust for his benefit before all the creditors are paid.—Pierson v. Manning, 2 Mich. 445.

¶ 41. A voluntary assignment, purporting to be general, is void if it does not fairly and in good faith assign all of the assignor's property that is liable for the payment of his debts.—Smith v. Mitchell, 12 Mich. 180.

¶ 42. An assignment is void if it does not include the assignor's real estate.—Price v. Haynes, 37 Mich. 487.

¶ 43. An assignment is not necessarily to be held fraudulent and void because some small portion of the assets was withheld from the assignee. If the assignment is legal on its face and the assignee is acting in good faith, he may by proper remedies pursue and recover anything wrongfully retained from him.—Parsell v. Patterson, 47 Mich. 505.

¶ 44. A general assignment that is broad enough in its terms to cover any property belonging to the assignor is nevertheless invalid if property is secretly kept back from the assignee and used for private purposes, and no authority is given to the assignee to take measures to set aside fraudulent transfers.—Farrington v. Sexton, 43 Mich. 454.

¶ 45. The fact that the assignors were allowed by the assignees to occupy premises conveyed by the assignment during a period when such property was not usually rented, the assignees in the meantime taking the crops, and expressing their intention to charge the assignors a fair rent, cannot, in the absence of any understanding that he should occupy them free of rent, be urged as evidence of a secret trust on behalf of the assignor.—Hollister v. Loud, 2 Mich. 309.

¶ 46. An assignment containing a clause that provides that the real estate shall not be sold by the assignees until all the personal property and assets shall be exhausted, unless with the consent of the assignor, not being an unconditional assignment, is therefore fraudulent and void in law as against creditors not preferred or not provided for in the assignment.—Pierson v. Manning, 2 Mich. 445.

¶ 47. In Comp. L. 1897, § 9539, where an assignment for creditors is made void if there be preference and failure to include all the debtor's property, the language used is technical, and under Comp. Laws 1897, § 50, is to be so construed, and the assignment referred to includes only the technical common-law assignment for the benefit of creditors.—Charles Maloney & Co. v. Gonhue, 152 Mich. 325.

¶ 48. Pub. Acts 1883, Act No. 193 (How. St., §§ 8749a-8749l), the purpose of which was to prevent preferences among creditors and to distribute the debtor's property equally, is inoperative, since it fails to provide for notice to parties concerned, for any record of the proceedings and review thereof, and for any means of giving effect to its provisions.—Risser v. Hoyt, 53 Mich. 185.

§ 10. ——Omission of exempt or previously transferred property.

See also post ¶ 58.

Allowing other creditors benefit of reduction of secured debt to which exemptions were applied, see post ¶ 191.

¶ 49. It is no objection to the validity of an assignment that the assignor reserved from it such property as was by law exempt from levy and sale on execution.—Hollister v. Loud, 2 Mich. 309; Rosenthal v. Scott, 41 Mich. 632.

¶ 50. When an assignment for the benefit of creditors limits the transfer to property "which might be reached or recovered by any of the creditors of the" assignee, it sufficiently excludes such property as would be exempt by law.—Chandler v. Jenks, 50 Mich. 151.

¶ 51. An assignment is not void on its face for excepting property exempt from execution without specifying it. A bona fide selection is as practicable here as under a levy.—Smith v. Mitchell, 12 Mich. 180.

¶ 52. An assignment set forth that certain property subject to specific claims of particular creditors was not assigned, and provided that these creditors would only be entitled to the benefits of the assignment if they surrendered their securities to the assignee. Held, that the express omission of this property from the assignment did not necessarily make it invalid.—Henry v. Root, 38 Mich. 371.

¶ 53. Payments of bona fide debts, or mortgages to secure them, made to persons having no knowledge of a contemplated assignment, are valid. How. St., § 8739, does not apply to preferences not made by the general assignment itself and not a part of the same transaction therewith, but prior to it.—Root v. Potter, 59 Mich. 498; Charles Root & Co. v. Harl, 62 Mich. 420; Sweetzer v. Higby, 63 Mich. 13; Field v. Fisher, 65 Mich. 606; Dwight v. Scranton & Watson Lumber Co., 67 Mich. 507.

¶ 54. The assignee is not authorized to recover a payment made by way of preference to a bona fide creditor before the assignment, nor to attack the validity of a mortgage given to secure payment of such debt.—Dwight v. Scranton & Watson Lumber Co., 67 Mich. 507.

¶ 55. A conveyance of real estate does not invalidate an assignment made the next day, if it was a complete and independent transaction, done without contemplating an assignment; and it is for the jury to determine whether it was or not.—Coots v. Chamberlain, 39 Mich. 565.

§ 11. Instruments or transfers amounting to preferential assignments.

Immateriality of name given to instrument of assignment, see ante § 8.

Bill of sale as assignment, see also ante ¶ 33.

¶ 56. Conveyances are not within the invalidating provisions of How. St., § 8739, relating to common-law assignments of a preferential nature, unless there is about them something in the nature of a common-law assignment to be attacked; the statute does not apply to a case where there are many instruments of different kinds, running to different persons and executed at different times, and where all the property was not covered by instruments.—Webber v. Hayes, 117 Mich. 256.

¶ 57. Where attaching creditors seek to show that instruments executed by their debtor to secure other creditors legally transfer an absolute title in trust for their benefit, they must show prima facie an assignment valid upon its face to convey the absolute title to the trustee, before they can demolish it for its preference of said particular creditors.—Austin v. First Nat. Bank, 100 Mich. 613.

¶ 58. A transfer of all one's property except his homestead, most of it to his sons, to whom he claimed to be indebted to pay

their claim and to pay five other creditors, who are not consulted with reference thereto, is in effect an assignment for the benefit of creditors; and, if any are excluded, is void for preferences. It is not merely a preferential payment by transfer of property.—Hill v. Mallory, 112 Mich. 387.

¶ 59. The fact that an instrument designed to secure a debt covers all the debtor's property, the value whereof greatly exceeds the debt secured, does not render it a common-law assignment where the right of redemption is not withdrawn.—Warner v. Littlefield, 89 Mich. 329.

¶ 60. Where a debtor assigns a certain claim to one creditor, with an oral understanding that the latter is to pay himself and certain other creditors out of it, and the assignment did not, and was not intended to, include all creditors and all property, it is not within Comp. Laws 1897, § 9539, making assignments void by reason of preference or failure to include all the debtor's property.—Charles Maloney & Co. v. Gonhue, 152 Mich. 325 (Montgomery, J., dissenting).

¶ 61. A bill of sale, given in payment of bona fide indebtedness and not purporting to cover, or in fact covering, all of the debtor's property, cannot be construed into an assignment for the benefit of creditors so as to be declared void for an unlawful preference. So held where a merchant gave a bill of sale to his brother of all his property except a city lot with a store and dwelling-house thereon, worth not to exceed $2,400 and mortgaged for $900, and which was occupied by the debtor as a homestead.—Bresson v. Musselman, 86 Mich. 186.

¶ 62. Under How. St., §§ 6184, 8739, a conveyance to a trustee to sell the property of a corporation and apply the proceeds to pay its indebtedness, and providing that a certain creditor be paid first and for the payment of compensation to the trustee after the payment of unsecured debts, had the effect of an assignment for the benefit of creditors, and was void for making preferences.—Conely v. Collins, 119 Mich. 519.

¶ 63. An instrument not purporting to convey all of the property of a debtor but only a specific merchandise stock (lumber yard) "in trust" for the payment of named creditors, and not authorizing the grantee to operate the business, but only to take possession on default of the grantor, who was left in possession and accountable for proceeds of sales, is not an assignment for creditors.—Belding-Hall Mfg. Co. v. Smith, 125 Mich. 54.

¶ 64. An insolvent's transfer to trustees to secure bona fide secured debts, cannot be assailed as a preferential assignment for creditors by unsecured creditors, where the property received by the trustees was not in excess of the amount of the secured debts.—City Savings Bank of Detroit v. Brown, 129 Mich. 377.

¶ 65. A trust deed for the payment of sums among others of money in specified sums to be advanced for the purpose of facilitating the conduct of the business by the trustee under a mortgage is not rendered preferential by reason of the fact that the money had not been paid to the mortgagor at the time, where it was put into the business producing augmented assets in which the creditor asserting the preference had no equity.—City Savings Bank of Detroit v. Brown, 129 Mich. 377.

¶ 66. Under How. St., § 8739, providing that all "assignments, commonly called 'common-law assignments,' for the benefit of creditors, shall be void, unless the same shall be without preferences as between such creditors, and shall be of all the property of the assignor not exempt from execution," a conveyance by which a debtor conveys his real property in trust as security for pre-existing debts, in the order named, and gives the trustees power of management, sale, disbursement of proceeds, and for payment of surplus, if any, to the grantor or to such person as he shall direct, and does not prevent the debtor from redeeming or place any surplus beyond the reach of creditors, is not a common-law assignment, but a mere security for the creditors named.—Ontario Bank of Toronto, Canada v. Hurst, 103 Fed. 231.

§ 12. ——Mortgages and chattel mortgages.

See also ante ¶ 8.
Trusts not amounting to general assignments, see Chattel Mortgages; Mortgages; Trusts; Fraudulent Conveyances.
Effect of chattel mortgage per se, see ante ¶ 2.
Corporate mortgage, see ante ¶ 3.
Evidence as to intended character, see also post ¶ 123.
Validity of mortgages and chattel mortgages in general, see Chattel Mortgages, I; Mortgages, III; Fraudulent Conveyances.

¶ 67. If the instrument by which property in chattels is transferred vests absolute title without redemption in a trustee for the creditors and thus takes it beyond the reach of other creditors and of the mortgagor, it is a common-law assignment and not a mortgage.—Warner v. Littlefield, 89 Mich. 329.

¶ 68. A chattel mortgage executed contemporaneously with an assignment for the benefit of creditors, and designed to give the mortgagees a preference, must be regarded as one transaction with the assignment, and is void under How. St., § 8739.—Burnham v. Haskins, 79 Mich. 35.

¶ 69. A mortgage given to secure a bona fide indebtedness is not invalid by reason of its proximity to a general assignment by the mortgagor for the benefit of creditors, where the mortgagee, at the time of taking the security, had no notice or knowledge that an assignment was contemplated. Such a transaction does not constitute an illegal preference within the meaning of the assignment law.—Kalamazoo Spring Axle Co. v. Winans, Pratt & Co., 106 Mich. 193.

¶ 70. The facts that an instrument, in form a trust mortgage, covered property scarcely adequate to pay the indebtedness secured, and gave authority to the trustee to take possession if he should deem the creditors insecure, and that the makers were insolvent at the time of its execution, have no tendency to show that the instrument was intended to operate as a common-law assignment.—Beckman v. Noble, 115 Mich. 523.

¶ 71. A mortgagor's intent to evade the prohibition of preferences in the assignment law by executing a mortgage to secure a bona fide debt in anticipation of and contemporaneous with the assignment does not defeat the security where the mortgagee is innocent of any such intent and does not knowingly participate therein.—Dwight v. Scranton & Watson Lumber Co., 67 Mich. 507.

¶ 72. The character of a transfer in trust for the payment of creditors of the transferor, whether it be a mortgage or an assignment for creditors, cannot depend upon what the trustee does after he takes possession of the property. If he does things which the instrument gives him no authority to do, it will be at his peril, but the rights of creditors cannot be lost by his notion of his powers.—Austin v. First Nat. Bank, 100 Mich. 613.

¶ 73. Provisions in a chattel mortgage that the mortgage shall be void upon the mortgagor's paying the mortgage debts within ten days from its date, authorizing the mortgagee to take immediate possession, empowering him to collect, settle, or compromise all of the demands, etc., covered by the mortgage, to insure the property, to gather the property, to realize as much as possible from that part of the property saved from fire, and to expend what is necessary for care, preservation and repair, do not make the title absolute in the mortgagee, which is necessary to constitute the mortgage an assignment for creditors, and voidable for being preferential.—Austin v. First Nat. Bank, 100 Mich. 613.

¶ 74. A chattel mortgage given to a trustee to secure certain creditors which authorizes the trustee to take possession of the mortgaged property forthwith, and, in addition to the usual power of sale, provides that, if he shall deem it more advantageous to sell the property, or any part thereof, at private sale or in the usual course of trade, he may do so, applying the proceeds to the liquidation of the mortgage indebtedness, does not vest any actual title in the mortgagee, and is not inconsistent with the right of the mortgagor, or his creditors who may acquire liens, to redeem at any time, and hence does not amount to a general assignment with preferences.—Cluett v. Rosenthal, 100 Mich. 193.

¶ 75. An insolvent debtor conveyed all of his real estate, except his homestead, to a firm to which he was indebted in a large amount, and at the same time executed to a member of the firm, as trustee for certain specified creditors, a chattel mortgage covering all of his personal property. This mortgage made no provision for the return of any surplus to the mortgagor. Held, that the instruments did not constitute an assignment for the benefit of creditors void because preferential.—McMorran v. Moore, 113 Mich. 101.

¶ 76. Simultaneous mortgages payable on demand, given to secure good-faith indebtedness and not purporting to cover, nor in fact covering, all of the debtor's property, cannot be construed as an assignment for the benefit of creditors so as to be declared void for preferences.—Sheldon v. Mann, 85 Mich. 265.

¶ 77. The validity of simultaneous mortgages, payable on demand, given to secure good-faith indebtedness, and not purporting to cover all the debtor's property, is not affected so as to be construed a general assignment for creditors by mortgages subsequently given to secure other creditors.—Sheldon v. Mann, 85 Mich. 265.

¶ 78. The fact that the mortgagee is not a creditor of the mortgagor, and that the mortgage is executed in trust to secure certain specified creditors the amount of their several claims, does not give the instrument the character of a common-law assignment.—Warner v. Littlefield, 80 Mich. 329.

¶ 79. Mortgages of real and personal property, together with a subsequent parol agreement that the mortgagee should sell the property before the maturity of the debt secured, do not amount to an assignment for creditors void because preferential.—National Bank of Oshkosh v. First Nat. Bank, 100 Mich. 485.

¶ 80. An arrangement between a mortgagor and various mortgagees whereby all the property covered by the mortgages was transferred to one of the mortgagees who assumed payment of the mortgages, the debtor being released from his obligations, held

not to be an assignment for creditors void because of preferences.—McCann v. Dillabaugh, 117 Mich. 446.

¶ 81. A common-law assignment void for preference is not made out by showing a mortgage to certain creditors of substantially all of the corporate property, a bill to foreclose filed on the same day and consent by the corporation to the appointment of receivers with power to continue the business, which was done for a short time when the entire property was sold to a new corporation by the receiver acting under orders of the court.—Longley, Low & Alexander v. Amazon Hosiery Co., 128 Mich. 194.

¶ 82. When an insolvent, at her own instance and convenience, voluntarily gives two of her creditors security for debts by chattel mortgage on a stock of merchandise, and, seven days later, and two hours after recording of the mortgages, makes an assignment for creditors, the conclusion is justified, in the absence of other controlling circumstances, that both were contemplated, and they should be deemed in law one transaction, and the preferences alone declared void and the trust arising from the assignment enforced, under How. St., § 8739, providing "that all assignments, commonly called common-law assignments, for the benefit of creditors, shall be void unless the same shall be without preferences as between such creditors," and How. St., § 8744, providing that in "case there shall be any fraud in the matter of said assignment, or in the execution of said trust, * * * any person interested may file his bill * * * for the enforcement of said trust, and the court, in its discretion, may appoint a receiver therein."—Kellogg v. Root, 23 Fed, 525.

¶ 83. Mortgages executed by a debtor to a trustee for the benefit of certain specified creditors, and which are evidently an assignment of all of his property with intent to prefer the beneficiaries, are void as to the unsecured creditors.—Atkinson v. Weidner, 79 Mich. 575.

¶ 84. A mortgage by an insolvent debtor to part of his creditors is not within How. St., § 8739, avoiding all assignments for benefit of creditors, unless free from preferences.—Warren v. Dwyer, 91 Mich. 414.

¶ 85. Chattel mortgages given by an insolvent debtor to a particular person in trust for certain of his creditors are not void as a common-law assignment preferring creditors.—Weber v. Childs, 90 Mich. 498.

¶ 86. A trust chattel mortgage providing that only those creditors of an insolvent mortgagor who accepted in writing the terms of the mortgage and who agreed to take a pro rata payment in full satisfaction of their claims, should share in the proceeds of the incumbered chattels, is void under § 9533, Comp. L. 1897, § 11417, How. St., 2nd Ed., as tending to hinder and delay creditors.—Brown, Eager & Hull Co. v. Mosier, 187 Mich. 55.

¶ 86a. Instruments in the ordinary form of chattel mortgages and given in good faith to secure pre-existing indebtedness of certain creditors of an insolvent corporation, are not invalid under How. St., § 8739, providing that "all assignments commonly called common-law assignments for the benefit of creditors shall be void unless the same shall be without preference as between such creditors, and shall be of the property of the assignor not exempt from execution."—Brown v. Grand Rapids Parlor Furniture Co., 58 Fed. 286.

¶ 87. Where a board of directors had by resolution authorized a chattel mortgage upon all the company's property to be given to a trustee, the instrument executed was held void because not such as the directors had authorized, and also void as being an assignment with preferences, as giving the surplus to the debtor before paying all debts, and as being a transfer in trust for grantor's use, contrary to How. St., § 6184.—Kendall v. Bishop, 76 Mich. 634, explained in Wolf v. Slosson, 83 Mich. 543.

¶ 88. A mortgage cannot be held to constitute an assignment for the benefit of creditors when, having been executed by an insolvent corporation to secure certain creditors, it does not appear that the officers of the corporation proposed to make a general assignment thereafter, or that the creditors secured by it had any knowledge of any such purpose, and where the mortgage does not by its terms create any trust or provide for any transfer for any other purpose than to secure the payment of honest debts.—Bank of Montreal v. Potts Salt & Lumber Co., 90 Mich. 345.

¶ 89. A mortgage of substantially all of the property of a corporation to secure certain creditors is not a common-law assignment and not void because of a preference.—Longley, Low & Alexander v. Amazon Hosiery Co., 128 Mich. 194.

¶ 89a. A chattel mortgage cannot properly be given under an arrangement by which it is to fall due at once and be foreclosed, and the property is to be placed in charge of a receiver, who is to manage it, to the exclusion of other creditors. Such a course would amount to creating, by means of the mortgage and a court order, a trust which would be invalid if made by an assignment.—Merchants' & Manufacturers' Nat. Bank v. Kent Circuit Judge, 43 Mich. 292.

§ 13. Hindrance or coercion of creditors.
Preferences and reservations, see ante § 9.
Fraudulent hindrance extraneous to the instrument of assignment, see post § 14.

¶ 90. If an assignment be so drawn that it must, in its execution, tend to hinder or delay creditors unprovided for by it in the collection of their demands, the legal presumption is that it was drawn with that intent.—Pierson v. Manning, 2 Mich. 445.

¶ 91. A general assignment is invalidated by a clause purporting to bind the creditors to agree to it and release their claims in full and discharge the assignor from all liabilities as soon as their just proportion of the proceeds is paid to them.—Hubbard v. McNaughton, 43 Mich. 220.

¶ 92. A clause authorizing the assignee to sell the assigned property on credit renders the assignment void.—Sutton v. Hanford, 11 Mich. 513; Ryerson v. Eldred, 18 Mich. 12.

§ 14. Fraud extrinsic to the instrument; motive.
Construction against fraud, see also ante ¶ 13.
Who may complain, see post § 34.
Intrinsic frauds apparent by terms of the instrument, see ante §§ 9, 10, 13.
Rule as to fraudulent conveyances generally, see Fraudulent Conveyances.

¶ 93. General assignments are not exempted from the consequences of actual fraud that has any tendency to hinder, delay or defraud creditors.—Farrington v. Sexton, 43 Mich. 454.

¶ 94. The mere fact of the solvency or insolvency of one who has made a general assignment, or his belief in the one or the other, does not necessarily render the assignment void. Without any fraudulent intent in either case it would be valid, and with a fraudulent intent it would be void in both cases alike.—Angell v. Rosenbury, 12 Mich. 241.

¶ 95. The fraudulent character of an assignment does not depend on the assignor's opinion that what he does is not fraud in law.—Hubbard v. McNaughton, 43 Mich. 220.

¶ 96. That it hinders, delays or obstructs creditors does not render an assignment void for fraud. To render it so it must have been made with that intent.—Hollister v. Loud, 2 Mich. 309.

¶ 97. It is no objection to the validity of an assignment that it was made in anticipation by both parties of the immediate issuing of attachments against the property of the assignor.—Hollister v. Loud, 2 Mich. 309.

¶ 98. The subsequent fraudulent acts of the assignor, unknown to the assignee, cannot change the character of the assignee's title, or make that fraudulent which was originally honest.—Baldwin v. Buckland, 11 Mich. 389.

¶ 99. That the assignment was made by an embarrassed debtor to prevent a sacrifice of his property does not necessarily render it void.—Angell v. Rosenbury, 12 Mich. 241.

¶ 100. Where the assignment substantially fulfils its ostensible purpose it may well be supported, though the assignors have failed to treat the assignee with entire fairness and frankness.—Parsell v. Patterson, 47 Mich. 505.

§ 15. ——Burden of proof and presumptions.

¶ 101. One who attacks a security as a fraudulent preference under the assignment law has the burden of establishing his claim. —Sweetzer v. Higby 63 Mich. 13.

¶ 102. Actual fraud in the making of an assignment is to be established by proof, like any other fact. And it must be clearly and distinctly made out, and cannot be inferred from circumstances of an equivocal tendency. —Hollister v. Loud, 2 Mich. 309.

¶ 103. Where an honest intent can as fairly be inferred from the terms of the assignment as a fraudulent one, the courts are not at liberty to infer the latter.—Nye v. Van Husan, 6 Mich. 329.

¶ 104. The fact that an assignment covers land in another state, and that according to the law of that state the assignment is invalid, does not stamp it as an attempt to fraudulently evade the laws of such state and make it void in consequence.—Watkins v. Wallace, 19 Mich. 57.

§ 16. ——Evidence and fact questions.
Right of party to testify as to his own intent, see Evidence, VI, A.
Admissibility of acts and declarations of party out of court as evincive of fraud, see Evidence, VII, C.

¶ 105. A fraudulent intent in making an assignment may be proved by the acts and declarations of the assignor, his circumstances and situation, the terms and provisions of the instrument, or any and all means of evidence which convince the mind of the existence of the thing sought.—Baldwin v. Buckland, 11 Mich. 389.

¶ 106. The whole conduct of the assignor with reference to the property after the assignment should be allowed to be shown, as bearing upon the question of the intent with which the assignment was made.—Flanigan v. Lampman, 12 Mich. 58.

¶ 107. Where a voluntary assignment, ostensibly for the benefit of creditors, is assailed as fraudulent, the most liberal rules should prevail for the admission of any evidence that may tend to prove the fraud.—Flanigan v. Lampman, 12 Mich. 58.

¶ 108. When a general assignment is assailed as fraudulent in fact, and there is some evidence that a portion of the assets was not delivered over to the assignee, it is competent, in support of the assignment, to show that the assignee was not aware that anything was retained and acted himself in good faith.—Parsell v. Patterson, 47 Mich. 505.

¶ 109. When, in opposition to an assignment, it is shown that one of the assignors did not deliver to the assignee possession of a house and lot to which he had title, it is competent for the assignee to show, on the other hand, that the property was encumbered to its full value.—Parsell v. Patterson, 47 Mich. 505.

¶ 110. The utmost good faith is required in the selection of the assignee; and it must be made with reference to the interest of the creditors rather than that of the debtor. When the assignment is assailed as fraudulent, evidence of a general reputation that the assignee is insolvent is admissible, as well as of any deficiency in age, health, business capacity or standing.—Angell v. Rosenbury, 12 Mich. 241.

¶ 111. If the assignor's conduct with reference to the property after the assignment tends to show that he still claims and seeks to derive a benefit from the property assigned, to the prejudice of creditors, it will generally tend, in a greater or less degree, to show that the assignment was originally made with a fraudulent purpose.—Flanigan v. Lampman, 12 Mich. 58.

¶ 112. The defendant assailed an assignment as fraudulent; and having shown that one of the assignors bought of the assignee a horse and carriage, constituting a part of the assigned property, ostensibly as agent of his brother-in-law, who was a preferred creditor, and whose claim was alleged to be fictitious, he then asked the witness, "Who had and kept possession of said horse and carriage, after such sale, and up to the time of the present trial?" It was held that the question was proper.—Flanigan v. Lampman, 12 Mich. 58.

¶ 113. Where a general assignment was assailed as fraudulent, it was held that evidence that, at the time it was made, goods were at a railroad depot, directed to the assignees, which they claimed and disposed of afterwards, was competent, as having a bearing on the good faith of the assignment. And evidence that said goods were afterwards sold with the assignee's knowledge and consent is competent as tending to prove fraud.—Smith v. Mitchell, 12 Mich. 180.

¶ 114. The avowal, by a debtor who believes himself solvent, but is pressed by creditors, that he intends to assign for the purpose of getting time, is strong evidence of fraud, but subject to explanation.—Baldwin v. Buckland, 11 Mich. 389; Angell v. Rosenbury, 12 Mich. 241.

¶ 115. A fraudulent intent in making an assignment for the benefit of creditors must be proved by such evidence as is required to establish any other fact.—Baldwin v. Buckland, 11 Mich. 389.

¶ 116. Fraud in a general assignment is fairly inferable from the fact that the goods were inventoried at $55,011.68 and were appraised at $27,272.77, while the goods on hand five weeks before inventoried about $95,000; it may also be inferred from a showing that the assets of a certain company belonged to the firm making the assignment, and had been disposed of by collusion.—Farrington v. Sexton, 43 Mich. 454.

¶ 117. Where it appeared that the assignee, a short time before the assignment, as an inducement to a third person to loan the assignor money, stated that the latter was perfectly good and not owing much, it was held that the setting up by him of a large preferred claim under the assignment, as having been owing to him before such statements were made, was strong evidence of fraud in making the assignment.—Angell v. Rosenbury, 12 Mich. 241.

¶ 118. An assignee's sale examined, and held to be with intent to defraud creditors, where it gave evidence of having been accomplished by fiction, transfers at assignee's sale, and finally investing the debtor with possession of a stock and causing him to sell it in a manner which forced creditors to accept too small a dividend or else see themselves shut out by secured creditors.—Morrison v. Mayer, 63 Mich, 238.

¶ 119. Facts showing that a debtor organized several limited partnerships to hold his lands and subsequently another limited partnership to conduct his affairs and pay his debts to which he assigned a large amount of property; and that this partnership pledged a large amount of property to

the debtor's son for a debt found to be bona fide, are held not sufficient to warr nt the relief sought by the assignee for creditors in a bill for an accounting and discovery.—Spaulding v. Steel, 126 Mich. 253.

¶ 120. The assignor's suffering a bill in equity which charges fraud to be taken as confessed does not establish the fraud as against the assignee who denies all knowledge of the assignor's fraudulent intent.—Hollister v. Loud, 2 Mich. 309.

¶ 121. That the assignee is a relative of the assignor, and resides in another town, and that he employs the assignor as his agent in managing the business under the assignment, are not conclusive evidence of fraud in making the assignment.—Baldwin v. Buckland, 11 Mich. 389.

¶ 122. A conveyance in satisfaction of a bona fide debt to some relative of the debtor does not invalidate a subsequent assignment by him for the benefit of creditors, even though there had been long delay in meeting the debt; the question whether there is a debt based upon an actual consideration and recognized by the parties is one of fact.—Coots v. Chamberlain, 39 Mich. 565.

¶ 123. The question as to whether the instrument is a chattel mortgage or an assignment for the benefit of creditors, must in all cases be determined as a question of law upon the contents of such instrument and not upon any outside testimony; and unless the conveyance upon its face purports to convey all of the debtor's property to secure certain preferred creditors by an absolute title, the court cannot declare it a common-law assignment. Where facts appear outside the instrument which tend to prove that it was executed with the intent that it should have the effect of such assignment, or with intent to evade the statute, then it becomes a question of fact for the jury to decide, and not for the court.—Warner v. Littlefield, 89 Mich. 329.

§ 17. Assumption of trust and bond by assignee.

Requisites of the instrument treating the trust, see ante §§ 4-8.
Death or removal of assignee, see post § 27.
Rights and liabilities on failure to file bond, see post § 33.
Liability on bond, see post § 32.
Suits before filing bond, see post § 36.
Effect to bar actions by or against assignor see post § 37.
Bill to enforce trust or in aid thereof by creditors, see post § 39.
As to bond, see Jud. Act. Chap. XLII, § 1; Comp. L. 1915, § 13604.

¶ 123a. A deed of assignment executed prior to the statute regulating the making of assignments for the benefit of creditors purporting to convey the whole of the property for the use and benefit of his creditors, signed and acknowledged by the assignor as well as the assignees, and duly recorded in the county where the assignor and one of the assignees lived, is a valid conveyance without active assumption.—Wolf v. O'Conner, 83 Mich. 301, reversed on other grounds on rehearing 88 Mich. 124.

¶ 124. Acceptance of the assignment by the assignee dedicates the assigned property to the purposes of the trust, notwithstanding it has been made without the knowledge of the creditors; it cannot afterwards be revoked without the express assent of the creditors.—Suydam v. Dequindre, H. 347.

¶ 125. Unless the statutory bond required by How. St., § 8739, is executed, approved and filed within ten days after the making of the assignment, no title passes to the assignee, and filing and approving afterwards will not cure the defect.—Beard v. Clippert, 63 Mich. 716; Springett v. Colerick, 67 Mich. 362; Abbott v. Chaffe, 83 Mich. 256; see s. c. 96 Mich. 294.

¶ 126. Whether an assignment for the benefit of creditors can be assailed at law for the failure to file the assignee's bond until after creditors have levied, if no proceeding has been taken in equity to enforce the trust, quere.—Munson v. Ellis, 58 Mich. 331.

¶ 127. No title passes to assignee unless bond is filed.—Beard v. Clippert, 63 Mich. 716.

¶ 128. No title passes to the assignee until bond is approved by county clerk.—People v. Colerick, 67 Mich. 362.

¶ 129. Until the assignee of an insolvent debtor has filed his bond he cannot proceed in the execution of his trust, and his trusteeship is for the time imperfect and subject to a contingency in the nature of a condition subsequent that may defeat his power to act without destroying the trust. But he may meanwhile do what may be necessary to protect the interests of beneficiaries in the assigned property; for example, he may insure such property.—Sibley v. Prescott Ins. Co., 57 Mich. 14.

¶ 130. Where an assignee has assumed the trust, his omission to file a bond within ten days for its faithful execution, as required by How. St., § 8739, does not render the assignment, Laws 1879, Act No. 198, absolutely void, but only voidable, and creditors may proceed by bill in equity for the enforcement of the trust.—Fuller v. Hasbrouck, 146 Mich. 78.

¶ 131. The omission of the county clerk to indorse his approval on the bond of an assignee within ten days after the latter's appointment does not invalidate the bond (How. St., § 8739).—Munson v. Ellis, 58 Mich. 331.

¶ 132. An assignment is not made void by the failure to make the penalty of the assignee's bond double the amount of the inventory (How. St., § 8739).—Munson v. Ellis, 58 Mich. 331.

¶ 133. An assignee's bond in double the value of the equity of redemption in chattels of the assignor, which he had mortgaged, is sufficient to sustain the assignment as against defendant in trover and trespass claiming that for want of a sufficient bond the assignee had no title.—Coots v. Radford, 47 Mich. 37.

¶ 134. A bond by an assignee for the benefit of creditors, with a corporation of another state as surety, cannot be considered a good bond without evidence that such corporation has been authorized to become surety on undertakings.—McCuaig v. City Sav. Bank, 111 Mich. 356.

¶ 135. Acceptance of his trust by an assignee is indicated by his taking possession of the property and notifying creditors; but it is shown conclusively by his joining in the act of assignment, and recording it when executed.—Commercial Nat. Bank of Detroit v. Mosser, 57 Mich. 386.

¶ 136. The validity of a debtor's assignment cannot be made to depend on the assignee's subsequent testimony as to whether he would have taken it or not if he had known when he took it that the assignor had conveyed a tract of land the day before he made it.—Coots v. Chamberlain, 39 Mich. 565.

§ 18. Assent or participation by creditors.

Assent necessary to revocation, see ante ¶ 124.
Delivery of the instrument of assignment, see ante § 5.
Right to attack assignment for irregularity, see post §§ 33, 34.
As estoppel or waiver of invalidity, see post § 34.

§ 19. Property of assigned estate.

Schedule in assignment, see ante § 6.
Reservation of estate as making assignment void, see ante § 9.
Right to recover property in which creditors have an equity, see post § 20.
Accounting for property, see post § 29.
See Jud. Act, Chap. XLII, § 2; Comp. L. 1915, § 13605.

¶ 137. Where an assignment is made of all the debtor's property, saving in general terms that which is exempt from execution, it passes for the benefit of the creditors all that they might take under execution, and the assignor may select and retain the property exempt from execution as he might had it been levied upon.—Brooks v. Nichols, 17 Mich. 39.

¶ 138. If in the assignment the property is referred to as described in a schedule which is attached, only such property will pass as is there described.—Ryerson v. Eldred, 18 Mich. 12.

¶ 139. The fee in lands of the debtor which are covered by the assignment will be conveyed by it without the use of words of inheritance.—Angell v. Rosenbury, 12 Mich. 241.

¶ 140. An assignment was made of all one's "goods, chattels, stock, promissory notes, debts, choses in action, evidences of debt, claims, demands, property and effects of every description wherever the same may be situated, to wit, all the goods, chattels and property now in the store lately occupied by" the assignor; also, certain other specified chattels and debts. Held, that this did not include real estate.—Price v. Haynes, 37 Mich. 487.

¶ 141. A banking firm, just before it had determined on assigning, and before making up its cash account, marked a package of money with the name of a general depositor and the word "private." The money did not amount to the depositor's full credit. On making the assignment the firm asked the assignee to give the package to the depositor, who knew nothing of these facts till afterwards. Held, that the money was not thereby delivered and was covered by the assignment.—Coots v. McConnell, 39 Mich. 742.

§ 20. Reduction of assets to possession and to money.

Duty of assignee, see also post § 22.
Petition or bill by assignee or creditors in aid of assignment to get in assets, see post §§ 39, 40.
See Jud. Act, Chap. XLII, § 3; Comp. L. 1915, § 13606.

¶ 142. Prior to the enactment of How. St., § 8741, the assignee of an insolvent debtor acquired only such interest in the assigned property as the debtor had to assign, but that section conferred upon the assignee the additional right to recover all property, or right or equities in property, which might be reached or recovered by any of the assignor's creditors.—Michigan Trust Co. v. Webber, 109 Mich. 87.

¶ 143. As the assignee takes by the assignment all nonexempt property of the assignor, and all of its rights, legal or equitable, and as he has the right to recover all property that any of the assignor's creditors can reach, the assignee of a corporation may recover from a stockholder for goods wrongfully converted prior to the assignment.—Boynton v. Roe, 114 Mich. 401.

¶ 144. Where an insolvent debtor who has made an assignment of his property for the benefit of creditors, admits, on his examination touching the alleged secreting and disposal of certain property which he did not turn over to the assignee, his possession of the property, he must clearly account for the same to the satisfaction of the court; otherwise he will be held to have it still in his possession, and to be able to hand it over to his receiver.—Burnham v. Dillon, 100 Mich. 350.

§ 21. Title of assignee and rights of assignor.

Necessity of approval and filing bond, see ante § 17.
Right to recover concealed or withheld assets, see ante § 20.
Title and rights of successor, see post § 28.
Compensation and expenses of assignee, see post § 31.
Revocation of assignment or termination and reassignment, see post § 30.
Estoppel of participating creditor to deny title, see post § 34.
Estoppel to assert title against lessee of assignor allowed to remain in possession, see Estoppel, III. B.
Statutory powers of assignee, see Jud. Act, Chap. XLII, §§ 2, 3; Comp. L. 1915, §§ 13605, 13606.

¶ 145. The assignee of an insolvent debtor, in the absence of fraud in fact, and where there are no statutory regulations, takes only the debtor's rights.—Brown v. Brabb, 67 Mich. 17.

¶ 146. Under the assignment law the whole estate vests in the assignee, and is not subject to seizure by any particular creditors.—Kintner v. Pickard, 67 Mich. 125.

¶ 147. An assignee for the benefit of creditors is the general owner of the assigned goods until his trust is fully performed, and then the resulting trust restores to the assignor the general ownership in what is left. But during the trust the assignor has no lien upon the goods or special property in them.—Redman v. Nathan, 45 Mich. 607.

¶ 148. An assignee of an insolvent cannot claim anything to which his assignor has no right.—Lentz v. Flint & P. M. Ry. Co., 53 Mich. 444.

¶ 149. Where one who buys goods to which the vendor expressly reserves title until payment of the price, makes an assignment for the benefit of creditors, no title to the goods passes to the assignee.—Ovid Carriage Co. v Parsille, 157 Mich. 402.

¶ 150. While it is true that courts have supervision of assignment proceedings, they cannot confer upon the assignee rights that the statute does not give him; and, giving to the statute of voluntary assignments the broadest construction of which it is capable, the assignee only stands in the place of his assignor and of the latter's creditors.—Michigan Trust Co. v. Webber, 109 Mich. 87.

¶ 151. A voluntary assignee for the benefit of creditors has no greater title than his assignor to the latter's property, and cannot question the validity of a recorded mortgage made by him by suing him in replevin for chattels covered by the mortgage. It would be different with an assignee in bankruptcy or an involuntary assignee.—Wakeman v. Barrows, 41 Mich. 363.

¶ 152. An assignee for the benefit of creditors is not a bona fide purchaser for a valuable consideration.—Pierson v. Manning, 2 Mich. 445; Flanigan v. Lampman, 12 Mich. 58; Farrington v. Sexton, 43 Mich. 454; Lentz v. Flint & Pere Marquette R. Co., 53 Mich. 444; Brown v. Brabb, 67 Mich. 17; contra, Hollister v. Loud, 2 Mich. 309, overruled, see 2 Mich. 445.

¶ 153. An assignee for the benefit of creditors is not an innocent purchaser, and takes no better title to the property than his assignor had.—Wisconsin M. & Fire Ins. Co. Bank v. Manistee Salt & Lumber Co., 77 Mich. 76; Koch v. Lyon, 82 Mich. 513.

¶ 154. Assignees take no title to firm property under assignment by one partner not purporting to convey such property.—Van Kleeck v. McCabe, 87 Mich. 599.

§ 22. Administration of estate, sales and disposal.

Assumption of the trust, property and reduction to possession, and titles in the property, see ante §§ 17-21.
Time and terms of the trust as part of instrument of assignment, see ante § 7.
Grant of discretionary power in deed, see ante ¶ 29.
Discretion to assignee as invalidating preference, see ante § 9.
Providing that personalty shall be sold first, see ante § 9.
Right of creditors to authorize continuation of business, see post § 23, ¶ 177.
Continuation of business after practical termination of trust, see post § 30.

Proof and payment of claims, and marshalling assets, see post §§ 24, 25.
Fraud in sale, how proved, see also ante ¶ 118.
Purchaser from assignee, right to question validity of assignment, see post § 34.
Accounting and discharge of assignee, see post § 29.
Bad management affecting right to compensation, see post § 31.
Liability for bad management, see post § 32.
Actions and suits for estate, see post § 36 et seq.
Bill in aid of trust, see post § 39.
Duty of purchaser to inquire of assignee when title is questioned, see also Equity, XI (diligence).
See generally Jud. Act, Chap. XLII, § 3; Comp. L. 1915, § 13606.
Appraisement and sale of property, see Jud. Act, Chap. XLII, § 4; Comp. L. 1915, § 13607.

¶ 155. As a general rule the assignment ends the ordinary operations of business; and the assignee must convert the assigned property into money without unnecessary delay and apply the proceeds to the payment of the debts.—Wilhelm v. Byles, 60 Mich. 561.

¶ 156. The assignee has no authority in virtue of his trust to renew or continue in force the undischarged debts, or to bind his assignor by an express or implied promise of payment.—Parsons v. Clark, 59 Mich. 414.

¶ 157. Assignees have no authority to make sales on credit.—Wilhelm v. Byles, 60 Mich. 561.

¶ 158. Assignees for the benefit of creditors may entrust the chief control of the business to the assignor, where it is done without fraud or collusion, under the honest belief that it is the best course for getting the value of the assets.—Clark v. Craig, 29 Mich. 398.

¶ 159. The assignee of the stock in trade of an insolvent debtor continued to carry on the business at retail, and to that end employed the assignor at a weekly salary, and placed him in charge of the main store. Held, that the wisdom of such employment depends entirely upon the character of the assignor that it may have been for the benefit of the creditors, he being more familiar than any one else with the business, the character of the goods, and the responsibility of his debtors.—In re Joslin, 101 Mich. 499.

¶ 160. After an assignment has been made and the assignee has taken possession of the property, he cannot divest it of its trust character by turning it over to one who is colluding with him to defraud creditors.—Morrison v. Mayer, 63 Mich. 238.

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¶ 161. The wife of an insolvent debtor has the same right as any one else to purchase the assigned property at assignee's sale; and the mere fact that a third party makes such purchase in her interest is no evidence of fraud on the part of the assignee.—In re Joslin, 101 Mich. 499.

¶ 162. Where an assignee for creditors, in the belief that certain property was covered by a chattel mortgage executed by his assignor, assigned his interest therein, and all right of action for a wrongful conversion thereof, to the mortgagees, without consideration, title passed to the mortgagees, and persons wrongfully in possession of the property could not, when sued by the mortgagees for the conversion, question the good faith of the transaction.—Brotherton v. Goldman, 90 Mich. 340.

¶ 163. Where assignees, awaiting an advantageous sale, stored an unsold remnant of goods assigned in a warehouse without insurance, it was held not such culpable negligence as to justify charging them with the value of the goods on their destruction by fire.—Clark v. Craig, 29 Mich. 398.

¶ 164. Comp. L. 1897, § 9541, providing that assigned property and assets shall be sold at auction or private sale as the circuit court might direct, is designed for the benefit of creditors and not debtors of the assignor, and therefore a defendant in an action on a note by an assignee for the benefit of creditors, is not in position to raise the question that the assignee had no right to sue under the act, but must sell it.—Gibbs v. Montcalm Circuit Judge, 123 Mich. 615.

§ 23. Rights and priorities of creditors under assignment.

Paramount and hostile levies and transfers and claims, see post § 26.
Assignee as party to bring suits, see post § 36.
Right to sue pending assignment, see post §§ 36-39.
Bills in aid of or to enforce trust, see post § 39.
Lien and priority of the various levies and claims, see such topics as Attachment; Chattel Mortgages; Executions; Liens.
Preference and lien of labor claims in general, see Liens.
Liens and preferences of labor claims against corporations, see Corporations, XXIII, XXIV, E; and see also Railroads, VI.
Rank and preference of claims, see Jud. Act, Chap. XLII, § 11; Comp. L. 1915, § 13614.

¶ 165. A general assignee for the benefit of creditors is the representative of all the creditors, including those whose rights have been injuriously affected by withholding a chattel mortgage from the files, and as against

the mortgagee may keep possession until tendered the amount as to which he is inferior to other creditors.—Kennedy v. Dawson, 96 Mich. 79.

¶ 166. An assignee for the benefit of creditors has no authority to make a contract subsequent to the assignment giving preference in payment to one creditor for goods belonging to the debtor at the date of the assignment.—Illinois Glass Co. v. United States Horse-Radish Co., 166 Mich. 520.

¶ 167. Complainant contracted to sell to defendant a quantity of bottles to be shipped from time to time at the direction of defendant, with the provision that all said bottles unshipped and in the hands of complainant on August 1, 1908, should be invoiced to the buyer and stored by complainant at the risk and expense of defendant. On August 31, 1908, there remained in the possession of complainant about five carloads of bottles which were on that date invoiced to defendant and charged to it upon complainant's books. Thereafter a composition agreement was made between creditors extending the time for payment one year on all claims, and placing the defendant's business in the hands of one Eddington, to conduct it for the benefit of creditors. After said assignment complainant shipped three carloads of the bottles invoiced to defendant under an agreement with said Eddington that he should receive immediate payment therefor. Under a bill to establish a priority of claim for said shipment, held, title to said bottles having passed to defendant at the date of invoice, said bottles became a part of the assets of the defendant, and complainant was not entitled to enforce any agreement as to priority of payment therefor.—Illinois Glass Co. v. United States Horse-Radish Co., 166 Mich. 520.

¶ 168. A debtor who had previously agreed to secure a creditor, the form of the security not having been agreed upon, executed a chattel mortgage and delivered it to the creditor's attorney, who filed it. The next day the debtor made a general assignment, subject to such mortgage. Held, that the mortgagee's subsequent ratification of the transaction related to the date of filing, and that his lien was prior to that of the other creditors under the assignment.—Field v. Fisher, 65 Mich. 606.

¶ 169. A creditor who knows of the assignment by his debtor, but does not call the assignees' attention to his rights or object to their action, has no peculiar equities entitling him to complain of their treating his claim as unpreferred, where they have acted honestly upon information that the claim had been placed by mistake in the list of preferred claims.—Clark v. Craig, 29 Mich. 398.

¶ 170. Two brothers, each of whom owed his mother, became partners, and, becoming insolvent to her knowledge, gave her security on the partnership assets just before executing an assignment. It also appeared that she had received on such security before the assignment more than the amount she had loaned the firm. Held, that she was not entitled to a preference as a bona fide secured creditor.—Cron v. Cron's Estate, 56 Mich. 8.

¶ 171. A mortgagee of chattels whose mortgage lay for a time unfiled is entitled to priority over the general creditors only to the amount of the balance due after deducting the claims of those creditors who gave or extended credit after the making of the mortgage and before the filing and thus became prior; but as to any indebtedness not realized from the goods he is entitled to his share in the general distribution of the funds by the assignee.—Kennedy v. Dawson, 96 Mich. 79.

¶ 172. Where, after a chattel mortgage, previously withheld from the files, had been filed, another mortgage was given to a different mortgagee, such second mortgage was entitled to preference in payment of debts by general assignee over the mortgagor's general creditors, but was subject to the first mortgage.—Root v. Harl, 62 Mich. 420.

¶ 173. A trustee to whom, prior to making a common-law assignment, a debtor has executed a valid mortgage to secure certain creditors, is entitled to a dividend based on, but not exceeding, the entire sum secured by the mortgage, without reference to the distribution of the dividend among the creditors secured.—High v. Fifth Nat. Bank, 97 Mich. 502; Fifth Nat. Bank v. Clinton Circuit Judge, 100 Mich. 67.

¶ 174. In determining the amount upon which a dividend should be paid to the several creditors secured by a trust mortgage, the apportionment should be based, not upon the amounts found due to the several creditors, but upon the faces of their respective claims as stated in the mortgage; and if such apportionment results in extinguishing any claim or claims, the aggregate of the excesses forms a new fund, to be apportioned among the claims remaining unpaid, which latter apportionment also should be based upon the faces of the claims, and not on amounts remaining unpaid.—High v. Fifth Nat. Bank, 97 Mich. 502; Fifth Nat. Bank v. Clinton Circuit Judge, 100 Mich. 67.

¶ 175. In determining the amount upon which a dividend should be paid to the several creditors secured by a trust mortgage, the direct claim of each creditor, as stated in the mortgage, is separate and distinct from his contingent claim; it is as though

separate mortgages, coincident in point of time, had been given for said claims, each of which was entitled to its proportionate percentage of the fund, which percentage would not be affected by a part-payment of any fund, unless it should be found to amount to a sum exceeding the balance unpaid of such fund, in which case such excess would be subject to application upon part-paid claims.—High v. Fifth Nat. Bank, 97 Mich. 502; Fifth Nat. Bank v. Clinton Circuit Judge, 100 Mich. 67.

¶ 176. Under How. St., § 8747, a creditor of an assignor for creditors who establishes his claim after the payment of a dividend to other creditors is entitled to be placed on a footing of equality with other creditors and to have proportionately as much as they received paid out of the surplus in the assignee's hands before the declaration of any further dividend.—Farwell v. Myers, 66 Mich. 678.

¶ 177. A majority of an insolvent's creditors cannot authorize his assignee to continue his business.—Wilhelm v. Byles, 60 Mich. 561.

§ 24. Proof and payment of claims; discharge.

Grant of power to make compromises, see ante ¶ 30.
Rank and priorities of creditors, see ante § 23.
Computing and application of dividends on secured claims, see post § 25.
Marshalling assets, see post § 25.
Claims not under but adverse to assignment, see post § 26.
Actions and suits by claimants, see post § 36.
Mode of trying claims by action, and judgment therein, see post § 36.
Filing claims as barring right to sue by action, see post § 37.
Notice to creditors, procedure thereon and proof of claims, contests and trial of contests, see Jud. Act, Chap. XLII, §§ 5-7; Comp. L. 1915, §§ 13608-13610.

¶ 178. Where the delay in presenting a claim to the assignee was due entirely to a matter of legal form in describing the nature of the debt, and to the disallowance in the shape first presented, it may be allowed afterwards, although the delay may have left less money in the assignee's hands than will place the claimant on as good a footing as those who have already received dividends.—Farwell v. Myers, 64 Mich. 234.

¶¶ 179, 180. Where, on the hearing of the petition of a secured creditor for the payment by an assignee of his claim, which is shown to be bona fide, no testimony is produced to show that his security constitutes an illegal preference, and the assignee has not placed himself in a position by his pleadings or proofs to attack its validity, payment should be directed.—Dupont v. McCorkle, 76 Mich. 676.

¶ 181. A son owed his father and others. He conveyed all his property to his father, who conveyed it to A. in trust to pay the son's debts, the residue to belong to the son's wife. The father and son had been in partnership, and after the execution of the trust deed the father and A. carried on the business, A. using the trust fund. Father and son died. The father's administrator sought to subject the residue claimed by the son's wife to the payment of the indebtedness to the father's estate, all of the son's other debts having been paid by A. Held, that it appearing probable that the father intended to release the obligation to himself, and plaintiff's theory being improbable, the claim should be rejected.—Wilkins v. Fitzhugh, 48 Mich. 78.

¶ 182. A trustee to whom a corporation has executed valid mortgages to secure certain of its creditors prior to making a common-law assignment is entitled to be paid a dividend based on the whole amount secured by the mortgages proved against the insolvent estate, said dividend being less than said amount; and the question of its distribution among the creditors secured by said mortgages does not concern the receiver or the court.—In re assignment of Scofield Buggy Co., 89 Mich. 15.

¶ 183. Receiving a dividend from assignee for creditor's benefit is not an estoppel against suing debtor for obtaining goods by fraudulent representations.—Hinchman v. Weeks, 85 Mich. 535.

¶ 184. Proving a claim in proceedings before an assignee for the benefit of creditors does not estop one from attacking as fraudulent chattel mortgages executed by the assignor prior to the assignment.—Black v. Dawson, 82 Mich. 485.

§ 25. ——Setoffs, marshalling and subrogation.

See also ante ¶ 62.
Priorities of creditors, see ante § 23.
See generally, Marshalling Assets; Setoff; Subrogation.
Setoffs, see Jud. Act, Chap. XLII, § 8; Comp. L. 1915, § 13611.

¶ 185. An assignee for the benefit of creditors who sells the assigned stock on credit cannot create an offset or payment in reduction of the price by incurring liabilities to his vendee, who knew of the trust, for articles knowingly furnished for his personal use and not on account of the trust fund; and a subsequent trustee, appointed in his place, will not be compelled to allow such debts of his predecessor in reduction of the purchase debt.—Page v. Stephens, 23 Mich. 357.

§ 13. Hindrance or coercion of creditors.
Preferences and reservations, see ante § 9.
Fraudulent hindrance extraneous to the instrument of assignment, see post § 14.

¶ 90. If an assignment be so drawn that it must, in its execution, tend to hinder or delay creditors unprovided for by it in the collection of their demands, the legal presumption is that it was drawn with that intent.—Pierson v. Manning, 2 Mich. 445.

¶ 91. A general assignment is invalidated by a clause purporting to bind the creditors to agree to it and release their claims in full and discharge the assignor from all liabilities as soon as their just proportion of the proceeds is paid to them.—Hubbard v. McNaughton, 43 Mich. 220.

¶ 92. A clause authorizing the assignee to sell the assigned property on credit renders the assignment void.—Sutton v. Hanford, 11 Mich. 513; Ryerson v. Eldred, 18 Mich. 12.

§ 14. Fraud extrinsic to the instrument; motive.
Construction against fraud, see also ante ¶ 13.
Who may complain, see post § 34.
Intrinsic frauds apparent by terms of the instrument, see ante §§ 9, 10, 13.
Rule as to fraudulent conveyances generally, see Fraudulent Conveyances.

¶ 93. General assignments are not exempted from the consequences of actual fraud that has any tendency to hinder, delay or defraud creditors.—Farrington v. Sexton, 43 Mich. 454.

¶ 94. The mere fact of the solvency or insolvency of one who has made a general assignment, or his belief in the one or the other, does not necessarily render the assignment void. Without any fraudulent intent in either case it would be valid, and with a fraudulent intent it would be void in both cases alike.—Angell v. Rosenbury, 12 Mich. 241.

¶ 95. The fraudulent character of an assignment does not depend on the assignor's opinion that what he does is not fraud in law.—Hubbard v. McNaughton, 43 Mich. 220.

¶ 96. That it hinders, delays or obstructs creditors does not render an assignment void for fraud. To render it so it must have been made with that intent.—Hollister v. Loud, 2 Mich. 309.

¶ 97. It is no objection to the validity of an assignment that it was made in anticipation by both parties of the immediate issuing of attachments against the property of the assignor.—Hollister v. Loud, 2 Mich. 309.

¶ 98. The subsequent fraudulent acts of the assignor, unknown to the assignee, cannot change the character of the assignee's title, or make that fraudulent which was originally honest.—Baldwin v. Buckland, 11 Mich. 389.

¶ 99. That the assignment was made by an embarrassed debtor to prevent a sacrifice of his property does not necessarily render it void.—Angell v. Rosenbury, 12 Mich. 241.

¶ 100. Where the assignment substantially fulfils its ostensible purpose it may well be supported, though the assignors have failed to treat the assignee with entire fairness and frankness.—Parsell v. Patterson, 47 Mich. 505.

§ 15. ——Burden of proof and presumptions.

¶ 101. One who attacks a security as a fraudulent preference under the assignment law has the burden of establishing his claim.—Sweetzer v. Higby 63 Mich. 13.

¶ 102. Actual fraud in the making of an assignment is to be established by proof, like any other fact. And it must be clearly and distinctly made out, and cannot be inferred from circumstances of an equivocal tendency.—Hollister v. Loud, 2 Mich. 309.

¶ 103. Where an honest intent can as fairly be inferred from the terms of the assignment as a fraudulent one, the courts are not at liberty to infer the latter.—Nye v. Van Husan, 6 Mich. 329.

¶ 104. The fact that an assignment covers land in another state, and that according to the law of that state the assignment is invalid, does not stamp it as an attempt to fraudulently evade the laws of such state and make it void in consequence.—Watkins v. Wallace, 19 Mich. 57.

§ 16. ——Evidence and fact questions.
Right of party to testify as to his own intent, see Evidence, VI, A.
Admissibility of acts and declarations of party out of court as evincive of fraud, see Evidence, VII, C.

¶ 105. A fraudulent intent in making an assignment may be proved by the acts and declarations of the assignor, his circumstances and situation, the terms and provisions of the instrument, or any and all means of evidence which convince the mind of the existence of the thing sought.—Baldwin v. Buckland, 11 Mich. 389.

¶ 106. The whole conduct of the assignor with reference to the property after the assignment should be allowed to be shown, as bearing upon the question of the intent with which the assignment was made.—Flanigan v. Lampman, 12 Mich. 58.

¶ 107. Where a voluntary assignment, ostensibly for the benefit of creditors, is assailed as fraudulent, the most liberal rules should prevail for the admission of any evidence that may tend to prove the fraud.—Flanigan v. Lampman, 12 Mich. 58.

¶ 108. When a general assignment is assailed as fraudulent in fact, and there is some evidence that a portion of the assets was not delivered over to the assignee, it is competent, in support of the assignment, to show that the assignee was not aware that anything was retained and acted himself in good faith.—Parsell v. Patterson, 47 Mich. 505.

¶ 109. When, in opposition to an assignment, it is shown that one of the assignors did not deliver to the assignee possession of a house and lot to which he had title, it is competent for the assignee to show, on the other hand, that the property was encumbered to its full value.—Parsell v. Patterson, 47 Mich. 505.

¶ 110. The utmost good faith is required in the selection of the assignee; and it must be made with reference to the interest of the creditors rather than that of the debtor. When the assignment is assailed as fraudulent, evidence of a general reputation that the assignee is insolvent is admissible, as well as of any deficiency in age, health, business capacity or standing.—Angell v. Rosenbury, 12 Mich. 241.

¶ 111. If the assignor's conduct with reference to the property after the assignment tends to show that he still claims and seeks to derive a benefit from the property assigned. to the prejudice of creditors, it will generally tend, in a greater or less degree, to show that the assignment was originally made with a fraudulent purpose.—Flanigan v. Lampman, 12 Mich. 58.

¶ 112. The defendant assailed an assignment as fraudulent; and having shown that one of the assignors bought of the assignee a horse and carriage, constituting a part of the assigned property, ostensibly as agent of his brother-in-law, who was a preferred creditor, and whose claim was alleged to be fictitious, he then asked the witness, "Who had and kept possession of said horse and carriage, after such sale, and up to the time of the present trial?" It was held that the question was proper.—Flanigan v. Lampman, 12 Mich. 58.

¶ 113. Where a general assignment was assailed as fraudulent, it was held that evidence that, at the time it was made, goods were at a railroad depot, directed to the assignees, which they claimed and disposed of afterwards, was competent, as having a bearing on the good faith of the assignment. And evidence that said goods were afterwards sold with the assignee's knowledge and consent is competent as tending to prove fraud.—Smith v. Mitchell, 12 Mich. 180.

¶ 114. The avowal, by a debtor who believes himself solvent, but is pressed by creditors, that he intends to assign for the purpose of getting time, is strong evidence of fraud, but subject to explanation.—Baldwin v. Buckland, 11 Mich. 389; Angell v. Rosenbury, 12 Mich. 241.

¶ 115. A fraudulent intent in making an assignment for the benefit of creditors must be proved by such evidence as is required to establish any other fact.—Baldwin v. Buckland, 11 Mich. 389.

¶ 116. Fraud in a general assignment is fairly inferable from the fact that the goods were inventoried at $55,011.68 and were appraised at $27,272.77, while the goods on hand five weeks before inventoried about $95,000; it may also be inferred from a showing that the assets of a certain company belonged to the firm making the assignment, and had been disposed of by collusion.—Farrington v. Sexton, 43 Mich. 454.

¶ 117. Where it appeared that the assignee, a short time before the assignment, as an inducement to a third person to loan the assignor money, stated that the latter was perfectly good and not owing much, it was held that the setting up by him of a large preferred claim under the assignment, as having been owing to him before such statements were made, was strong evidence of fraud in making the assignment.—Angell v. Rosenbury, 12 Mich. 241.

¶ 118. An assignee's sale examined, and held to be with intent to defraud creditors, where it gave evidence of having been accomplished by fiction, transfers at assignee's sale, and finally investing the debtor with possession of a stock and causing him to sell it in a manner which forced creditors to accept too small a dividend or else see themselves shut out by secured creditors.—Morrison v. Mayer, 63 Mich, 238.

¶ 119. Facts showing that a debtor organized several limited partnerships to hold his lands and subsequently another limited partnership to conduct his affairs and pay his debts to which he assigned a large amount of property; and that this partnership pledged a large amount of property to

¶ 186. The general rule that, when one of two creditors of a common debtor has two funds out of which he may receive his pay, he is first to resort to the fund upon which the other creditor has no lien, and exhaust that before encroaching upon the other, does not apply to the distribution of the estate of a debtor who has made a general assignment for the benefit of his creditors.—Southern Michigan National Bank v. Byles, 67 Mich. 296; Third National Bank v. Haug, 82 Mich. 607.

¶ 187. Where a dividend has been made on proved claims in an assigned estate a creditor who afterwards establishes a claim should be placed on an equality with the other creditors before they receive a second dividend.—Farwell v. Myers, 66 Mich. 678.

¶ 188. A secured creditor is entitled to dividends at the same rate with unsecured creditors upon the whole of his claim as proved, without deducting the value of his securities or the amount realized therefrom.—Southern Michigan Nat. Bank v. Byles, 67 Mich. 296; Third National Bank v. Haug, 82 Mich. 607.

¶ 189. The assignee of a debtor should distribute the fund realized from the estate without regard to a claim for which his assignor was not personally liable, such as a debt secured by a mortgage on lands which the assignor had purchased subject to the incumbrance.—Booth v. Connecticut Mut. Life Ins. Co., 43 Mich. 299.

¶ 190. Where, after a general assignment for the benefit of its creditors by a Michigan corporation, a nonresident creditor with knowledge of such assignment attaches property of the debtor in another state and afterwards files its claim for allowance under the assignment, the value of said attached property should be ascertained and applied in reduction of the claimant's demand.—J. A. Fay & Co. v. James Jenks & Co., 78 Mich. 304.

¶ 191. Where insolvent partners, after a general assignment, applied their exemptions on a prior chattel mortgage given to a creditor, it was held that the amount of such exemptions was properly allowed to diminish the amount of such mortgage that would be affected by intermediate claims.—Root v. Harl, 62 Mich. 420.

¶ 192. An assignment does not affect the rights of the creditor. He may still look to the debtor's general estate for the payment of his debt, and if his debt be thus paid, the property on which he has security will fall back into the body of the debtor's estate, which passed to the assignee, relieved of the creditor's lien. If a part only of the debt be realized from the general estate of the debtor, the creditor may look to his security for the balance. The assignment affects the remedy merely.—Third National Bank v. Haug, 82 Mich. 607.

¶ 193. Where both the maker and indorser of a promissory note become insolvent, the holder has a right to compromise with or receive a dividend from the indorser's estate and release it from further liability; and so doing does not prevent his sharing with the other creditors of the maker's estate until the whole claim is satisfied upon the whole mount due upon the note at the time the maker assigned.—Southern Michigan Nat. Bank v. Byles, 67 Mich. 296.

¶ 194. An assignee for creditors who has paid out of the estate a mortgage debt which his assignor was bound to pay cannot enforce the mortgage against a person against whom such assignor could not have enforced it.—Byles v. Kellogg, 67 Mich. 318.

§ 26. Rights paramount or in hostility to assignment.

Reservations and preferences and prior transfers and liens, see ante § 9.

Extent of estate taken by assignee, see ante § 21.

Concurrent remedy of action or supervisory suit, see post § 38.

Rights under mortgages and chattel mortgages or transfers, see Chattel Mortgages; Mortgages; Fraudulent Conveyances.

Adoption of chattel mortgage as conferring priority by doctrine of relation, see Attorneys and Counselors, II, C.

¶ 195. If an attachment is levied upon the property assigned before the acceptance of the trust the property will be subject to the attachment.—Pierson v. Manning, 2 Mich. 445.

¶ 196. Laws 1879, Act. No. 198 (How. St., § 8739), invalidates any attachment levied on assigned property after the assignment is made and before the assignee files his bond. Held, that a creditor levying an attachment within that period cannot be allowed to support it by showing that the assignment was made with intent to defraud creditors.—Coots v. Radford, 47 Mich. 37.

¶ 197. An assignment need not be recorded to defeat an attachment levied within ten days after it was made (How. St., § 8739).—Gott v. Hoschna, 57 Mich. 413.

¶ 198. An attachment levy in the afternoon upon property which had been assigned by the debtor for the benefit of his creditors on

the morning of the same day is void.—Angell v. Pickard, 61 Mich. 561.

¶ 199. Where a corporation purchased land subject to the payment of a mortgage, which payment was a condition precedent to the vesting of title under said purchase, after which it conveyed the land by warranty deed subject to said mortgage, which the grantee agreed to pay as a part of the purchase price, and to that end gave a note to the grantor for the amount of the mortgage debt and received an agreement for its payment by the grantor, which note was sold by the president of the grantor and the proceeds used in the business, but the mortgage was not paid, after which the grantor made an assignment for the benefit of its creditors, and on the failure of the assignee to qualify a receiver was appointed, the proper equity court will order the payment of said mortgage by the receiver on the petition of the grantee, of whom such payment has been demanded.—Wisconsin M. & Fire Ins. Co. Bank v. Manistee Salt & Lumber L. Co., 77 Mich. 76.

¶ 200. Where one who has bought goods with intent to defraud vendors of their pay makes a general assignment, a claim lies for the proceeds of such goods as were sold by him before the assignment.—Farwell v. Myers, 64 Mich. 234; Farwell v. Myers, 59 Mich. 179.

§ 27. Death or removal of assignee.

Rights and liabilities between successive assignees, see post § 28.

¶ 201. Laws 1889, Act No. 215, § 1 (How. St., § 8739), which provides that the court, upon the petition of a majority in number and value of the unsecured creditors who have proved their claims, may remove the assignee and appoint one designated by the petitioners, does not apply to an assignee appointed before the act took effect; such an assignee has vested rights and cannot be removed except for cause shown.—Old National Bank v. Joslin, 81 Mich. 413.

¶ 202. Chancery under its general supervisory powers over assignment proceedings may, upon petition, proceed to the removal of the assignee, and may in the same proceedings appoint a receiver.—In re Appeal of Smith, 86 Mich. 149.

§ 28. Successors and coassignees; receivers.

See also ante ¶ 185.

Effect of designation of executors, etc., as successors, see ante ¶ 28.

Capacity and status of receiver to sue or defend, see post § 36.

Right to sue to set aside fraudulent transfers, see post § 40.

General law as to successions in trust, see Trusts.

Judicial appointment, see Jud. Act, Chap. XLII, § 13; Comp. L. 1915, § 13616.

¶ 203. If the assignee under a common-law assignment has accepted his trust, any attachment subsequently levied is nugatory; and if, for whatever reason, he fails to act, a receiver may be appointed in his place under How. St., chap. 303. So held where the assignees had ceased to act because they supposed themselves displaced by proceedings taken under the assignment law of 1883, which turned out to be unconstitutional.—Commercial Nat. Bank of Detroit v. Mosser, 57 Mich. 386.

¶ 204. A creditor may proceed in equity, after the time for the assignee to file his bond has expired, to have the trust carried out through a receiver under the supervisory powers of chancery.—Beard v. Clippert, 63 Mich. 716.

¶ 205. A receiver has no better or greater rights in the property than the assignee would have had if he had qualified under the trust to him in the assignment.—Wisconsin M. & Fire Ins. Co. Bank v. Manistee Salt & Lumber L. Co., 77 Mich. 76.

§ 29. Accounting by assignee and discharge from trust.

Powers in administering the estate, see ante § 22.

Liability for loss because of failure to insure, see ante ¶ 163.

Liability for mismanagement and liability on bond, see post § 32.

Remedy to enforce accountability, see post § 36, ¶ 236.

Provisions of statute, see Jud. Act, Chap. XLII, § 10; Comp. L. 1915, § 13613.

¶ 206. In the absence of evidence to show an actual appropriation of goods, or of money received upon sales, it would be harsh to hold an assignee of an insolvent debtor liable for an assigned stock of goods at its appraised value.—In re Joslin, 101 Mich. 499.

§ 30. Revocation, termination and reassignment.

Reversionary right of assignor, see ante § 21.

Bill by creditors to bring assignment to close, see post § 39.

¶ 207. An assignment which contemplates simply the immediate sale of the assigned property by the assignees, for the payment of debts for which the assignees themselves were liable as indorsers, is superseded by subsequent arrangements embracing a continuation of the business of the assignors by the use of assigned property, and of advances to be made by the assignees, the arrangements involving both parties to the assign-

ment as well as a third person. Such new arrangements are repugnant to the original assignment and subvert whatever trust was created thereby.—Craig v. Bradley, 26 Mich. 358.

¶ 208. An assignee under an assignment for the benefit of creditors may, after all debts have been paid whereby the trust is terminated by arrangement with the assignor continue the business under his own name, they being then the only parties interested.—Quimby v. Uhl, 130 Mich. 198.

¶ 209. Where a assignee under an assignment for the benefit of creditors, with the unanimous consent of the assignor and the creditors, continues to carry on business with the property assigned, the assignor and the creditors are estopped to deny his authority to do so.—Quimby v. Uhl, 130 Mich. 198.

§ 31. Compensation, expenses and allowances.

Provisions of statute, see Jud. Act, Chap. XLII, § 12; Comp. L. 1915, § 13615.

¶ 210. The fact that an assignee has been loose in some of his methods, and negligent in not preserving the original inventory of the assigned property, which was taken on loose sheets of paper, and certain other books and documents, is not a sufficient reason for depriving him of all compensation for his services.—In re Joslin, 101 Mich. 499.

§ 32. Liability of assignees, and sureties on bond.

¶ 211. The assignees of a failing debtor under an assignment for the benefit of creditors must use reasonable diligence in closing up the trust, and are liable for any damage resulting from culpable negligence. Where most of the property was sold and most of the assets realized in somewhat over a year, and nearly all in a little over two years, it was held there was no delay. For mere delay in payment, interest is, in law, sufficient compensation.—Clark v. Craig, 29 Mich. 398.

¶ 212. Where the whole property, subject to an exemption, is put in the assignee's hands, the assignee is not liable for the exemption until the assignor makes some demand for it, nor is he liable for any portion of it that he has expended, with the assignor's consent, for the purposes of the assignment.—Chipman v. Kellogg, 60 Mich. 438.

¶ 213. Where certain lands, in which an undivided half interest belonged to the trust under the assignment, were put up at auction after full notice, and the assignor, in order to have the whole sold, purchased upon his individual note the other undivided half, and the lands, after being bid off at the auction sale, were conveyed to unpreferred creditors in consideration of their releasing their debts, the assignees charging themselves with the half of the purchase bid, it was held that the action of the assignees would not be held culpable in the absence of any showing of the real value of the lands, or of improper management, upon mere inferences to be drawn from a comparison of the amount of the auction price with that of the assignor's note, given for the other half, or with that of the debts released; the assignees could only be justly charged with the real value of the lands, and this will not be presumed, without evidence, to have exceeded the auction biddings.—Clark v. Craig, 29 Mich. 398.

¶ 214. Laws 1877, Act No. 186 (How. St., § 8847), relative to assignees of insolvent debtors, does not apply to any other assignees than those who have become such under Comp. L. 1871, chap. 234, How. St., chap. 308, of which it is an amendment.—Booth v. Eddy, 38 Mich. 245.

¶ 215. An assignment was made for the benefit of creditors and under agreement the trustee continued the business. After the debts were all paid the business was still continued in the name of the assignee and under his direction, and upon the death of the assignor, it was still so continued by consent of the heirs who received the profits and assisted in the management. For some years it was profitable but later was continued at a loss, though the aggregate profits were greater than the losses, and the heirs of the assignor brought action for a receiver and for an accounting. Held, that since the heirs had acquiesced in the continuation of the business and had received and retained the profits, they could not hold the trustee for the losses.—Quimby v. Uhl, 130 Mich. 198.

§ 33. Rights under invalid assignment.

Bill under supervisory jurisdiction of chancery as proper proceeding rather than bill to annul, see post § 38.

¶ 216. An assignee who, because of his failure to file bond within ten days, has taken no title, cannot in a court of law attack as fraudulent against creditors, when they do not complain, the validity of a chattel mortgage given by his assignor previous to the assignment.—Abbott v. Chaffee, 96 Mich. 294.

¶ 217. An assignee's failure to file the statutory bond required by How. St., § 8739, does not of itself entitle a mortgagee, whose mortgage is fraudulent as to creditors, to recover in trover against the assignee for the value of the mortgage interest; defendant can defeat the action by showing title in a stranger.—Abbott v. Chaffee, 83 Mich. 256.

¶ 218. Failure to file bond does not prejudice bona fide purchasers for value from assignee, where assignor and creditors—for

whose protection bond is required—have not objected.—Munro v. Meech, 94 Mich. 596.

¶ 219. Where an assignment is fraudulent as to any of its provisions it is void in toto as against creditors who are entitled by law to take advantage of the fraud.—Pierson v. Manning, 2 Mich. 445.

¶ 220. An assignment void in part is altogether void. It cannot be sustained in part because of one good trust in it.—Kirby v. Ingersoll, H. 172.

§ 34. ——Right to question validity.

Estoppel of participating officer to attack corporation assignments, see Corporations, XXIII.

¶ 221. The legality of a common-law assignment with preferences can be attacked only by the assignor's creditors; debtors, therefore, who have been garnished cannot plead its illegality in abatement of an action brought against them by the assignee for the amount of their debt.—Butler v. Wendell, 57 Mich. 62.

¶ 222. If an assignment for the benefit of creditors contains a power to sell on credit, it is void as against the garnishment of a judgment recovered by the insolvent, though it may be valid as against the assignor and also as regards creditors and others not seeking to avoid it.—Richardson v. Rogers, 45 Mich. 591.

¶ 223. When an assignment was supposed by the parties to be void and so treated by them, and one of the assignors, with the knowledge of the assignee, entered into a contract with the others to purchase a part of the joint property and pay the joint debts, and also make certain payments to the other assignors, and he went on acting under this contract, making payments and improving the property, held, that other parties who were not creditors, and who with knowledge of this contract bought the land of the assignee and the other assignors, were bound by the contract, and might be compelled to deed over in specific performance of it.—Ryerson v. Eldred, 18 Mich. 12.

¶ 224. Creditors may doubtless waive the avoidance which a clause authorizing the assignee to sell on credit works in the assignment.—Ryerson v. Eldred, 18 Mich. 12.

¶ 225. A fraudulent assignment for the benefit of creditors is not so absolutely void that a creditor's right to complain of it may not be lost by waiver or acquiescence; he cannot attack it until he has in some way acquired a legal standing, and he may let it alone if he chooses to do so.—Blake v. Hubbard, 45 Mich. 1.

¶ 226. A creditor's right to complain of an assignment for the benefit of creditors, in the execution of which there may have been fraud and which may have been fraudulent as to creditors, may be lost by waiver or acquiescence.—In re Smith's Appeal, 86 Mich. 149.

¶ 227. A creditor who comes in under assignment proceedings so as to entitle himself to share in the dividends arising from the assets in the assignee's hands estops himself from objecting to the assignee's title to such assets.—In re Smith's Appeal, 86 Mich. 149.

§ 35. Partnership and corporation assignments.

Corporate mortgage as assignment, see ante ¶ 8.

Mortgages amounting to common-law assignments, see ante § 12.

Rank and priorities of creditors, see ante § 23.

Rights under assignment by one partner, see ante ¶ 154.

Dividend allowable to secured creditor, see ante § 24, ¶ 182.

Insolvency of corporations and the adjustment of rights of creditors and distribution of assets, see generally Corporations, XXIII.

Insolvency and dissolution of partnership generally, see Partnership, VII.

¶ 228. A preference of individual debts in a copartnership assignment did not of itself, independent of an actual intent to defraud, render the assignment void.—Nye v. Van Husan, 6 Mich. 329; Hollister v. Loud, 2 Mich. 309.

¶ 229. Where one partner, without the consent of the other, who was on the spot and might have been consulted, made an assignment of the partnership effects to one of the creditors for the benefit of the creditors generally, preferring the debt of the assignee, it was held that the assignment was void in toto, and could not be sustained to the extent of securing the debt of the assignee.—Kirby v. Ingersoll, H. 172; Kirby v. Ingersoll, 1 D. 477.

§ 36. Actions and suits.

Removal of assignee, see ante § 27.

Accounting by assignee, see ante § 29.

Supervisory suit or other action or suit as concurrent remedies, see also post § 38.

Petition or bill by creditors in aid of assignment, and proceedings thereon, see post § 39.

Presumptions and evidence as to fraud in assignments, see ante §§ 15, 16.

Action for trover for improper levy, see also post ¶ 276.

For the general law of remedies and procedure not primarily controlled by the relation of an assignment for creditors to the suit, see topics treating of procedure and of the particular remedies.

Which court has jurisdiction, see Courts, V.
Proper venue, see Venue.
Nature of actions or suits under the statute as controlling method of review, appeal or error, see Appeal and Error, I.
Error as remedy for review of proceedings to enforce claim, see Appeal and Error, ¶ 19.
Appealability of decrees in assignment proceedings, see Appeal and Error, § 53.
Appealability of order as a "cause" in chancery, see Appeal and Error, ¶ 62.
Effect of judgment for or against assignee to bind assignor, see Former Adjudication, V.
Power of assignee to sue or defend, see Jud. Act, Chap. XLII, § 3; Comp. L. 1915, § 13606.

¶ 230. The assignee of an insolvent debtor under Pub. L. 1879, by accepting the assignment and taking possession makes himself a trustee; and he may defend the trust by the institution of any necessary suit, even though his trusteeship is not yet perfected by filing a bond.—Sibley v. Prescott Ins. Co., 57 Mich. 14.

¶ 231. The assignment law regards the assignee as a trustee or representative of the creditors for all purposes auxiliary to the assignment, and if creditors could sue also, it would create great confusion.—Root v. Potter, 59 Mich. 498.

¶ 232. Under the assignment law the assignee, when applied to by creditors interested, represents all interests for the purposes of contest, and is the proper person to contest claims; and a receiver, when appointed, stands in his place.—E. T. Barnum Wire & Iron Works v. Speed, 59 Mich. 272.

¶ 233. An assignee may be sued at law by a third person for property held under the assignment and alleged to have been wrongfully taken or converted notwithstanding the supervisory jurisdiction given to chancery over assignments for creditors by How. St., § 8749.—Edwards v. Symons, 65 Mich. 348.

¶ 234. An assignee for the benefit of creditors, may, after taking possession of and asserting title to the assigned property, be made a defendant in replevin brought for it by third persons notwithstanding that he has turned over the property to the holder of a chattel mortgage on the same.—Beach v. Davis, 78 Mich. 602.

¶ 235. Under How. St., § 8741, which provides that every assignment for the benefit of creditors shall confer upon the assignee the right to recover all property, or rights or equities therein which might be reached by creditors, a creditor's special right or lien that was not a lien when the assignment was made must be enforced through the assignee.—Farrell Foundry & Machine Co. v. Preston Nat Bank, 93 Mich. 582.

¶ 236. A debtor, who had made an assignment, afterward resumed control of the goods, and the assignee brought replevin for them. Held, that losses by the assignee's negligence could not be charged on him in this or in any suit at law, an accounting in respect to a trust being the correct procedure.—Rodman v. Nathan, 45 Mich. 607.

¶ 236a. One who has title to goods by virtue of a voluntary assignment to him under a foreign insolvent law may bring trover here for their value against his assignor.—Burrows v. Keays, 37 Mich. 430.

¶ 237. An assignee has no such title or right as will sustain trover against the United States marshal for goods taken by him from the possession of mortgagees holding adversely to the assignee, whatever may be the right thereto as between the marshal and the mortgages.—Axford v. Mathews, 43 Mich. 327.

¶ 237a. An assignee for the benefit of creditors can maintain trover against a sheriff for the full value of property assigned subject to valid mortgages and seized by defendant on attachments issued after the assignment was made and before actual filing of the assignee's bond.—Coots v. Radford, 47 Mich. 37.

¶ 238. Where any claim is disputed by assignee, receiver or creditor of an assigned estate, a trial is to be had on the law side of the same court, in a contest entered as a cause between creditor and assignor, and on a verdict a judgment is to be entered but no execution can be issued on it. Provision is also made concerning the declaration of dividends and other matters, and it is finally provided that the circuit court in chancery shall have supervisory power over all matters, questions and disputes arising under assignments, and may, upon the application of the assignee, or any person interested, make all necessary and proper orders for management, disposition and distribution, and for the recovery of property claimed by third persons, and may from time to time require new bonds or securities (How. St., § 8749).—Scott v. Wayne Circuit Judges, 58 Mich. 311.

§ 37. ——Bar or abatement of actions pending assignment.

Assignment as invalidating levies, see ante § 26.
Discharge of arrested debtor on making assignment for creditors, see Civil Arrest and Bail.

¶ 239. A common-law assignment for the benefit of creditors does not bar an action by the creditor against the assignor.—Parsons v. Clark, 59 Mich. 414.

¶ 240. An assignment for the benefit of creditors does not bar a creditor's right to sue or to proceed to judgment whether suit is commenced before or after the assignment is made.—Detroit Stove Works v. Osmun, 74 Mich. 7.

¶ 241. An assignment for creditors does not bar a creditor's right of action against the debtor; nor is his right to proceed to judgment affected by his having filed a claim in the assignment proceedings.—Detroit Stove Works v. Osmun, 74 Mich. 7; Black v. Dawson, 82 Mich. 485; Hinchman v. Weeks, 85 Mich. 535; Bedford v. Penney, 65 Mich. 667.

¶ 242. An assignment for creditors does not abate an action of replevin previously brought by the assignor's vendee against an officer who had attached the goods in favor of creditors of the assignor and vendor.—Bedford v. Penney, 65 Mich. 667.

¶ 243. An assignment for the benefit of creditors (How. St., §§ 2137-2140) does not prevent the continuance of proceedings—such as an attachment suit—previously begun in a competent court.—E. T. Barnum Wire & Iron Works v. Speed, 59 Mich. 272.

§ 38. ——Supervisory jurisdiction of chancery.

Concurrent remedy at law, see also ante § 36, ¶ 233.

Conclusiveness of decree on one who submits issues beyond scope of suit, see Former Adjudication, II, A.

See generally Jud. Act, Chap. XLII, § 9; Comp. L. 1915, § 13612.

¶ 244. The term "proceedings," as used in the statute, relating to assignments for creditors (How. St., § 8749), includes all matters connected with or attending the exercise of the power conferred upon the circuit courts in chancery which are necessary to enable the court to exercise the superintending control and authority conferred by the statute.—Kittridge v. Washtenaw Circuit Judge, 80 Mich. 200.

¶ 245. The authority of the court in chancery to exercise its supervisory powers is called into being whenever application is made by any one authorized by the act relating to assignments for creditors (How. St., § 8749), to invoke such powers.—Kittridge v. Washtenaw Circuit Judge, 80 Mich. 200.

¶ 246. Common-law assignments for the benefit of creditors are by statute placed fully under the control and supervision of the courts of chancery.—Kittridge v. Washtenaw Circuit Judge, 80 Mich. 200.

¶ 247. Under How. St., § 8749, the circuit court of the proper county is the court which has jurisdiction of matters arising out of or under an assignment for creditors, and the validity of such an assignment cannot be attacked elsewhere.—Smith v. Wayne Circuit Judge, 84 Mich. 564.

¶ 248. An assignment for the benefit of creditors under How. St., chap. 303, § 1, providing "that all assignments commonly called common law assignments for the benefit of creditors shall be void, unless the same shall be without preferences as between such creditors," when fully perfected, cannot be set aside at the suit of an attachment or execution creditor where he himself is seeking a preference, by proof of an unlawful preference, or of "any fraud in the matter of such assignment," but relief against such preference or fraud is to be sought in chancery under How. St., §§ 8744, 8749, for the benefit of all the creditors.—Wolf v. Slosson, 83 Mich. 543, explaining Kendall v. Bishop, 76 Mich. 634, which is held not to have overruled Coots v. Radford, 47 Mich. 37.

¶ 249. How. St., § 8749, giving the circuit court in chancery supervisory power over matters and questions arising under assignments for creditors, and to make orders for the management of the assigned property and the recovery of property claimed by third persons, does not vest exclusively in that court the right to try and determine the claims of third persons to property in the assignee's hands held by virtue of that assignment; he may be sued at law.—Edwards v. Symons, 65 Mich. 348.

¶ 250. How. St., § 8749 (2nd Ed., § 14175), does not vest in chancery the right of determining the claims of third persons to property in the assignee's hands, and held by him under the assignment, nor does it prevent a third person from suing at law to recover property so held; but chancery may dispose of such claims if the parties are willing and voluntarily submit to the jurisdiction; and its decision will be binding.—Edwards v. Symons, 65 Mich. 348; Sawyer v. McAdie, 70 Mich. 386; Gordon v. Sherman, 178 Mich. 629.

¶ 251. Chancery has jurisdiction to set aside at the instance of the assignee of an insolvent debtor an unauthorized attachment of the assigned property.—Turner v. Hatch, 100 Mich. 65; Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

¶ 252. A mere interloper claiming nothing under the assignment and related to the

property only in that it is a trespasser liable to one or the other party according to the outcome of a chancery bill cannot by cross-bill seek to be protected and have its liability adjudicated.—Gordon v. Sherman, 178 Mich. 629.

§ 39. ——Petition or bill by creditors in aid of assignment.

Office and propriety of cross-bills generally, see Equity, VII, D.
Enforcing administration within reasonable time, see ante ¶ 27.
For removal of assignee and appointment of successor, see ante §§ 27, 28.

¶ 253. In case of fraud in an assignment for the benefit of creditors, or of failure to conform to the statutory regulations, any person interested may file a bill to enforce the trust, and a receiver may be appointed, and the court may order a summary examination of parties or witnesses at any stage of the cause (How. St., § 8744).—Scott v. Wayne Circuit Judges, 58 Mich. 311.

¶ 254. General creditors of an assignor may file a bill to reach assets fraudulently conveyed, under How. St., §§ 8744, 8749, which allow "any person interested" to enforce the trust created by an assignment or to sue to recover property or prevent any fraudulent transfer; where the assignee, having refused to sue, is joined as a defendant with the transferee.—Burnham v. Dillon, 100 Mich. 352.

¶ 255. That a complainant has an adequate remedy at law, he having taken judgment upon his claims, is not conclusive of his right to pursue in equity a fund held by an assignee in trust for the assignor's creditors of whom complainant is one.—Matthews v. Forslund, 112 Mich. 591.

¶ 256. A creditor of the assignors, after the statutory time to file the bond has expired, may proceed upon the equity side of the court to have the trust carried out through the intervention of a receiver and the supervisory powers of chancery; or, if no other creditor invokes the aid of chancery, he may proceed to enforce his claim against the debtor's property by attachment or execution.—Beard v. Clippert, 63 Mich. 716.

¶ 257. If the assignee refuses to move to attack fraudulent transfers or mortgages, or his interest be such that the court is satisfied he ought not to direct or control the proceedings, leave should be granted to the creditor to file his bill.—Sweetzer v. Higby, 63 Mich. 13.

¶ 258. The fraud referred to in How. St., § 8744, is one "in the matter of such assignment" with which the assignee is connected as well as the assignor. The section was intended to give the creditors relief against the assignee's incompetency, neglect or fraud, and not to cover cases where he could and would act.—Sweetzer v. Higby, 63 Mich. 13.

¶ 259. Under How. St., § 8744, a creditor may file a bill to set aside a chattel mortgage alleged to have been given in anticipation of an assignment by the mortgagor, and to secure to the mortgagee a preference, to which transaction the assignee is alleged to have been a party; and it is not necessary that the complainant should have obtained an order from the court requiring the assignee to institute proceedings.—Burnham v. Haskins, 72 Mich. 235.

¶ 260. Where by an assignment which was executed by the assignee a time was limited for closing up the trust, and the assignee allowed the time nearly to expire before taking any proceedings for that purpose, it was held that creditors need not wait for the expiration of the time before filing a bill to enforce the execution of the trust.—Suydam v. Dequindre, H. 347.

¶ 261. Defrauded creditors are entitled to have fraudulent mortgages executed a few days before the assignment set aside, to have an accounting by the assignor for the property received by him, and to have a receiver appointed to enforce the trust on the assignee's refusal to do so, and may maintain for that purpose a bill to enforce the assignee's trust.—Funke v. Cone, 65 Mich. 581.

¶ 262. A merchant who had long been conducting a successful business, made, apparently unnecessarily, an assignment for the benefit of creditors to his brother-in-law, and it was shown that his stock had been greatly reduced, and that he had executed a few days before the assignment chattel mortgages to his relatives covering the greater part of his property, and for a consideration not satisfactorily explained. His own testimony was uncertain and unsatisfactory as to details which he must have known. The assignee would not contest the transfers. Held, that the creditors were entitled to have such mortgages and transfers set aside, to compel the assignor to account, and to have a receiver appointed to enforce the trust.—Funke v. Cone, 65 Mich. 581.

¶ 263. Where an assignee for the benefit of creditors holds the assigned property during the period allowed him to file his bond, and then, instead of filing it, relinquishes his trust and at once attaches the goods as a creditor, other creditors over whom he has thereby obtained an undue advantage should proceed, under L. 1879, Act No. 198 (How. St., § 8744), to compel a proper execution of the

trust, and the attachment proceedings will meanwhile be stayed.—Pickersgill v. Riker, 50 Mich. 98.

¶ 264. A single creditor may file a bill to enforce the prompt execution of an assignee's trust; and the other creditors need not be made parties.—Wilhelm v. Byles, 60 Mich. 561.

¶ 265. The trust being under a general assignment for the benefit of creditors, some of the creditors filed a bill to have the assignment set aside as fraudulent, or, in case it was sustained, then to have the trust enforced. The bill averred that certain creditors had been paid their demands in full. Held, not necessary to make such persons parties to the bill.—Suydam v. Dequindre, H. 347.

¶ 266. Under How. St., § 8749, proceedings in the circuit court in chancery against the assignee to recover a dividend may be commenced by petition as well as by bill; and jurisdiction of the assignee may be acquired by an order requiring him to appear and answer.—Southern Michigan Nat. Bank v. Byles, 67 Mich. 296.

¶ 267. Under How. St., § 8749, proceedings in the circuit court in chancery against the assignee to recover a dividend may be commenced by petition; and jurisdiction of the assignee may be acquired by an order requiring him to appear and answer. It is not necessary to serve the creditors with notice of the petition or with a copy of the order, since the assignee represents them.—Southern Michigan Nat. Bank v. Byles, 67 Mich. 296.

¶ 268. An assignee for creditors failed, after the creditors' written request, to contest mortgages made by the assignor and claimed to be fraudulent, whereupon the creditors filed a bill for the purpose. The issue upon the validity of the mortgages was fairly made in the pleadings and upon the testimony, and no question as to the right to litigate such validity was made in the court below. Held, that any necessity for an application for leave to file the bill must be deemed waived.—Funke v. Cone, 65 Mich. 581.

¶ 269. An objection that general creditors of an insolvent debtor, who has made an assignment for the benefit of his creditors, are not authorized, on the refusal of the assignee, to file a bill to set aside an alleged fraudulent chattel mortgage executed by the assignor prior to and in anticipation of the assignment, will not be regarded as fatal when raised for the first time after all of the testimony has been taken, and with all of the parties before the court who could be brought in had the bill been filed by the assignee.—Burnham v. Dillon, 100 Mich. 352.

¶ 270. The right of creditors, on the refusal of the assignee, to sue to set aside a chattel mortgage by bill in equity cannot be defeated by the contention that the fact that the assignee of the mortgage was in possession of the mortgaged property under his security, and hence the general assignee might have maintained an action at law.—Burnham v. Dillon, 100 Mich. 352.

§ 40. ——Suits to avoid levies or transfers of property.

Rights of assignee, see ante §§ 20, 21.

¶ 271. Equity has jurisdiction, at the suit of an insolvent's assignee, to dissolve void attachments improperly levied on the insolvent's lands, whether such lands are occupied or not.—Gott v. Hoschna, 57 Mich. 413.

¶ 272. The assignee or receiver is the proper person to attack as fraudulent against the assignment conveyances, mortgages or payments by the assignor to third persons; and the creditors must move through the assignee or ask chancery to compel him to move or allow them to do so.—Root v. Potter, 59 Mich. 498; Angell v. Pickard, 61 Mich. 561; Scott v. Chambers, 62 Mich. 532; Sweetzer v. Higby, 63 Mich. 13.

¶ 273. An insolvent's assignee can attack his assignor's transfers for fraud; and so can a receiver acting in place of an assignee (How. St., § 8741).—Heineman v. Hart, 55 Mich. 64.

¶ 274. The assignee of an insolvent debtor may seek in chancery the dissolution of an attachment upon the assigned property; he cannot intervene in the law action.—Turner v. Hatch, 100 Mich. 65; Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

¶ 275. The assignee of an insolvent may file a bill in equity to get rid of an attachment levied on the debtor's lands and void under How. St., § 8739; for he cannot seek a dissolution in the attachment suit itself.—Gott v. Hoschna, 57 Mich. 413.

¶ 276. An assignee can bring trover against the sheriff or other stranger for the full value of assigned property seized and sold by him on writ of attachment issued after the assignment was made and before the assignee's bond was filed.—Coots v. Radford, 47 Mich. 37.

§ 41. ——Pleading assignment and debt.

Pleading assignments generally, see Assignments, §§ 31, 32.

¶ 277. The declaration by an assignee for the benefit of creditors to recover for goods sold and delivered by the assignor should aver defendant's indebtedness to the assignor for goods and assignment of the claim by the assignor to plaintiff.—Powell v. Williams, 99 Mich. 30.

ASSISTANCE, WRIT OF.

TREATS of the chancery writ to assist the sheriff or executive officer of the court to put the purchaser in possession of land sold under decree. The writ of possession used in a law court in ejectment is treated in Ejectment, V; and the writ of restitution used in summary proceedings is treated in Forcible Entry.

Analysis.

§ 1. Nature and office of writ.
§ 2. Issuance and requisites of writ; application.
§ 3. For and against whom issuable.
§ 4. ——Purchasers and others in privity with defendant.
§ 5. ——Hostile claimants.
§ 6. Defenses and objections to issuance.

§ 1. Nature and office of writ.

¶ 1. A writ of assistance is the regular process for carrying out a decree of possession, and it lies on foreclosure sales.—Ramsdell v. Maxwell, 32 Mich. 285.

¶ 2. A writ of assistance will be granted to put the purchaser of mortgaged premises in possession if the defendant, on being shown the master's deed and a certified copy of the order confirming the sale under the seal of the court, refuses to deliver possession.—Hart v. Linsday, W. 144.

¶ 3. The object of a writ of assistance is to compel parties who are bound by a decree in foreclosure to give up the possession which the decree and sale under it estop them from further asserting. It cannot be proper where there is any real controversy as to the right of possession not precluded by the decree and sale.—Ramsdell v. Maxwell, 32 Mich. 285.

¶ 4. A writ of assistance is proper only where a party concluded by the proceedings refuses to give up possession on request; and it should not be granted without proper evidence of such refusal after the right of possession is established.—Howard v. Bond, 42 Mich. 131.

§ 2. Issuance and requisites of writ; application.

Necessity of service of deed, see ante § 1.

Necessity of notice and demand on person not party, see also post ¶ 8.

Appealability of order on application for writ, see Appeal and Error, § 48, ¶ 219.

Irreviewableness on appeal from decree, see Appeal and Error, § 297.

Conclusiveness of order on application for writ as an adjudication of fact, see Former Adjudication.

¶ 5. A decree was made in the Supreme Court requiring the complainant to deliver up possession of certain premises, and the cause was remitted to the court below for the purposes of an accounting. Held, that any application for a writ of assistance under the decree should be made in the court below.—Ryerson v. Eldred, 18 Mich. 195.

¶ 6. Where exceptions to the report of sale in a mortgage foreclosure case were overruled, and the sale was confirmed, and an order made on the same day for a writ of assistance, based upon the petition of the complainant, showing the exhibition on that day to the mortgagor of the commissioner's deed and of a certified copy of the order confirming the sale, it will not be assumed, from the fact that the mortgagor resided 20 miles from the place where the court was held, that the complainant could not get a copy of the order of confirmation on the morning of the day it was made, make the service, and return in time to get the writ of assistance on the same day, or that it was the nisi order of confirmation, instead of the court order, which was served, in the absence of proof of that fact.—Tucker v. Stone, 99 Mich. 419.

§ 3. For and against whom issuable.

[Note. The writ is by statute allowable in tax cases to put the purchaser in possession and the issuance of it in such cases is regulated by statute. For that reason all such cases will be treated in Taxes, XII, C.]

Writ as process to put public or condemnor in possession in condemnation proceedings, see Eminent Domain, IX; Highways, II, B.

¶ 7. A defendant in a foreclosure proceeding whose interest in the property has been cut off by the sheriff's deed, has no standing to resist an order granting a writ of assistance to obtain possession of the property.—Farr v. Lachman, 130 Mich. 40.

§ 4. ——Purchasers and others in privity with defendant.

¶ 8. A writ of assistance will not be granted against a person not a party to the suit, who has come into possession of mortgaged premises since the suit was commenced, unless notice of the motion, with a copy of the affidavit on which it is founded, is served upon him.—Benhard v. Darrow, W. 519.

¶ 9. In a proceeding by a purchaser on foreclosure for a writ of assistance against a contract-purchaser the latter cannot avoid the effect of the foreclosure by setting up equities between himself and other defendants before the sale, and by connecting the petitioner with them.—Ketchum v. Robinson, 48 Mich. 618.

¶ 10. Where, in a foreclosure suit, a subsequent mortgagee was not made a party, and no lis pendens was filed, and after decree, and just before sale under it, such subsequent mortgagee was, by some arrangement with the owner of the equity of redemption (who was a party), placed in possession of the mortgaged premises, having, at the time, notice of the foreclosure proceedings, held, that any right to possession thus acquired ceased on the sale, and that the purchaser at such sale was entitled to a writ of assistance to put him in possession.—Baker v. Pierson, 5 Mich. 456.

§ 5. ——Hostile claimants.

See also ante ¶¶ 3, 4.

¶ 11. Where in a foreclosure suit a defendant, in addition to claiming rights in the mortgaged premises as a subsequent purchaser at an execution sale, claims under tax titles, which cannot be litigated in said suit, no writ of assistance will be awarded to put him out of possession of the mortgaged premises.—Hayward v. Kinney, 84 Mich. 591.

¶ 12. A mere oral statement by one not a party of record, made in the course of proceedings for a writ of assistance in behalf of a purchaser at foreclosure sale, that he claims possession by virtue of a sale for taxes, is too informal to warrant consideration.—Aldrich v. Wayne Circuit Judge, 111 Mich. 525.

§ 6. Defenses and objections to issuance.

Doubt or controversy as to right, see also ante § 1.

That person in possession is not bound by decree, see also ante §§ 3-5.

¶ 13. Since the decree and sale are binding on the parties and their privies, one who neither shows a prior title nor an independent claim of ownership and possession is not entitled to object.—Lightner v. Prentis, 158 Mich. 13.

¶ 14. Where proceedings by writ of assistance were taken on the foot of a foreclosure decree against a wife, leave being given to discontinue as against the husband, the objection that the papers were wrongly entitled in the names of both defendants was held a mere technicality, especially where it was not clear from the record whether the order of discontinuance had been entered.—Howe v. Lemon, 47 Mich. 544.

¶ 15. An assignee of a decree of foreclosure who, in a proceeding brought by him to set aside the sale made thereunder without notice of the assignment, waives all objections to the sale and prays for an order granting six months' time for redemption, which is denied, will not thereafter be heard to resist a writ of assistance based on the sale on the ground that the decree had been assigned and the sale had without a petition being made and allowed as required by 1897 Chancery Rule 34.—Farr v. Lachman, 130 Mich. 40.

¶ 16. Matters set up in defence to a motion for the writ cannot be received to affect the decree of assistance which is the basis of the application.—Howe v. Lemon, 47 Mich. 544.

ASSISTANTS.

Cross-References.

To prosecuting attorney, see Attorneys, III.

Assistant judges, see Judges, IV.

Associated magistrates, see Arrest, Commitment and Bail, § 31.

Deputies to officers, see Officers; Sheriffs, V.

Complicity and liability of assistants in crime or tort, see Crimes, I; and see topics treating of the specific torts, e. g., Assault and Battery; Conversion; False Imprisonment; Malicious Prosecution; Libel; Trespass; Negligence.

ASSOCIATIONS AND SOCIETIES.

TREATS of unincorporated or incorporated associations of persons for mutual objects, ordinarily social, benevolent or protective, without capital stock or purpose of profit, and having an entity distinct from that of the members. It excludes associations in a lodge system with ritual and for insurance or mutual pecuniary benefits (see Fraternal Beneficiary Associations), labor unions (see Trade Unions), societies and corporations for religious worship (see Religious Societies), institutions for public charity (see Charities), and associations for profit (see Corporations; Joint Stock Companies; Partnership; Joint Adventures).

Analysis.

§ 1. Nature and objects in general.
§ 2. Incorporation, organization and personnel.
§ 3. Charter, constitution and by-laws.
§ 4. Admission, discipline or expulsion of members.
§ 5. ——Notice, hearing and procedure.
§ 6. Remedy for, and review of expulsion or denial of rights.
§ 7. Contracts, conveyances and property.
§ 8. Rights and liabilities of members.
§ 9. Dealings and contracts between members and association.
§ 10. Actions by and against association or members.
§ 11. ——Parties, pleading and judgment.
§ 12. Dissolution and winding up.
§ 13. Reorganization, merger and succession.

§ 1. Nature and objects in general.

Particular kinds of associations, see Agriculture, § 3; Building and Loan Associations; Cemeteries; Fraternal Associations; Insurance (mutual companies).

Joint stock associations for profit (partnership associations), see Joint Stock Companies.

Religious societies in general, see Religious Societies.

Trade and labor unions, see Trade Unions.

General law of corporations, see Corporations.

¶ 1. Persons have a right to enter into purely benevolent and social organizations, having also in view the protection, benefit and welfare of their members in their various employments, and to bind themselves as to their membership and rights in such societies, and the funds of the same by the constitution and by-laws of the association which they adopt, or subscribe to after adoption; and such associations are in no sense partnerships.—Brown v. Stoerkel, 74 Mich. 269.

§ 2. Incorporation, organization and personnel.

Necessity of unanimous consent to action, see post ¶ 33.

Reorganization, merger and succession, see post § 13.

Reposing power in secretary to expel members, see post ¶ 13.

Appointment of committee to investigate charges against member, see post ¶ 18.

Effect of withdrawal of portion of members, see post ¶ 45.

Effect of incorporation to vest association property in succeeding corporation, see post ¶ 50.

Relation of grand and subordinate lodges, see also Fraternal Associations, I.

Right to corporate name, and infringements on name, see Corporations, III.

Names of fraternal associations, see Fraternal Associations, I.

Admissibility of parol evidence to prove official character of persons, see Evidence, IV. B.

For the statutes relating to associations and societies, see indexes to the published statutes. The matter is too voluminous to warrant any attempt to refer to it here.

¶ 2. A corporation organized for the purpose of improving the breed of horses by promoting the interests of the American trotting turf, and whose articles of association contained no provision for a capital stock, nor for the carrying on of any business, nor for the acquiring of any money or property, except membership fees and annual dues from the members, was not organized for pecuniary profit and comes within the provision of Pub. Acts, 1903, No. 171, providing for the incorporation of associations not for pecuniary

profit.—American Matinee Ass'n v. Secretary of State, 140 Mich. 579.

¶ 3. An election of officers by a board of directors of an unincorporated organization, before the terms of office of the members of the board have begun, and without giving notice to all of the directors, is illegal.—Grand Rapids Guard v. Bulkley, 97 Mich. 610.

§ 3. Charter, constitution and by-laws.

By-law fixing price for concessions, see post ¶ 36.

What law governs, see Conflict of Laws, VI.

¶ 4. The articles of agreement of an unincorporated association, whether called a "constitution," "charter," "by-law" or by any other name, constitute a contract between the members which the courts will enforce, if not immoral or contrary to public policy or the law of the land.—Brown v. Stoerkel, 74 Mich. 269.

¶ 5. Under Comp. L. 1897, c. 207, relating to summer resort associations, power is given to make reasonable by-laws for the management, control and disposition of the property, affairs and concerns of corporations organized thereunder.—Highland Park Ass'n v. Boseker, 169 Mich. 4.

¶ 6. The validity of by-laws and regulations of a resort association organized under Comp. L. 1897, c. 207, relating to the management of the property, affairs and business of said association, depends upon the fact of their being reasonable, and their reasonableness depends upon particular circumstances or matters in pais.—Highland Park Ass'n v. Boseker, 169 Mich. 4.

¶ 7. Parties to a mutual organization expressly agreeing to abide by after-enacted by-laws are bound thereby.—Highland Park Ass'n v. Boseker, 169 Mich. 4.

¶ 8. The question of the reasonableness of by-laws and regulations of a resort association organized under Comp. L. 1897, c. 207, and amendments relating to the management of its property, affairs and business, is one for the jury.—Highland Park Ass'n v. Boseker, 169 Mich. 4.

§ 4. Admission, discipline or expulsion of members.

Notice, hearing and procedure to expel, see post § 5.

Nonjoinder of expelled members in making contracts, see post § 7.

Of members in fraternal beneficiary associations, see Fraternal Associations, I, V.

In trade unions, see Trade Unions.

¶ 9. No corporation can allow its members to be disfranchised for any cause or in any manner which it could not have adopted itself.—Allnutt v. Subsidiary High Court of A. O. F., 62 Mich. 110.

¶ 10. Articles of association which provide for expelling members "guilty of improper conduct calculated to bring this society into disrepute" doubtless cover cases of misconduct injurious to the society and damaging to the reputation of the person charged, e. g., where a member received and kept the initiation fee of an applicant for admission to the society and took the roll of the society without leave and refused to return it.—Burton v. St. George's Soc. of Detroit, 28 Mich. 261.

¶ 11. Under Comp. L. 1871, § 3429, How. St., § 4861, in the general corporation law, limiting penalties for violations of by-laws, expulsion for any mere infraction of a by-law would not be allowable.—People ex rel. Pulford v. Detroit Fire Department, 31 Mich. 458.

¶ 12. Where the constitution of a corporation was so amended as to introduce a new provision that any member who should fail, by a given date, to pay the whole of his dues then in arrears, or any indebtedness to the corporation, should thereafter cease absolutely to be a member without any further action of the corporation or its trustees, and that the secretary should drop the names of all such delinquent persons from the roll, such amendment was held void.—People ex rel. Pulford v. Detroit Fire Department, 31 Mich. 458.

Amendments subjecting member to expulsion, see post ¶¶ 12, 13.

¶ 13. Where, by the by-laws of a corporation, personal notice must be given by a specified date, annually, to members defaulting in the payment of their dues, and there can be no forfeiture of their membership without notice, it is incompetent to so amend the constitution of the corporation as to leave the declaration of the forfeiture to the secretary, acting as witness and judge on his own assertion, and without either hearing or appeal, and so that his action in a manner depends on his own performance of a prior duty.—People ex rel. Pulford v. Detroit Fire Department, 31 Mich. 458.

¶ 14. The history of the organization and changes in the fire department of Detroit considered in relation to membership and the right to expel for non-payment of back dues.—People ex rel. Pulford v. Detroit Fire Department, 31 Mich. 458.

§ 5. ——Notice, hearing and procedure.

In fraternal associations, see Fraternal Associations, V.

ment as well as a third person. Such new arrangements are repugnant to the original assignment and subvert whatever trust was created thereby.—Craig v. Bradley, 26 Mich. 353.

¶ 208. An assignee under an assignment for the benefit of creditors may, after all debts have been paid whereby the trust is terminated by arrangement with the assignor continue the business under his own name, they being then the only parties interested.—Quimby v. Uhl, 130 Mich. 198.

¶ 209. Where a assignee under an assignment for the benefit of creditors, with the unanimous consent of the assignor and the creditors, continues to carry on business with the property assigned, the assignor and the creditors are estopped to deny his authority to do so.—Quimby v. Uhl, 130 Mich. 198.

§ 31. Compensation, expenses and allowances.

Provisions of statute, see Jud. Act, Chap. XLII, § 12; Comp. L. 1915, § 13615.

¶ 210. The fact that an assignee has been loose in some of his methods, and negligent in not preserving the original inventory of the assigned property, which was taken on loose sheets of paper, and certain other books and documents, is not a sufficient reason for depriving him of all compensation for his services.—In re Joslin, 101 Mich. 499.

§ 32. Liability of assignees, and sureties on bond.

¶ 211. The assignees of a failing debtor under an assignment for the benefit of creditors must use reasonable diligence in closing up the trust, and are liable for any damage resulting from culpable negligence. Where most of the property was sold and most of the assets realized in somewhat over a year, and nearly all in a little over two years, it was held there was no delay. For mere delay in payment, interest is, in law, sufficient compensation.—Clark v. Craig, 29 Mich. 398.

¶ 212. Where the whole property, subject to an exemption, is put in the assignee's hands, the assignee is not liable for the exemption until the assignor makes some demand for it, nor is he liable for any portion of it that he has expended, with the assignor's consent, for the purposes of the assignment.—Chipman v. Kellogg, 60 Mich. 438.

¶ 213. Where certain lands, in which an undivided half interest belonged to the trust under the assignment, were put up at auction after full notice, and the assignor, in order to have the whole sold, purchased upon his individual note the other undivided half, and the lands, after being bid off at the auction sale, were conveyed to unpreferred creditors in consideration of their releasing their debts, the assignees charging themselves with the half of the purchase bid, it was held that the action of the assignees would not be held culpable in the absence of any showing of the real value of the lands, or of improper management, upon mere inferences to be drawn from a comparison of the amount of the auction price with that of the assignor's note, given for the other half, or with that of the debts released; the assignees could only be justly charged with the real value of the lands, and this will not be presumed, without evidence, to have exceeded the auction biddings.—Clark v. Craig, 29 Mich. 398.

¶ 214. Laws 1877, Act No. 186 (How. St., § 8847), relative to assignees of insolvent debtors, does not apply to any other assignees than those who have become such under Comp. L. 1871, chap. 234, How. St., chap. 308, of which it is an amendment.—Booth v. Eddy, 38 Mich. 245.

¶ 215. An assignment was made for the benefit of creditors and under agreement the trustee continued the business. After the debts were all paid the business was still continued in the name of the assignee and under his direction, and upon the death of the assignor, it was still so continued by consent of the heirs who received the profits and assisted in the management. For some years it was profitable but later was continued at a loss, though the aggregate profits were greater than the losses, and the heirs of the assignor brought action for a receiver and for an accounting. Held, that since the heirs had acquiesced in the continuation of the business and had received and retained the profits, they could not hold the trustee for the losses.—Quimby v. Uhl, 130 Mich. 198.

§ 33. Rights under invalid assignment.

Bill under supervisory jurisdiction of chancery as proper proceeding rather than bill to annul, see post § 38.

¶ 216. An assignee who, because of his failure to file bond within ten days, has taken no title, cannot in a court of law attack as fraudulent against creditors, when they do not complain, the validity of a chattel mortgage given by his assignor previous to the assignment.—Abbott v. Chaffee, 96 Mich. 294.

¶ 217. An assignee's failure to file the statutory bond required by How. St., § 8739, does not of itself entitle a mortgagee, whose mortgage is fraudulent as to creditors, to recover in trover against the assignee for the value of the mortgage interest; defendant can defeat the action by showing title in a stranger.—Abbott v. Chaffee, 83 Mich. 256.

¶ 218. Failure to file bond does not prejudice bona fide purchasers for value from assignee, where assignor and creditors—for

whose protection bond is required—have not objected.—Munro v. Meech, 94 Mich. 596.

¶ 219. Where an assignment is fraudulent as to any of its provisions it is void in toto as against creditors who are entitled by law to take advantage of the fraud.—Pierson v. Manning, 2 Mich. 445.

¶ 220. An assignment void in part is altogether void. It cannot be sustained in part because of one good trust in it.—Kirby v. Ingersoll, H. 172.

§ 34. ——Right to question validity.

Estoppel of participating officer to attack corporation assignments, see Corporations, XXIII.

¶ 221. The legality of a common-law assignment with preferences can be attacked only by the assignor's creditors; debtors, therefore, who have been garnished cannot plead its illegality in abatement of an action brought against them by the assignee for the amount of their debt.—Butler v. Wendell, 57 Mich. 62.

¶ 222. If an assignment for the benefit of creditors contains a power to sell on credit, it is void as against the garnishment of a judgment recovered by the insolvent, though it may be valid as against the assignor and also as regards creditors and others not seeking to avoid it.—Richardson v. Rogers, 45 Mich. 591.

¶ 223. When an assignment was supposed by the parties to be void and so treated by them, and one of the assignors, with the knowledge of the assignee, entered into a contract with the others to purchase a part of the joint property and pay the joint debts, and also make certain payments to the other assignors, and he went on acting under this contract, making payments and improving the property, held, that other parties who were not creditors, and who with knowledge of this contract bought the land of the assignee and the other assignors, were bound by the contract, and might be compelled to deed over in specific performance of it.—Ryerson v. Eldred, 18 Mich. 12.

¶ 224. Creditors may doubtless waive the avoidance which a clause authorizing the assignee to sell on credit works in the assignment.—Ryerson v. Eldred, 18 Mich. 12.

¶ 225. A fraudulent assignment for the benefit of creditors is not so absolutely void that a creditor's right to complain of it may not be lost by waiver or acquiescence; he cannot attack it until he has in some way acquired a legal standing, and he may let it alone if he chooses to do so.—Blake v. Hubbard, 45 Mich. 1.

¶ 226. A creditor's right to complain of an assignment for the benefit of creditors, in the execution of which there may have been fraud and which may have been fraudulent as to creditors, may be lost by waiver or acquiescence.—In re Smith's Appeal, 86 Mich. 149.

¶ 227. A creditor who comes in under assignment proceedings so as to entitle himself to share in the dividends arising from the assets in the assignee's hands estops himself from objecting to the assignee's title to such assets.—In re Smith's Appeal, 86 Mich. 149.

§ 35. Partnership and corporation assignments.

Corporate mortgage as assignment, see ante ¶ 3.

Mortgages amounting to common-law assignments, see ante § 12.

Rank and priorities of creditors, see ante § 23.

Rights under assignment by one partner, see ante ¶ 154.

Dividend allowable to secured creditor, see ante § 24, ¶ 182.

Insolvency of corporations and the adjustment of rights of creditors and distribution of assets, see generally Corporations, XXIII.

Insolvency and dissolution of partnership generally, see Partnership, VII.

¶ 228. A preference of individual debts in a copartnership assignment did not of itself, independent of an actual intent to defraud, render the assignment void.—Nye v. Van Husan, 6 Mich. 329; Hollister v. Loud, 2 Mich. 309.

¶ 229. Where one partner, without the consent of the other, who was on the spot and might have been consulted, made an assignment of the partnership effects to one of the creditors for the benefit of the creditors generally, preferring the debt of the assignee, it was held that the assignment was void in toto, and could not be sustained to the extent of securing the debt of the assignee.—Kirby v. Ingersoll, H. 172; Kirby v. Ingersoll, 1 D. 477.

§ 36. Actions and suits.

Removal of assignee, see ante § 27.

Accounting by assignee, see ante § 29.

Supervisory suit or other action or suit as concurrent remedies, see also post § 38.

Petition or bill by creditors in aid of assignment, and proceedings thereon, see post § 39.

Presumptions and evidence as to fraud in assignments, see ante §§ 15, 16.

Action for trover for improper levy, see also post ¶ 276.

For the general law of remedies and procedure not primarily controlled by the relation of an assignment for creditors to the suit, see topics treating of procedure and of the particular remedies.

Which court has jurisdiction, see Courts, V.
Proper venue, see Venue.
Nature of actions or suits under the statute as controlling method of review, appeal or error, see Appeal and Error, I.
Error as remedy for review of proceedings to enforce claim, see Appeal and Error, ¶ 19.
Appealability of decrees in assignment proceedings, see Appeal and Error, § 53.
Appealability of order as a "cause" in chancery, see Appeal and Error, ¶ 62.
Effect of judgment for or against assignee to bind assignor, see Former Adjudication, V.
Power of assignee to sue or defend, see Jud. Act, Chap. XLII, § 3; Comp. L. 1915, § 13606.

¶ 230. The assignee of an insolvent debtor under Pub. L. 1879, by accepting the assignment and taking possession makes himself a trustee; and he may defend the trust by the institution of any necessary suit, even though his trusteeship is not yet perfected by filing a bond.—Sibley v. Prescott Ins. Co., 57 Mich. 14.

¶ 231. The assignment law regards the assignee as a trustee or representative of the creditors for all purposes auxiliary to the assignment, and if creditors could sue also, it would create great confusion.—Root v. Potter, 59 Mich. 498,

¶ 232. Under the assignment law the assignee, when applied to by creditors interested, represents all interests for the purposes of contest, and is the proper person to contest claims; and a receiver, when appointed, stands in his place.—E. T. Barnum Wire & Iron Works v. Speed, 59 Mich. 272.

¶ 233. An assignee may be sued at law by a third person for property held under the assignment and alleged to have been wrongfully taken or converted notwithstanding the supervisory jurisdiction given to chancery over assignments for creditors by How. St., § 8749.—Edwards v. Symons, 65 Mich. 348.

¶ 234. An assignee for the benefit of creditors, may, after taking possession of and asserting title to the assigned property, be made a defendant in replevin brought for it by third persons notwithstanding that he has turned over the property to the holder of a chattel mortgage on the same.—Beach v. Davis, 78 Mich. 602,

¶ 235. Under How. St., § 8741, which provides that every assignment for the benefit of creditors shall confer upon the assignee the right to recover all property, or rights or equities therein which might be reached by creditors, a creditor's special right or equity that was not a lien when the assignment was made must be enforced through the assignee.—Farrell Foundry & Machine Co. v. Preston Nat Bank, 93 Mich. 582.

¶ 236. A debtor, who had made an assignment, afterward resumed control of the goods, and the assignee brought replevin for them. Held, that losses by the assignee's negligence could not be charged on him in this or in any suit at law, an accounting in respect to a trust being the correct procedure.—Rodman v. Nathan, 45 Mich. 607.

¶ 236a. One who has title to goods by virtue of a voluntary assignment to him under a foreign insolvent law may bring trover here for their value against his assignor.—Burrows v. Keays, 37 Mich. 430.

¶ 237. An assignee has no such title or right as will sustain trover against the United States marshal for goods taken by him from the possession of mortgagees holding adversely to the assignee, whatever may be the right thereto as between the marshal and the mortgages.—Axford v. Mathews, 43 Mich. 327.

¶ 237a. An assignee for the benefit of creditors can maintain trover against a sheriff for the full value of property assigned subject to valid mortgages and seized by defendant on attachments issued after the assignment was made and before actual filing of the assignee's bond.—Coots v. Radford, 47 Mich. 37.

¶ 238. Where any claim is disputed by assignee, receiver or creditor of an assigned estate, a trial is to be had on the law side of the same court, in a contest entered as a cause between creditor and assignor, and on a verdict a judgment is to be entered but no execution can be issued on it. Provision is also made concerning the declaration of dividends and other matters, and it is finally provided that the circuit court in chancery shall have supervisory power over all matters, questions and disputes arising under assignments, and may, upon the application of the assignee, or any person interested, make all necessary and proper orders for management, disposition and distribution, and for the recovery of property claimed by third persons, and may from time to time require new bonds or securities (How. St., § 8749).—Scott v. Wayne Circuit Judges, 58 Mich. 311.

§ 37. ——Bar or abatement of actions pending assignment.

Assignment as invalidating levies, see ante § 26.
Discharge of arrested debtor on making assignment for creditors, see Civil Arrest and Bail.

¶ 239. A common-law assignment for the benefit of creditors does not bar an action by the creditor against the assignor.—Parsons v. Clark, 59 Mich. 414.

¶ 240. An assignment for the benefit of creditors does not bar a creditor's right to sue or to proceed to judgment whether suit is commenced before or after the assignment is made.—Detroit Stove Works v. Osmun, 74 Mich. 7.

¶ 241. An assignment for creditors does not bar a creditor's right of action against the debtor; nor is his right to proceed to judgment affected by his having filed a claim in the assignment proceedings.—Detroit Stove Works v. Osmun, 74 Mich. 7; Black v. Dawson, 82 Mich. 485; Hinchman v. Weeks, 85 Mich. 535; Bedford v. Penney, 65 Mich. 667.

¶ 242. An assignment for creditors does not abate an action of replevin previously brought by the assignor's vendee against an officer who had attached the goods in favor of creditors of the assignor and vendor.—Bedford v. Penney, 65 Mich. 667.

¶ 243. An assignment for the benefit of creditors (How. St., §§ 2137-2140) does not prevent the continuance of proceedings—such as an attachment suit—previously begun in a competent court.—E. T. Barnum Wire & Iron Works v. Speed, 59 Mich. 272.

§ 38. ——Supervisory jurisdiction of chancery.

Concurrent remedy at law, see also ante § 36, ¶ 233.

Conclusiveness of decree on one who submits issues beyond scope of suit, see Former Adjudication, II, A.

See generally Jud. Act, Chap. XLII, § 9; Comp. L. 1915, § 13612.

¶ 244. The term "proceedings," as used in the statute, relating to assignments for creditors (How. St., § 8749), includes all matters connected with or attending the exercise of the power conferred upon the circuit courts in chancery which are necessary to enable the court to exercise the superintending control and authority conferred by the statute.—Kittridge v. Washtenaw Circuit Judge, 80 Mich. 200.

¶ 245. The authority of the court in chancery to exercise its supervisory powers is called into being whenever application is made by any one authorized by the act relating to assignments for creditors (How. St., § 8749), to invoke such powers.—Kittridge v. Washtenaw Circuit Judge, 80 Mich. 200.

¶ 246. Common-law assignments for the benefit of creditors are by statute placed fully under the control and supervision of the courts of chancery.—Kittridge v. Washtenaw Circuit Judge, 80 Mich. 200.

¶ 247. Under How. St., § 8749, the circuit court of the proper county is the court which has jurisdiction of matters arising out of or under an assignment for creditors, and the validity of such an assignment cannot be attacked elsewhere.—Smith v. Wayne Circuit Judge, 84 Mich. 564.

¶ 248. An assignment for the benefit of creditors under How. St., chap. 303, § 1, providing "that all assignments commonly called common law assignments for the benefit of creditors shall be void, unless the same shall be without preferences as between such creditors," when fully perfected, cannot be set aside at the suit of an attachment or execution creditor where he himself is seeking a preference, by proof of an unlawful preference, or of "any fraud in the matter of such assignment," but relief against such preference or fraud is to be sought in chancery under How. St., §§ 8744, 8749, for the benefit of all the creditors.—Wolf v. Slosson, 83 Mich. 543, explaining Kendall v. Bishop, 76 Mich. 634, which is held not to have overruled Coots v. Radford, 47 Mich. 37.

¶ 249. How. St., § 8749, giving the circuit court in chancery supervisory power over matters and questions arising under assignments for creditors, and to make orders for the management of the assigned property and the recovery of property claimed by third persons, does not vest exclusively in that court the right to try and determine the claims of third persons to property in the assignee's hands held by virtue of that assignment; he may be sued at law.—Edwards v. Symons, 65 Mich. 348.

¶ 250. How. St., § 8749 (2nd Ed., § 14175), does not vest in chancery the right of determining the claims of third persons to property in the assignee's hands, and held by him under the assignment, nor does it prevent a third person from suing at law to recover property so held; but chancery may dispose of such claims if the parties are willing and voluntarily submit to the jurisdiction; and its decision will be binding.—Edwards v. Symons, 65 Mich. 348; Sawyer v. McAdie, 70 Mich. 386; Gordon v. Sherman, 178 Mich. 629.

¶ 251. Chancery has jurisdiction to set aside at the instance of the assignee of an insolvent debtor an unauthorized attachment of the assigned property.—Turner v. Hatch, 100 Mich. 65; Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

¶ 252. A mere interloper claiming nothing under the assignment and related to the

property only in that it is a trespasser liable to one or the other party according to the outcome of a chancery bill cannot by cross-bill seek to be protected and have its liability adjudicated.—Gordon v. Sherman, 178 Mich. 629.

§ 39. ——Petition or bill by creditors in aid of assignment.

Office and propriety of cross-bills generally, see Equity, VII, D.
Enforcing administration within reasonable time, see ante ¶ 27.
For removal of assignee and appointment of successor, see ante §§ 27, 28.

¶ 253. In case of fraud in an assignment for the benefit of creditors, or of failure to conform to the statutory regulations, any person interested may file a bill to enforce the trust, and a receiver may be appointed, and the court may order a summary examination of parties or witnesses at any stage of the cause (How. St., § 8744).—Scott v. Wayne Circuit Judges, 58 Mich. 311.

¶ 254. General creditors of an assignor may file a bill to reach assets fraudulently conveyed, under How. St., §§ 8744, 8749, which allow "any person interested" to enforce the trust created by an assignment or to sue to recover property or prevent any fraudulent transfer; where the assignee, having refused to sue, is joined as a defendant with the transferee.—Burnham v. Dillon, 100 Mich. 352.

¶ 255. That a complainant has an adequate remedy at law, he having taken judgment upon his claims, is not conclusive of his right to pursue in equity a fund held by an assignee in trust for the assignor's creditors of whom complainant is one.—Matthews v. Forslund, 112 Mich. 591.

¶ 256. A creditor of the assignors, after the statutory time to file the bond has expired, may proceed upon the equity side of the court to have the trust carried out through the intervention of a receiver and the supervisory powers of chancery; or, if no other creditor invokes the aid of chancery, he may proceed to enforce his claim against the debtor's property by attachment or execution.—Beard v. Clippert, 63 Mich. 716.

¶ 257. If the assignee refuses to move to attack fraudulent transfers or mortgages, or his interest be such that the court is satisfied he ought not to direct or control the proceedings, leave should be granted to the creditor to file his bill.—Sweetzer v. Higby, 63 Mich. 13.

¶ 258. The fraud referred to in How. St., § 8744, is one "in the matter of such assignment" with which the assignee is connected as well as the assignor. The section was intended to give the creditors relief against the assignee's incompetency, neglect or fraud, and not to cover cases where he could and would act.—Sweetzer v. Higby, 63 Mich. 13.

¶ 259. Under How. St., § 8744, a creditor may file a bill to set aside a chattel mortgage alleged to have been given in anticipation of an assignment by the mortgagor, and to secure to the mortgagee a preference, to which transaction the assignee is alleged to have been a party; and it is not necessary that the complainant should have obtained an order from the court requiring the assignee to institute proceedings.—Burnham v. Haskins, 72 Mich. 235.

¶ 260. Where by an assignment which was executed by the assignee a time was limited for closing up the trust, and the assignee allowed the time nearly to expire before taking any proceedings for that purpose, it was held that creditors need not wait for the expiration of the time before filing a bill to enforce the execution of the trust.—Suydam v. Dequindre, H. 347.

¶ 261. Defrauded creditors are entitled to have fraudulent mortgages executed a few days before the assignment set aside, to have an accounting by the assignor for the property received by him, and to have a receiver appointed to enforce the trust on the assignee's refusal to do so, and may maintain for that purpose a bill to enforce the assignee's trust.—Funke v. Cone, 65 Mich. 581.

¶ 262. A merchant who had long been conducting a successful business, made, apparently unnecessarily, an assignment for the benefit of creditors to his brother-in-law, and it was shown that his stock had been greatly reduced, and that he had executed a few days before the assignment chattel mortgages to his relatives covering the greater part of his property, and for a consideration not satisfactorily explained. His own testimony was uncertain and unsatisfactory as to details which he must have known. The assignee would not contest the transfers. Held, that the creditors were entitled to have such mortgages and transfers set aside, to compel the assignor to account, and to have a receiver appointed to enforce the trust.—Funke v. Cone, 65 Mich. 581.

¶ 263. Where an assignee for the benefit of creditors holds the assigned property during the period allowed him to file his bond, and then, instead of filing it, relinquishes his trust and at once attaches the goods as a creditor, other creditors over whom he has thereby obtained an undue advantage should proceed, under L. 1879, Act No. 198 (How. St., § 8744), to compel a proper execution of the

trust, and the attachment proceedings will meanwhile be stayed.—Pickersgill v. Riker, 50 Mich. 98.

¶ 264. A single creditor may file a bill to enforce the prompt execution of an assignee's trust; and the other creditors need not be made parties.—Wilhelm v. Byles, 60 Mich. 561.

¶ 265. The trust being under a general assignment for the benefit of creditors, some of the creditors filed a bill to have the assignment set aside as fraudulent, or, in case it was sustained, then to have the trust enforced. The bill averred that certain creditors had been paid their demands in full. Held, not necessary to make such persons parties to the bill.—Suydam v. Dequindre, H. 347.

¶ 266. Under How. St., § 8749, proceedings in the circuit court in chancery against the assignee to recover a dividend may be commenced by petition as well as by bill; and jurisdiction of the assignee may be acquired by an order requiring him to appear and answer.—Southern Michigan Nat. Bank v. Byles, 67 Mich. 296.

¶ 267. Under How. St., § 8749, proceedings in the circuit court in chancery against the assignee to recover a dividend may be commenced by petition; and jurisdiction of the assignee may be acquired by an order requiring him to appear and answer. It is not necessary to serve the creditors with notice of the petition or with a copy of the order, since the assignee represents them.—Southern Michigan Nat. Bank v. Byles, 67 Mich. 296.

¶ 268. An assignee for creditors failed, after the creditors' written request, to contest mortgages made by the assignor and claimed to be fraudulent, whereupon the creditors filed a bill for the purpose. The issue upon the validity of the mortgages was fairly made in the pleadings and upon the testimony, and no question as to the right to litigate such validity was made in the court below. Held, that any necessity for an application for leave to file the bill must be deemed waived.—Funke v. Cone, 65 Mich. 581.

¶ 269. An objection that general creditors of an insolvent debtor, who has made an assignment for the benefit of his creditors, are not authorized, on the refusal of the assignee, to file a bill to set aside an alleged fraudulent chattel mortgage executed by the assignor prior to and in anticipation of the assignment, will not be regarded as fatal when raised for the first time after all of the testimony has been taken, and with all of the parties before the court who could be brought in had the bill been filed by the assignee.—Burnham v. Dillon, 100 Mich. 352.

¶ 270. The right of creditors, on the refusal of the assignee, to sue to set aside a chattel mortgage by bill in equity cannot be defeated by the contention that the fact that the assignee of the mortgage was in possession of the mortgaged property under his security, and hence the general assignee might have maintained an action at law.—Burnham v. Dillon, 100 Mich. 352.

§ 40. ——Suits to avoid levies or transfers of property.

Rights of assignee, see ante §§ 20, 21.

¶ 271. Equity has jurisdiction, at the suit of an insolvent's assignee, to dissolve void attachments improperly levied on the insolvent's lands, whether such lands are occupied or not.—Gott v. Hoschna, 57 Mich. 413.

¶ 272. The assignee or receiver is the proper person to attack as fraudulent against the assignment conveyances, mortgages or payments by the assignor to third persons; and the creditors must move through the assignee or ask chancery to compel him to move or allow them to do so.—Root v. Potter, 59 Mich. 498; Angell v. Pickard, 61 Mich. 561; Scott v. Chambers, 62 Mich. 532; Sweetzer v. Higby, 63 Mich. 13.

¶ 273. An insolvent's assignee can attack his assignor's transfers for fraud; and so can a receiver acting in place of an assignee (How. St., § 8741).—Heineman v. Hart, 55 Mich. 64.

¶ 274. The assignee of an insolvent debtor may seek in chancery the dissolution of an attachment upon the assigned property; he cannot intervene in the law action.—Turner v. Hatch, 100 Mich. 65; Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

¶ 275. The assignee of an insolvent may file a bill in equity to get rid of an attachment levied on the debtor's lands and void under How. St., § 8739; for he cannot seek a dissolution in the attachment suit itself.—Gott v. Hoschna, 57 Mich. 413.

¶ 276. An assignee can bring trover against the sheriff or other stranger for the full value of assigned property seized and sold by him on writ of attachment issued after the assignment was made and before the assignee's bond was filed.—Coots v. Radford, 47 Mich. 37.

§ 41. ——Pleading assignment and debt.

Pleading assignments generally, see Assignments, §§ 31, 32.

¶ 277. The declaration by an assignee for the benefit of creditors to recover for goods sold and delivered by the assignor should aver defendant's indebtedness to the assignor for goods and assignment of the claim by the assignor to plaintiff.—Powell v. Williams, 99 Mich. 30.

ASSISTANCE, WRIT OF.

TREATS of the chancery writ to assist the sheriff or executive officer of the court to put the purchaser in possession of land sold under decree. The writ of possession used in a law court in ejectment is treated in Ejectment, V; and the writ of restitution used in summary proceedings is treated in Forcible Entry.

Analysis.

§ 1. Nature and office of writ.
§ 2. Issuance and requisites of writ; application.
§ 3. For and against whom issuable.
§ 4. ——Purchasers and others in privity with defendant.
§ 5. ——Hostile claimants.
§ 6. Defenses and objections to issuance.

§ 1. Nature and office of writ.

¶ 1. A writ of assistance is the regular process for carrying out a decree of possession, and it lies on foreclosure sales.—Ramsdell v. Maxwell, 32 Mich. 285.

¶ 2. A writ of assistance will be granted to put the purchaser of mortgaged premises in possession if the defendant, on being shown the master's deed and a certified copy of the order confirming the sale under the seal of the court, refuses to deliver possession.—Hart v. Linsday, W. 144.

¶ 3. The object of a writ of assistance is to compel parties who are bound by a decree in foreclosure to give up the possession which the decree and sale under it estop them from further asserting. It cannot be proper where there is any real controversy as to the right of possession not precluded by the decree and sale.—Ramsdell v. Maxwell, 32 Mich. 285.

¶ 4. A writ of assistance is proper only where a party concluded by the proceedings refuses to give up possession on request; and it should not be granted without proper evidence of such refusal after the right of possession is established.—Howard v. Bond, 42 Mich. 131.

§ 2. Issuance and requisites of writ; application.

Necessity of service of deed, see ante § 1.
Necessity of notice and demand on person not party, see also post ¶ 8.
Appealability of order on application for writ, see Appeal and Error, § 48. ¶ 219.
Irreviewableness on appeal from decree, see Appeal and Error, § 297.
Conclusiveness of order on application for writ as an adjudication of fact, see Former Adjudication.

¶ 5. A decree was made in the Supreme Court requiring the complainant to deliver up possession of certain premises, and the cause was remitted to the court below for the purposes of an accounting. Held, that any application for a writ of assistance under the decree should be made in the court below.—Ryerson v. Eldred, 18 Mich. 195.

¶ 6. Where exceptions to the report of sale in a mortgage foreclosure case were overruled, and the sale was confirmed, and an order made on the same day for a writ of assistance, based upon the petition of the complainant, showing the exhibition on that day to the mortgagor of the commissioner's deed and of a certified copy of the order confirming the sale, it will not be assumed, from the fact that the mortgagor resided 20 miles from the place where the court was held, that the complainant could not get a copy of the order of confirmation on the morning of the day it was made, make the service, and return in time to get the writ of assistance on the same day, or that it was the nisi order of confirmation, instead of the court order, which was served, in the absence of proof of that fact.—Tucker v. Stone, 99 Mich. 419.

§ 3. For and against whom issuable.

[Note. The writ is by statute allowable in tax cases to put the purchaser in possession and the issuance of it in such cases is regulated by statute. For that reason all such cases will be treated in Taxes, XII, C.]

Writ as process to put public or condemnor in possession in condemnation proceedings, see Eminent Domain, IX; Highways, II, B.

¶ 7. A defendant in a foreclosure proceeding whose interest in the property has been cut off by the sheriff's deed, has no standing to resist an order granting a writ of assistance to obtain possession of the property.—Farr v. Lachman, 130 Mich. 40.

§ 4. ——Purchasers and others in privity with defendant.

¶ 8. A writ of assistance will not be granted against a person not a party to the suit, who has come into possession of mortgaged premises since the suit was commenced, unless notice of the motion, with a copy of the affidavit on which it is founded, is served upon him.—Benhard v. Darrow, W. 519.

¶ 9. In a proceeding by a purchaser on foreclosure for a writ of assistance against a contract-purchaser the latter cannot avoid the effect of the foreclosure by setting up equities between himself and other defendants before the sale, and by connecting the petitioner with them.—Ketchum v. Robinson, 48 Mich. 618.

¶ 10. Where, in a foreclosure suit, a subsequent mortgagee was not made a party, and no lis pendens was filed, and after decree, and just before sale under it, such subsequent mortgagee was, by some arrangement with the owner of the equity of redemption (who was a party), placed in possession of the mortgaged premises, having, at the time, notice of the foreclosure proceedings, held, that any right to possession thus acquired ceased on the sale, and that the purchaser at such sale was entitled to a writ of assistance to put him in possession.—Baker v. Pierson, 5 Mich. 456.

§ 5. ——Hostile claimants.

See also ante ¶¶ 3, 4.

¶ 11. Where in a foreclosure suit a defendant, in addition to claiming rights in the mortgaged premises as a subsequent purchaser at an execution sale, claims under tax titles, which cannot be litigated in said suit, no writ of assistance will be awarded to put him out of possession of the mortgaged premises.—Hayward v. Kinney, 84 Mich. 591.

¶ 12. A mere oral statement by one not a party of record, made in the course of proceedings for a writ of assistance in behalf of a purchaser at foreclosure sale, that he claims possession by virtue of a sale for taxes, is too informal to warrant consideration.—Aldrich v. Wayne Circuit Judge, 111 Mich. 525.

§ 6. Defenses and objections to issuance.

Doubt or controversy as to right, see also ante § 1.

That person in possession is not bound by decree, see also ante §§ 3-5.

¶ 13. Since the decree and sale are binding on the parties and their privies, one who neither shows a prior title nor an independent claim of ownership and possession is not entitled to object.—Lightner v. Prentis, 158 Mich. 13.

¶ 14. Where proceedings by writ of assistance were taken on the foot of a foreclosure decree against a wife, leave being given to discontinue as against the husband, the objection that the papers were wrongly entitled in the names of both defendants was held a mere technicality, especially where it was not clear from the record whether the order of discontinuance had been entered.—Howe v. Lemon, 47 Mich. 544.

¶ 15. An assignee of a decree of foreclosure who, in a proceeding brought by him to set aside the sale made thereunder without notice of the assignment, waives all objections to the sale and prays for an order granting six months' time for redemption, which is denied, will not thereafter be heard to resist a writ of assistance based on the sale on the ground that the decree had been assigned and the sale had without a petition being made and allowed as required by 1897 Chancery Rule 34.—Farr v. Lachman, 130 Mich. 40.

¶ 16. Matters set up in defence to a motion for the writ cannot be received to affect the decree of assistance which is the basis of the application.—Howe v. Lemon, 47 Mich. 544.

ASSISTANTS.

Cross-References.

To prosecuting attorney, see Attorneys, III.

Assistant judges, see Judges, IV.

Associated magistrates, see Arrest, Commitment and Bail, § 31.

Deputies to officers, see Officers; Sheriffs, V.

Complicity and liability of assistants in crime or tort, see Crimes, I; and see topics treating of the specific torts, e. g., Assault and Battery; Conversion; False Imprisonment; Malicious Prosecution; Libel; Trespass; Negligence.

§ 10. ——Tort by cotenant of plaintiff.
See also ante ¶ 25.

¶ 35. The right of a tenant in common to maintain assumpsit against his cotenant for a conversion of the common property is based upon a violation of the contractual obligation, and it is not essential to the existence of the right that the goods converted should be susceptible of division by weight or measure.—Williams v. Rogers, 110 Mich. 418.

¶ 36. A tenant in common excluded by his cotenant from his share of harvested crops may waive the tort and sue in assumpsit for the value.—Fiquet v. Allison, 12 Mich. 328; McLaughlin v. Salley, 46 Mich. 219.

¶ 37. A tenant in common, excluded by his cotenant from his share of harvested crops, may waive the tort and sue in assumpsit for the value, but he must show just what property has been appropriated in such case by defendant.—Coe v. Wager, 42 Mich. 49.

¶ 38. The refusal of a tenant in common of crops to recognize his cotenant's rights is a conversion, and the cotenant may waive the tort and sue in assumpsit.—Loomis v. O'Neal, 73 Mich. 582.

¶ 39. A tenant in common of a stock of goods whose co-tenant, without her consent, sells the entire stock to purchasers who ignore her rights, cannot waive the tort and bring assumpsit so long as the goods remain unsold in the purchaser's hands.—Tuttle v. Campbell, 74 Mich. 652.

§ 11. Cause based on same transaction but not on the tort.
Distinction between fraud and cause of action collateral to fraud, see Fraud, III, A.
Proper remedy to recover balance due on claim settled under fraud, see Accord and Satisfaction, ¶¶ 89, 90.

¶ 40. Where a vendor has been induced by the purchaser's representations to receive in part payment a mortgage which he afterwards found to be unavailable, it was held that assumpsit would lie upon the purchaser's representations, as well as an action of tort for fraudulent statements.—Chandler v. Childs, 42 Mich. 128.

¶ 41. There is no attempt to waive a tort to realty involved in an action on an implied contract to repay the value of land conveyed in satisfaction of a supposed mortgage on the misrepresentation that it was still in force when in fact it had already been discharged of which the grantor was ignorant. —Child v. Pierce, 37 Mich. 155.

¶ 42. A defense that the assumpsit attempts a waiver of a tort to land, is untenable where the basis of the assumpsit is an implied promise to repay a consideration in land passed to discharge a supposed debt, which consideration failed because there was no debt, and where the wrong was in representing that the debt did exist and was secured by a mortgage on the land. The implication is not based on the wrong but on the failure of consideration collateral thereto. —Child v. Pierce, 37 Mich. 155.

¶ 43. Assumpsit for money had and received, lies against one whose false and fraudulent statements have procured plaintiff's money to be paid to a corporation whereof defendant was a director and stockholder, which money has been paid over to defendant or credit given for it on account.—Coon v. Anderson, 101 Mich. 295.

II. THE COMMON COUNTS.

§ 12. Money had and received; when proper.
See also post §§ 13-17.
On particular transactions and contracts, see post §§ 24-43.
Necessity that money be realized to admit of waiving tort, see ante § 6 et seq.
Necessary allegations, see post § 48.
Sufficiency of bill of particulars, see post § 51.
Variance in proof, see post § 53.
Remedy against bailee, see Bailments.

¶ 44. As a general rule, when money has been received by a defendant under any state of facts that would in a court of equity entitle the plaintiff to a decree for the money when that is the specific relief sought, the same state of facts will entitle him to recover at law in an action for money had and received.—Moore v. Mandlebaum, 8 Mich. 433.

¶ 45. Assumpsit for money had and received is an equitable action and is subject to equitable principles.—Atkinson v. Scott, 36 Mich. 18.

¶ 46. Assumpsit for money had and received, being equitable in its nature, lies whenever an express or implied trust to pay over money has been violated.—Catlin v. Birchard, 13 Mich. 110; Twitchell v. Drury, 25 Mich. 393.

¶ 47. Assumpsit for money had and received does not depend upon any preliminary agreement, but upon the receipt of money by one that he is bound to pay over to another.—Spencer v. Towles, 18 Mich. 9.

¶ 48. An action in assumpsit for money had and received will lie where defendant has

in his possession money which in equity and good conscience belongs to the plaintiff; and it is not essential that there should be an express promise to pay, or any privity between the parties.—Beardslee v. Horton, 3 Mich. 560; Walker v. Conant, 65 Mich. 194.

¶ 49. The mere receipt of money by one not entitled to it creates no equity in his favor.—People ex rel. Village of Decatur v. Decatur Township Board, 33 Mich. 335.

¶ 50. In the action of assumpsit for money had and received the right to recover must be based upon the claim that defendant has money which in equity and good conscience belongs to plaintiff.—Minor Lumber Co. v. Alpena, 97 Mich. 499.

¶ 51. In order to sustain an action for money received by defendant for the use of plaintiff, it is sufficient to show that defendant had obtained possession of money or received something as money, which, in equity and good conscience, belongs to plaintiff.—Harty v. Teagan, 150 Mich. 75.

¶ 52. The right to bring assumpsit for money had and received exists whenever a person, natural or artificial, has in his or its possession money which in equity and good conscience belongs to the plaintiff, and neither express promise nor privity between the parties is essential.—Hoyt v. Paw Paw Grape Juice Co., 158 Mich. 619.

§ 13. ——Received from third person.

Remedy of corporation against promoter for fraud, see Corporations, VI.

¶ 53. Where an agent collected money for his principal, and the latter afterwards assigned it to the plaintiff, it was held that the plaintiff might recover it in this action after demand.—Beardslee v. Horton, 3 Mich. 560.

¶ 54. Assumpsit to recover back the amount paid for a shipping receipt lies against the persons who originally issued the receipt, if the merchandise therein described was not actually shipped as agreed in the receipt, and the defendants have by words or acts authorized, consented to, connived at or sanctioned the act of the person selling the receipt in thereby obtaining from plaintiff money which he has turned over to defendants in payment of a debt due them from himself.—Tregent v. Maybee, 51 Mich. 191.

¶ 55. In every action at law upon a contract the contest must be between the two alleged contracting parties; a third person beneficiary's right to resort to the equitable action for money had and received exists only where the parties to the contract have given him such a right as transfers the fund to his control.—Davis v. Lenawee County Sav. Bank, 53 Mich. 163.

¶ 56. A creditor who, having notice that money tendered by his debtor is in fact the property of a third party, applies the same upon the indebtedness, is liable to such third party in an action for money had and received.—Bearce v. Fahrnow, 109 Mich. 315.

¶ 57. A married woman, having a mortgage upon which there was due principal and interest, made an oral gift to her husband of the interest which was due and put the mortgage into his hands. The mortgagor exchanged the mortgaged lands for others under an agreement whereby he was to pay off the interest. He deeded the lands, and at the same time paid the grantees the interest, on their promise to hand it over to the husband. The grantees having failed to pay it, held, that the husband might maintain an action against them for money received to his use. And the wife having subsequently purchased the lands, subject to the mortgage excluding this interest, and then discharged the mortgage of record, held, that this did not affect the husband's right of action.—Fay v. Sanderson, 48 Mich. 259.

§ 14. ——Received by trustee, agent or pledgee.

Variance by proving sale to defendant, see post § 53.

By agent against principal and vice versa, see Agency, IV, C.

Money received by corporate treasurer, see Corporations, XVII, F.

Received by justice of the peace, see Justices of the Peace, II.

¶ 58. Where a note is made payable to one man in trust for another, and the payee receives the money upon it, he is liable to the party in interest for the amount in an action for money had and received.—Catlin v. Burchard, 13 Mich. 110.

¶ 59. An action for money had and received lies against a grantee for the proceeds of the sale of land conveyed to him under a parol trust to make such sale and divide the proceeds among the grantors, such trust having been recognized by him.—Collar v. Collar, 75 Mich. 414; Collar v. Collar, 86 Mich. 507.

¶ 60. One who has collected accounts assigned to him under an agreement that he will pay the proceeds, less a reasonable collection fee, to the creditors of the assignor "or to" a third party, is liable to such party, after having discharged the indebtedness, in an action for money had and received, even though a trust may have been created by the arrangement.—Tanner v. Page, 106 Mich. 155.

¶ 61. One who, being duly authorized to do so, has collected money for another is liable to him in this action.—Liesemer v. Burg, 106 Mich. 124.

¶ 62. The common money counts in assumpsit lie against an agent for moneys received in making collections on a mortgage belonging to his principal, and for moneys advanced to be used in foreclosure.—Schmemann v. Rothfuss, 46 Mich. 453.

¶ 63. A father who has employed a person to collect damages from the seducer of his daughter may sue such person for money obtained but withheld.—Heimbach v. Weinberg, 18 Mich. 48.

¶ 64. The count for money had and received includes any dealings whereby money due to plaintiff came into defendant's hands as factor from sales on commission.—Freehling v. Ketchum, 39 Mich. 299.

¶ 65. A count for money had and received includes any dealings whereby money due to plaintiff came into defendant's hands as factor from sales on commission.—Freehling v. Ketchum, 39 Mich. 299.

¶ 66. The common counts are sufficient for recovering the amount collected and wrongfully retained by defendant on securities which plaintiff had put up to indemnify defendant for going on a bond, the condition of which plaintiff has performed.—Blackwood v. Brown, 34 Mich. 4.

¶ 67. Where an agent, intrusted with the collection of debts and foreclosure of mortgages, seeks to deceive his principal by representing that payments have not been made on a mortgage, the latter can maintain assumpsit on the common money counts against him for moneys received in making collections thereon and for moneys advanced to be used in foreclosing it.—Schmemann v. Rothfuss, 46 Mich. 453.

¶ 68. An action for money had and received will not lie for money paid by plaintiff to defendant on a subscription to the use of a third party, where it is not shown that defendant paved any interest in the money or that it did not come into the third party's hands before the suit was brought.—Wilson v. Haywood, 33 Mich. 99.

§ 15. ——Personal profits made by agent or trustee.

¶ 69. Where [illegible] a bank can maintain assumpsit, declaring on the common counts, against one who has drawn it and appropriated it on the pretence of being the guardian of the person with whom it was left.—Martin v. Sheridan, 46 Mich. 93.

§ 17. ——Equitable defenses.

Defenses to actions on contracts in general, see Contracts; and see Duress; Fraud; Mistake; Infants.

¶ 71. An equitable defense to a claim for money had and received must be one known to the law and recognized on principles which courts of equity administer.—Fraser v. Fraser's Estate, 42 Mich. 275.

§ 18. Money paid to use; when proper.

On particular contracts, see post §§ 24-43.
Right to recover back payments made, see post § 43.
Variance in proof, see post § 53.
Actions between landlord and tenant for advances or other outlay, see Landlord and Tenant, V. A.
Against covenantor for title after paying off incumbrance, see Covenants for Title, IV.
On conditional sale after repossession by seller, see Sales, XII.
Gambling contract as defense, see Gambling Contracts.

¶ 72. The common counts lie to recover the amount of a tax paid by plaintiff for defendant's use, though defendant's duty to pay the tax arose on his sealed contract to sell the land to plaintiff, since the action is not based upon the contract; the contract is a matter of evidence only.—Curtis v. Flint & P. M. R. Co., 32 Mich. 291.

§ 19. Money lent; when proper.

Evidence, see post § 60.
Variance by proving loan of government bond, see post § 53, ¶ 146.
[illegible] see post § 53, ¶ 147.
[illegible] see Bailments.

§ 20. [illegible] stated; when proper.

[illegible] stated, see generally Account Stated, § 7.

¶ 70. [illegible] Assumpsit will [illegible] settlement [illegible] unliquidated claim [illegible] as destructive of [illegible].—Davis v. Mann, 23 Mich. 189.

§ 21. Quantum meruit, when proper.

See cases post §§ 32-36.
[illegible] see post §§ 24-45.

Necessary and proper allegations, see post § 48.
Variance in proof, see post § 53.
Admissibility of evidence, see post § 62.
Proper remedy on contract, see generally Contracts, VII, D, X.
Against municipality, see Municipal Corporations, XVI, A.
For sheriff's fees, see Sheriffs, III.

¶ 74. The right of the plaintiff to recover on a quantum meruit does not exist where no contractual relations existed between the parties.—Franck v. McGilvray, 144 Mich. 318.

¶ 75. One who by his contract has agreed to receive payment in something else than money cannot, where he has broken the contract, recover on the quantum meruit the value of his labor performed under the contract.—Roberts v. Wilkinson, 34 Mich. 129.

¶ 76. Where, under a non-apportionable contract, a party has done anything from which the other party has received substantial benefit, and which he has appropriated, a recovery may be had on the quantum meruit, based on that benefit.—Allen v. McKibbin, 5 Mich. 449.

§ 22. Quantum valebat; when proper.

See also post § 29; and see generally Sales, VIII, IX.
On particular transactions, see post §§ 24-43.
Necessary allegations, see post § 48.
Variance in proofs, see post § 53.
Admissibility of evidence, see post § 62.
Necessity that money have been realized to admit of waiving tort, see ante § 6 et seq.
Proper and available remedies on performance or breach of contract, see Contracts, VII, D, X.

¶ 77. Where there is a contract for a set sum it is not allowable to show quantum valebat.—Closs v. Thiefels, 79 Mich. 589.

¶ 78. Assumpsit on the common count for goods sold and delivered cannot be maintained where the goods were sold as part of a bill to a third person, and were charged and delivered to him, and never went into the hands of defendant, and the conditions proposed by defendant in his offer to buy were not observed, and his liability if any was on a later agreement.—Carpenter v. Butterfield, 34 Mich. 97.

¶ 79. The count for goods sold and delivered lies for the value of such articles delivered in part performance of an entire contract of sale as have been retained by the vendee.—Clark v. Moore, 8 Mich. 55.

¶ 80. The count for goods sold and delivered lies where a vendee has actually received and appropriated articles delivered in partial performance of a special contract that the vendor has not fully carried out.—Begole v. McKenzie, 26 Mich. 470.

¶ 81. Under the common counts, for goods sold, plaintiff cannot show that he had, at defendant's request, repossessed himself of the product, expended money thereon and sold it to third persons, crediting defendant with the proceeds.—Yelter v. Campau, 174 Mich. 94.

§ 23. Use and occupation; when proper.

Necessary allegations, see post § 48.
Defenses under the general issue, see post § 52.
Right to recover for use and occupation or for rent, see Landlord and Tenant, IV, G.
Actions for rent or for use and occupation, see generally Landlord and Tenant, V, A.

¶ 82. Assumpsit for use and occupation lies at common law.—Dwight v. Cutler, 3 Mich. 566; Hogsett v. Ellis, 17 Mich. 351; Dalton v. Laudahn, 30 Mich. 349.

¶ 83. Use and occupation may be sued for generally or specially without reference to the form of the lease.—Conkling v. Tuttle, 52 Mich. 630.

¶ 84. Where the count for use, etc., is omitted, the other common counts will not sustain an action for the use of land demised.—Heyerman v. Kanter, 36 Mich. 316.

§ 24. Debt of third person assumed or undertaken.

¶ 85. The common counts are proper in suing for a debt which defendant has assumed by novation, where defendant has retained, for the purpose of paying it, the money originally due to the person whose debt is thus assumed, and where, also, the amount to be paid under the novation agreement is a sum certain. The count for money had and received covers the first case, and indebitatus assumpsit the other.—Mulcrone v. American Lumber Co., 55 Mich. 622.

¶ 86. In order to make a principal contractor liable for money had and received to the use of creditors of the subcontractor, on the ground of withholding or failure to pay to the subcontractor, or on his account, a sum claimed to be his due, there must be a showing at least that there had been a settlement with him, under which the sum so withheld had been allowed as so much money, and that defendants had agreed to pay as their own obligation from such sum, the sum owing to plaintiff by the subcontractor.—Barden v. Briscoe, 36 Mich. 254.

§ 25. On express promises to pay money.

When the action is on a note, bill or check, see Negotiable Instruments, XIV.

¶ 87. The common counts are not adapted to a recovery upon a promise to pay plaintiff a given sum in consideration of the plaintiff's deeding to defendants certain land, to be by them deeded to a third person in exchange for land the latter was to convey to a railroad company for depot grounds.—Mace v. Page, 33 Mich. 38.

¶ 88. An action, the gist of which is defendant's failure to pay a note that he has agreed to pay, should be laid in assumpsit rather than in case, though the undertaking set up includes also a promise to become a co-signer of the note, by which the other was induced to sign it; the case is in effect one to compel defendant to make plaintiff good for money paid to defendant's use at his request.—Potter v. Brown, 35 Mich. 274.

§ 26. On instruments for payment of money.

¶ 89. A certificate of deposit may be sued under the common counts with copy appended.—Cate v. Patterson, 25 Mich. 191.

¶ 90. It has always been competent to sue the makers of notes, negotiable or otherwise, on the common counts.—Port Huron & S. W. R. Co. v. Potter, 55 Mich. 627.

¶ 91. The payee of a conditional railroad aid note may, after condition performed, sue upon the note under the common counts.—Port Huron & S. W. R. Co. v. Potter, 55 Mich. 627.

§ 27. ——Privity of contract.

¶ 92. Where one has promised the maker of a promissory note, for a consideration proceeding from the latter alone, to pay the note when due, the holder of the note cannot recover upon such promise on the common counts in assumpsit, but, if entitled to recover at all, must declare specially.—Halstead v. Francis, 31 Mich. 113.

¶ 93. A draft that had been accepted by the drawees was on maturity presented at the bank where it was made payable, but payment was refused for want of funds, and the drawee's bookkeeper told the cashier of the bank that the drawers should pay, and not he, who would have to make a draft back on them to pay with. Said drawers had promised the drawees to take care of the sight draft, the cashier on being so informed agreed to take the time draft, and thereupon the bank charged the amount of the accepted draft to the drawees and credited them with the proceeds of the sight draft. Held, that there was no privity of contract between the bank and the drawees of the sight draft such as would entitle the former to recover from the latter as for money paid for their use.—Bay City Bank v. Lindsay, 94 Mich. 176.

§ 28. Price payable for land.

¶ 94. The indebitatus count includes a count for the price of real property sold, and may be used to recover the price or value of an estate sold by plaintiff to defendant.—Nugent v. Teachout, 67 Mich. 571.

¶ 95. Purchase money paid for land can be recovered in an action for money had and received, whether the consideration fails for want of title or for want of a valid contract to convey.—Wright v. Dickinson, 67 Mich. 580.

§ 29. Price for chattels.

Recovery on rescission, see also post § 41.
Proof of quantum valebat as variance, see post § 53.
Variance by proving services incident to protection of the property, see post ¶ 200.
See generally, Sales, VIII.

¶ 96. Where a contract for the sale and delivery of goods has been completely performed, the price may be recovered under the common counts in assumpsit.—McGraw v. Sturgeon, 29 Mich. 436; Richards v. Burroughs, 62 Mich. 117.

¶ 97. The price of cattle may be recovered under the common count for goods, wares and merchandise sold and delivered.—Weston v. McAswell, 30 Mich. 353.

¶ 98. The amount of a fully executed contract for the sale and delivery of goods may be recovered either under a general count for goods sold and delivered or under a special count upon the contract. The basis of the action under the general count is an undertaking which the law imposes to the defendant as a consequence of the full execution of the special agreement by the plaintiff.—Begole v. McKenzie, 36 Mich. 470.

¶ 99. Recovery can be had under the common counts for personal property, bought by defendant of plaintiff, which he refuses to return or pay for.—Gunsberg v. Cutler & Savidge Lumber Co., 55 Mich. 439.

¶ 100. Where goods are sold on credit to be paid for in a note, if the note is not given, the vendor, if he sues before the time of credit expires, must declare on the contract; but after the expiration of the time of credit he may sue on the common counts.—Gibbs v. Blanchard, 15 Mich. 290.

¶ 101. Where plaintiff sold goods and received securities for the purchase price, one

of which he collected and the other offered to return, and he afterwards brought suit to recover the balance, it was held not necessary that he should declare specially.—Gardner v. Gorham, 1 D. 507.

¶ 102. The common counts will lie for the price of articles sold, on the vendee's refusal to give an order which the plaintiff had agreed to take in payment, and which was to be drawn on a third person and be payable in labor.—Stone v. Nichols, 43 Mich. 16.

§ 30. Aliquot or undivided shares owing.

¶ 103. One who sues for his share of a payment can sue as for money had and received if he can show by any evidence how much belongs to him, and notwithstanding the fact that defendant has lumped the whole amount so that there is no direct way of showing it.—Harrison v. Ingersoll, 56 Mich. 36.

¶ 104. A share of profits realized under executed oral agreement for purchase and sale of land is recoverable by an agent from his principal under declaration on common counts amplified by bill of particulars stating the facts.—Davis v. Gerber, 69 Mich. 246.

§ 31. ——Shares of chattels.

Waiver of tort by cotenant, see ante § 10.

¶ 105. Where one of two joint owners of personalty, who bought under an agreement that it should be sold and the proceeds equally divided, refuses to make division of certain corporate stock assigned to him on such sale, the other may recover in assumpsit the admitted value of one-half of the stock.—Murphy v. Craig, 76 Mich. 155.

¶ 106. The common counts in assumpsit sustain recovery for the value of the share of a crop of wheat belonging to a tenant in common of the wheat under a valid agreement between them.—McLaughlin v. Salley, 46 Mich. 219.

§ 32. On executed performance of express contract.

See generally Contracts, VII, D, X.
On executed sale of goods or land, see ante §§ 28, 29.
Where contract is invalid or services were not under it, see post §§ 35-37.
Necessity of special allegations of breach, see post § 58.
Against drain commissioners, see Drains, II.

¶ 107. Where the contract between two parties has been executed by plaintiff, and nothing remains but payment to be made by defendant, the former may sue upon the common counts and need not declare specially.—Bush v. Brooks, 70 Mich. 446.

¶ 108. Where a contract has been fully performed a party may, in general, recover under the common counts.—Shaw v. Bradley, 59 Mich. 199.

¶ 109. The common counts constitute a sufficient declaration upon a contract performed by plaintiff, where nothing remains but the payment of money.—White v. Taylor, 113 Mich. 543.

¶ 110. Where there is a special contract between the parties, one cannot recover upon a general count for money paid to the other's use, except where he could have recovered without any special contract.—Carney v. O'Neil, 27 Mich. 495.

¶ 111. Recovery under the common counts cannot be had on a special contract performed on plaintiff's part, except for money due.—Pierson v. Spaulding, 61 Mich. 90.

¶ 112. Money actually due under an express contract is recoverable under the common counts.—Thomas v. Caulkett, 57 Mich. 392.

¶ 113. The common counts in assumpsit lie to recover the agreed compensation for services fully performed by plaintiff's assignor under a contract with defendant to procure freight for vessels, though one was lost and could not carry it.—Nicol v. Fitch, 115 Mich. 15.

¶ 114. Where plaintiff had performed for defendant services shown to be worth more than plaintiff had received for them, and for which no bargain was made as to price, except one which defendant shortly after repudiated and refused to regard, it was error to rule that no recovery could be had on the common counts, and that the action should have been brought on the contract.—McQueen v. Gamble, 33 Mich. 344.

¶ 115. An action lies on the common counts for services in driving defendant's logs under a written contract fully performed by plaintiff.—Shaw v. Bradley, 59 Mich. 199.

¶ 116. Recovery can be had under the common counts upon an agreement to pay for services in forwarding the sale of one's land.—Fletcher v. Bradford, 45 Mich. 349.

¶ 117. An attorney's retainer is recoverable under the common courts, and there need not have been an express promise to pay it.—Eggleston v. Boardman, 37 Mich. 14.

¶ 118. Where a contract for the construction of a building has been substantially performed, the contract price may be recovered in an action on the common counts.—Strome v. Lyon, 110 Mich. 680.

§ 33. ——Defective or partial performance.

¶ 119. The count in indebitatus assumpsit is appropriate to recover the value of work done and materials furnished in erecting a building under contract, where the terms of the contract have not been strictly complied with, but the defaults have been waived.—Andre v. Hardin, 32 Mich. 324.

¶ 120. Where plaintiff is at liberty to treat the contract as at an end, though only partly performed, or where he has not performed in the manner or time agreed upon in the contract, but what he did was beneficial to defendant and was accepted by him, plaintiff may declare on the common counts.—Bush v. Brooks, 70 Mich. 446.

§ 34. ——Performance prevented.

¶ 121. An action will lie on the common counts for wages fairly earned by past services already rendered under an express agreement of which defendant has prevented full performance.—Mitchell v. Scott, 41 Mich. 108; and see Butterfield v. Seligman, 17 Mich. 95.

¶ 122. Where labor has been performed by one party under a contract which the other party breaks, the former may recover on the quantum meruit for work done.—Hemminger v. Western Assur. Co., 95 Mich. 355.

¶ 123. A logging contractor who is obliged to abandon his contract because of the failure of the other party to furnish funds is entitled to recover the value of his services at the contract price so far as rendered either under indebitatus assumpsit or under quantum meruit where the declaration sets out the contract and alleges specifically what the contractor had done in compliance therewith, and that he was prevented from completing it by reason of the refusal of the defendant to furnish funds for labor and supplies in accordance with the contract, and where he only undertakes to recover on the contract so far as it is executed.—Brooks v. Bellows, 192 Mich. 109.

¶ 124. A broker may recover not exceeding an agreed commission (this being in effect an agreed compensation for services rendered) under the common counts in assumpsit, where he has been discharged, and the sale later made by the owner to the persons with whom he had been negotiating.—McGovern v. Bennett, 146 Mich. 558.

§ 35. Services or value rendered under unenforceable contract.

¶ 125. Where a contract within the statute of frauds has been executed by one party, and the other has received the consideration and its benefits, the former can maintain an action against the latter for the benefit thus conferred, accepted and appropriated, bringing suit on the appropriate common counts in assumpsit.—Whipple v. Parker, 29 Mich. 369.

¶ 126. A. conveyed to B. land in part payment for which it had been orally agreed that B. should convey a house and lot, which, however, B. refused to do, and afterwards B. sold to another. Held, that as B.'s agreement was void under the statute of frauds, his refusal to convey rescinded the contract and raised an implied promise to pay for the land which he had received on the contract, and that the value of such land could be recovered on the indebitatus count for real property sold.—Nugent v. Teachout, 67 Mich. 571.

¶ 127. Quantum meruit lies for the recovery of the value of services performed under a contract void under the statute of frauds, the benefit of which services has been accepted by the other party.—Cadman v. Markle, 76 Mich. 448.

¶ 128. An action lies upon the common counts for work and labor done and materials furnished which plaintiff was induced to do and furnish by reason of a contract made between the parties, but not binding upon plaintiff because of the frauds and mistakes of defendant. Such is not to be regarded as assumpsit based on waiver of a tort or as assumpsit based on the contract itself.—Bush v. Brooks, 70 Mich. 446.

¶ 129. Compensation for services rendered under a contract void under the statute of frauds may be recovered under the common counts in assumpsit.—Carroll v. Palmer Mfg. Co., 181 Mich. 280.

¶ 129a. The value of services rendered under a contract within the statute of frauds may be recovered under the common counts.—Smith v. Chase & Baker Piano Mfg. Co., 185 Mich. 313.

§ 36. Services rendered outside of contract.

¶ 130. A party is entitled under the common counts to recover for services performed by him outside of his contract.—Burroughs v. Morse, 48 Mich. 520.

§ 37. Services after alteration of contract.

¶ 131. One may recover under a quantum meruit where there has been a change in the express contract and the mode of performing an unapportionable part is so changed that the original contract price cannot be determined.—Boyce v. Martin, 46 Mich. 239.

¶ 132. In an action to recover on a written contract for logging, where plaintiff was ordered by an authorized agent of defendant to change the character of the opera-

tion as provided by the contract and to perform extra services to meet an emergency, such agent agreeing that defendant would pay therefor, plaintiff may recover under the common counts for the value of such services as are shown by the evidence. —Martindale v. Lobdell-Emery Mfg. Co., 180 Mich. 477.

§ 38. Recovery upon failure of consideration.

¶ 133. Money paid without consideration may be recovered under the common counts in assumpsit.—Murphy v. McGraw, 74 Mich. 318.

¶ 134. Money paid without consideration may be recovered under a declaration on the common counts for money had and received. —Ripley v. Case, 78 Mich. 126.

¶ 135. Assumpsit is the proper form of action to recover back moneys that have been received by a person without consideration and against law and equity.—Friend v. Dunks, 37 Mich. 25.

¶ 136. A man belonged to a mutual aid society to which he paid certain moneys which, according to the scheme of the society, were to be paid out again to the various members. Thinking that he had received no consideration for these payments he afterwards brought an action as for money had and received. As the money had been disposed of with plaintiff's consent the form of action, it seems, is inappropriate.—Murphy v. Bidwell, 52 Mich. 487.

¶ 137. Where a horse purchased under a warranty that he was sound, and just the kind of an animal the purchaser wanted for a driving horse, proved to have an incurable disease of the feet which rendered him worthless for the purpose named, the price paid is recoverable as money paid without consideration, although there was no stipulation that the horse might be returned if he proved worthless.—Murphy v. McGraw, 74 Mich. 318.

¶ 138. A recovery in assumpsit on the common counts may be had on the theory of having received no consideration for the payment of a certain sum of money where plaintiff traded his team for a team belonging to defendant, paying a certain sum in addition, and, in pursuance with the agreement, returned one of the horses which was unsatisfactory and received another in place, and, the latter horse becoming ill, returned it to defendant at the latter's request, and this horse died while in defendant's custody, the latter refusing to pay plaintiff the price equal to one-half the agreed valuation of the team or to give plaintiff a new horse. —Taylor v. Belton, 188 Mich. 302.

§ 39. ——Failure of seller's title.

¶ 139. Assumpsit lies where defendant has received the entire consideration for personalty to which he represented he had title, whereas he had not.—Fitzpatrick v. Hoffman, 104 Mich. 228.

¶ 140. The common counts lie to recover the purchase price of felled timber where the vendor's title has failed; and this, although the consideration both for the timber and for the land it had been cut from was included in a deed of the land.—Fitzpatrick v. Hoffman, 104 Mich. 228.

§ 40. ——Fraud or misrepresentation as inducement.

Question for the jury, see post § 64, ¶ 248.

¶ 141. Money paid for a worthless bond in reliance upon the seller's representation that it is good is recoverable in assumpsit. —Ripley v. Case, 86 Mich. 261.

¶ 142. Assumpsit for money had and received will lie without a special count at the suit of an insurance company to recover back the amount paid on a loss where the policy had been made void by fraudulent representations as to the extent of the loss.—Johnson v. Continental Ins. Co. of New York, 39 Mich. 33.

§ 41. Money due on rescission.

¶ 143. When a person who has contracted to sell land proceeds to rescind the contract and oust the other party, the latter may acquiesce and consider it at an end; and as there is a failure of consideration for whatever he has paid on the contract, he may recover it back under the equitable count for money had and received.—Davis v. Strebridge, 44 Mich. 157.

¶ 144. In an action for money had and received, the equities attending a rescission of a contract and the placing of the parties as far as possible in statu quo can be settled without resorting to a court of equity.—Wright v. Dickinson, 67 Mich. 580; Wright v. Dickinson, 67 Mich. 590.

¶ 145. The common counts lie on waiver of tort for the value of goods which the purchaser, after rescinding the contract of sale, has refused to return to the vendor.—Aldine Mfg. Co. v. Barnard, 84 Mich. 632.

¶ 146. Recovery may be had on the common counts for money paid on a contract into which plaintiff was induced to enter by fraudulent representations of the defendant, and which plaintiff repudiated.—Billig v. Goodrich, 199 Mich. 423.

§ 42. Money paid under unenforceable contract.

¶ 147. Money paid on an oral agreement to buy land is recoverable as money paid

without consideration unless possession has been given to the vendee so as to take the case out of the statute of frauds.—Scott v. Bush, 26 Mich. 418; Scott v. Bush, 29 Mich. 523; Colgrove v. Solomon, 34 Mich. 494; Cilley v. Burkholder, 41 Mich. 749; Nims v. Sherman, 43 Mich. 45; Kelly v. Kelly, 54 Mich. 30.

¶ 148. A vendee in a land contract which is void and incapable of ratification may recover in assumpsit what he has paid less the benefits received from the land while in his possession under the contract, and the whole controversy may be adjusted in this common-law proceeding.—Wright v. Dickinson, 67 Mich. 590; Wright v. Dickinson, 67 Mich. 590.

¶ 149. A count for money had and received sustains a recovery of money received by a grantee on sale of land conveyed to him under a parol trust to make such sale and distribute the proceeds among the grantors.—Collar v. Collar, 75 Mich. 414; Collar v. Collar, 86 Mich. 507.

§ 43. Overpayments and payments by mistake, fraud or duress.

For overcharge amounting to breach of contract, see Contracts, VII, D.

¶ 150. The common count for money had and received sustains recovery of money paid on an express contract by mistake and in ignorance of material facts.—Lane v. Pere Marquette Boom Co., 62 Mich. 63.

¶ 151. Assumpsit on the common counts, as for money had and received, lies where plaintiff sues for the excess paid under a written contract for timber, where the estimated quantity falls short and the vendor is bound to refund an amount corresponding to the shortage and reckoned according to a fixed basis of calculation. And under the common counts testimony is admissible to show the amount due for shortage.—Phippen v. Morehouse, 50 Mich. 537.

¶ 152. Assumpsit for money had and received to plaintiff's use lies to recover back the amount of the overpayment where a purchaser who had agreed to pay what the property had cost his vendor found, after paying, that the latter had deceived him as to the amount. The false representation will not support an action for tort.—Barnard v. Colwell, 39 Mich. 215.

¶ 153. Where plaintiff has fraudulently been induced to enter into a contract and pay money thereon, he may recover damages for the fraud and deceit either through an action on the case or in assumpsit, but in neither case would the common counts be a proper declaration.—Barbour v. Hurlburt, 137 Mich. 584.

¶ 154. The action against a city to recover the surplus of money assessed for improvements is equitable and is maintainable for money that in equity and good conscience belongs to plaintiff.—Thayer v. City of Grand Rapids, 82 Mich. 298.

III. SPECIAL ASSUMPSIT.

§ 44. In general.

[Note. Many decisions turn on the question whether the common counts will lie or whether the cause of action must be pleaded specially. Others turn on the nature of the contract or cause of action, holding that certain facts must be specially alleged. In the judgment of the editor it would be misleading to endeavor to collect such decisions here, especially in view of the abolishment of special forms by the Judicature Act. For the cases on propriety of the common counts, see division II, ante, but particularly see the topics treating of the particular contracts, viz., those portions treating of pleading and procedure.]

Joinder of special and common counts, see post § 47.

Necessity of special allegations to cover breach, see post § 58.

Issues and variance, see post §§ 56, 57.

IV. PLEADING AND VARIANCE.

§ 45. In general.

General law of pleading, see Pleading.

Construction of declaration, whether assumpsit or other form, see Pleading, II.

In actions before justices of the peace, see Justices of the Peace, IV.

Pleading damages, see Damages, X.

In actions against carriers of goods, see Carriers, II, J.

In actions against carriers of passengers, see Carriers, IV, E.

Pleading in actions on contracts in general, see Contracts, X; Sales, VIII, IX; Negotiable Instruments, XIV.

In action against covenantor for title, see Covenants for Title, IV.

Pleading in action on claim against estate, see Estates of Decedents, VI, C, 5.

In actions on insurance contracts, see Insurance, XX; Fraternal Associations, VIII.

Actions for contribution or indemnity, see Indemnity and Contribution, III, A.

In action on judgment, see Judgments, XII.

In actions by or against partners, see Partnership, VI, B.

Necessity and sufficiency of allegation of assignment to plaintiff, see Assignments, §§ 31-33.
Allegation of municipal corporate existence, see Municipal Corporations, XVI, A.
Pleading title as personal representative, see Estates of Decedents, XI, B.
Pleading estoppels, see Estoppel, III.
Pleading fraud in general, see Fraud, III.
Setoffs and recoupment, see Setoff.

§ 46. Joinder of actions and parties.

Variance as to parties liable, see post § 54.
Joinder with other counts than assumpsit, and necessity for election between counts, see Pleading, II.
Joint liability of corporation and stockholders for labor debts, see Corporations, XXIV.
Who are parties to contract, see Contracts, II.

¶ 155. Two persons, each of whom has received for safe keeping a part of a sum of money, cannot be made joint defendants in assumpsit.—O'Connor v. O'Connor, 86 Mich. 189.

§ 47. Diverse counts; joinder of counts.

General rule as to joinder of counts in declaration, see Pleading, II.
Present statutory rule, see Jud. Act, Chap. VIII, § 1; Comp. L. 1915, § 12309.

¶ 156. Comp. L. 1857, § 4550, How. St., § 7778, authorizes, in actions of assumpsit, the joinder of the common counts with special counts upon judgments, a count for use and occupation, a count upon a special contract to pay rent, and a special contract to purchase a house and lot.—Hogsett v. Ellis, 17 Mich. 351.

¶ 157. It is not necessary that special counts in assumpsit should be harmonious, even when the same instrument is set out in each as the foundation of an action. And the court cannot refuse to receive evidence under the declaration on any such ground as that what would support one count would defeat another.—Barton v. Gray, 48 Mich. 164.

¶ 158. A special count for breach of a contract is properly joined with common counts in assumpsit, as all causes of action enforceable in assumpsit may be joined.—Carland v. Western Union Tel. Co., 118 Mich. 369.

¶ 159. An action to enforce the personal liability of directors for the debts of the corporation, provided by Comp. L. 1897, § 7059, could not be joined with a suit upon the common counts in assumpsit, or with a count charging defendants with fraud.—Wachusett Nat. Bank v. Steel, 135 Mich. 688.

¶ 160. Defendant was employed by plaintiff to act as a broker in negotiating the purchase for the plaintiff of a certain piece of real estate. The defendant secured from the seller an option at the price of $19,110, but represented to plaintiff that the seller demanded $20,000, and upon putting the deal through pocketed the difference, $890. Plaintiff, in ignorance of the fraud, paid him a commission of $200. In a suit in assumpsit under section 10421, 3 Comp. L. 1897, held, plaintiff could recover under the common counts the $200 paid in commissions, and under a special count joined therewith, the $890.—Hogle v. Meyering, 161 Mich. 472.

¶ 161. A count of which the gist is that the parties agreed to buy lands jointly, each paying half, and that defendant made the purchase for $1,500 but represented to plaintiff that it was for $2,000, whereby he induced plaintiff to pay him $1,000 instead of $750, and that plaintiff sues him for the excess, with interest, is a good count in assumpsit; it is not in tort, and may be joined with the common counts.—Young v. Taylor, 36 Mich. 25.

§ 48. Requisites and sufficiency of common counts.

Variance due to want of special allegations or use of wrong count, see post §§ 53-58.
To admit proof of damages, see Damages, X.
Allegation of promise to decedent when suit is by personal representative, see Estates of Decedents, XI, B.
Necessity of special allegations in assumpsit for labor debt of corporation under the statute, see Corporations, XXIV.
In actions for commissions, see Brokers.
In action to recover indemnity, see Indemnity, III, A.
In action for use and occupation, see Landlord and Tenant, V, A.
To recover for support of poor in action by poor superintendents, see Poor Persons.
Actions on contract of sale, see Sales, VIII, IX.

¶ 162. A count to recover money paid for taxes under duress must allege that defendant had and received it or some portion of it to its use.—Weston v. County of Luce, 102 Mich. 528.

¶ 163. Declaration against township to recover money paid under protest for illegally assessed taxes is sufficiently specific if it states that the money was paid to the town under protest, and that the town received such money never having been entitled thereto.—Mills v. Township of Richland, 72 Mich. 100.

¶ 164. Where a township sues in assumpsit for the amount of township orders wrong-

fully obtained and used as money by defendant, the declaration need not be special.—Township of Buckeye v. Clark, 90 Mich. 432.

¶ 165. Where one had promised to pay for certain repairs which another was to have made and had refused to pay for them after they were made, it was held that in an action to recover the money the latter would be at liberty to declare upon the common counts without setting up special circumstances or stating the consideration, that being matter of evidence.—Crane v. Grassman, 27 Mich. 443.

¶ 166. It is not error to allow under the common counts proof that plaintiff had undertaken to log certain lands of defendant, that owing to inability to market the logs plaintiff became unable to carry out his contract, and that defendant thereupon took over all of the logging operations and supplies and agreed to pay plaintiff and plaintiff's debts in connection therewith, and to have the logs that were cut, where defendant was misled in no respect by such testimony; but it would have been better pleading to have stated that as matter of inducement to defendant's alleged promise to pay for the labor and supplies.—Howe v. Morey, 141 Mich. 383.

¶ 167. Where the count for use and occupation is omitted, the common counts for goods sold and delivered, work and materials, money lent, money paid, money had and received, and money found due on an accounting will not sustain recovery for the use of land demised at a specified yearly rental.—Heyerman v. Kanter, 36 Mich. 316.

§ 49. ——On waiver of tort.

See also ante ¶ 164.

¶ 168. A declaration in assumpsit for the value of personalty, where tort is waived, need not set forth the waiver.—Aldine Mfg. Co. v. Barnard, 84 Mich. 632.

¶ 169. A declaration in assumpsit for a conversion need not allege that plaintiff has waived the tort.—McDonald v. McDonald, 67 Mich. 122.

¶ 170. A count in assumpsit, waiving a tort on which it rests, may properly state the facts that constitute the tort, as they will have to be proved.—Tregent v. Marbe, 54 Mich. 226.

¶ 171. One who alleges that he has been induced by fraudulent representations to sell property for less than its real value cannot by allegations disaffirm the contract, and waiving the tort, maintain assumpsit as upon an implied promise for the difference between the amount so received and the greater actual value of the property. The allegations rebut any such promise.—Bedier v. Fuller, 106 Mich. 342.

¶ 172. On waiving a trespass by cutting and removing timber, it is not necessary to aver the tort.—Nelson v. Kilbride, 113 Mich. 637.

§ 50. Statutory assumpsit.

Pleading in actions under logging law, see Forestry, III.

¶ 173. Laws 1885, Act No. 165 (prior to its amendment in 1891, see How. St., § 8024), permitting one to waive a trespass on lands and bring assumpsit, only applies to cases where damages have been sustained, and the declaration must show that the damages accrued from the trespass. The action cannot rest upon any theory of a contract, as for use and occupation.—Lockwood v. Thunder Bay River Boom Co., 42 Mich. 536.

¶ 174. Under Comp. Laws 1897, § 10421, How. 2nd Ed., § 13954, providing that in all cases where, "by the fraudulent representations or conduct of any person, an injury has been produced, either to the person, property or rights of another, for which an action on the case for fraud or deceit may by law be brought, an action of assumpsit may be brought to recover for such injury, and in all such cases a promise shall be implied by law to pay all just damages arising from such fraud or deceit, and may be so declared upon," a recovery may not be had under the common counts.—Billig v. Goodrich, 109 Mich. 423.

¶ 175. There can be no recovery under the common counts for fraud and deceit as provided in Comp. L. 1897, § 10421, unless the declaration refers to the statute or brings the case within its provisions by averment.—Anderson Carriage Co. v. Pungs, 134 Mich. 79.

¶ 176. Where a declaration is in assumpsit and upon the common counts, without reference to 3 Comp. L. 1897, § 11207, authorizing a recovery in assumpsit for certain trespasses upon land, plaintiff is not entitled to recover upon the theory that his action is based upon such statute.—Weidman v. Williams, 133 Mich. 82.

¶ 177. Under Comp. L. 1897, § 10421, providing that assumpsit lies to recover damages for injuries in all cases where a person is injured by fraudulent representations or conduct, while it would be better practice to refer to the statute, a declaration setting up representations claimed to be false and fraudulent and in which deceit will lie is sufficient to support a judgment, although in the form of an action for breach of contract.—Hallet v. Gordon, 128 Mich. 364.

§ 51. Sufficiency of bill of particulars.

In general, see Pleading, V.

Variance from cause particularized, see post § 53 et seq.

Bill of particulars under common counts as sufficient allegation of assignment, see Assignments, § 33.

¶ 178. In a suit for money had and received it is not necessary that the bill of particulars put in by plaintiff contain credit items covering payments made by defendant. —Cairbre v. McQuillen, 162 Mich. 679.

¶ 179. In an action of assumpsit to recover advances made on contracts, one of which was mutually abandoned, and the other repudiated by defendant, a bill of particulars specifying that the money was "lent" to defendant, while not technically correct, is sufficient where defendant's plea and notice show that he fully understood what was meant, and hence was not taken by surprise.—Murphy v. Dalton, 129 Mich. 79.

§ 52. General issue; scope of defenses.

Issues presented and variance in proofs, see post §§ 53-58.

In general, see Pleading, IX, C.

Admission of existence of corporation, see Corporations, XIX.

Admission of capacity as personal representative, see Estates of Decedents, XI, B.

Defense of payment or release, see Payment, IV; Pleading, IX, C; Releases, IV.

Defense of limitations, see Limitations of Actions, VII.

In action on negotiable paper, see Negotiable Instruments, XIV.

¶ 180. The general issue in assumpsit, as a general rule, denies and puts in issue every fact and combination of facts essential to the plaintiff's cause of action as set up in the declaration.—Wilson v. Wagar, 26 Mich. 452.

¶ 181. Plea of the general issue to an implied assumpsit denies the cause of action altogether, and leaves the plaintiff to prove not only performance but the understanding on which it was based. It would be different if only payment or other discharge were pleaded.—Berringer v. Lake Superior Iron Co., 41 Mich. 305.

¶ 182. Defenses to an action of assumpsit going to the existence of any promise having legal force are admissible under the general issue.—Snyder v. Willey, 33 Mich. 483.

¶ 183. Under the general issue in an action for price, defendant may prove that the article delivered was not the article he purchased.—Grieb v. Cole, 60 Mich. 397.

¶ 184. In assumpsit for the sale of chattels, evidence that they were sold in violation of the United States revenue laws is admissible under the general issue.—Dean v. Chapin, 22 Mich. 275.

¶ 185. In pleading the statutory general issue to a declaration upon the money counts on an accepted order, it is proper to show, without giving special notice of such a defense, that the instrument sued on was never valid, as, by evidence that the sole consideration for it was the sale of spirituous liquors, contrary to the prohibitory law.—Hill v. Callaghan, 31 Mich. 424.

¶ 186. In an action upon the common counts for use and occupation the tenant can, under the general issue, set up a new agreement.—Conkling v. Tuttle, 52 Mich. 630.

¶ 187. Proof that an alleged contract was never made was admissible, in assumpsit, under the general issue.—Mail & Express Co. v. Wood, 140 Mich. 505.

¶ 188. The claim of an exposition commissioner intrusted to prepare an exhibit that, though he was the agent of the state, and the money he received and for which he was being sued in assumpsit by the state, was state money, the state was not in position to claim such money, and that if he was liable at all, it was because as an officer of the state he had failed to account for moneys which he had received to disburse as such officer under How. St., § 309, was not tenable; since it sufficiently appeared that the defendant, by pleading the general issue, denying all indebtedness, refused to recognize the state as interested in such fund. —People v. Swineford, 77 Mich. 573.

¶ 189. In an action to recover the proportionate share of the expense of running logs, under Comp. L. 1897, chap. 129, the defendants who were driving at the same time may prove an agreement under which their services balance plaintiff's, under a plea of the general issue.—Bellows v. Crane Lumber Co., 126 Mich. 476.

§ 53. Issues and variance.

See also post §§ 54-58.

Issues presented and defenses available under general issue, see ante § 52.

Express written contract as evidence under common counts, see post § 61.

Issues as to damages, see Damages, X.

General law as to variance, see Pleading, X.

Motions to strike testimony for variance, see Trial, V.

In contract actions generally, see Contracts, X.

Variance as to name in bond, see Bonds.

In actions by brokers, see Brokers.

In actions on policies of insurance, see Insurance, XX.

¶ 190. Where a contract for work to be done by plaintiff calls for payment in notes, a claim that defendant never gave the notes called for by the contract requires that the contract should be sued on, and cannot be considered in a suit for the value of the work. —Whitaker v. Kilroy, 70 Mich. 635.

¶ 191. Where the bill of particulars in an action for the price of merchandise relies on an actual sale for a specific sum and contains nothing which would justify recovery on a quantum valebat for its conversion, there is no ground of action against defendants for the unauthorized taking of goods belonging to plaintiff but taken away and shipped in defendant's name and with his privity.—Campbell v. Sherman, 49 Mich. 534.

¶ 192. In an action where the declaration was on the common counts in assumpsit, and a bill of particulars was filed stating an account between plaintiff and defendant for items furnished defendant, evidence is not admissible that the account for items was furnished to defendant's deceased husband and that defendant promised to pay the bill if plaintiff would not make expense and would release the estate.—Hosken v. Carr, 147 Mich. 633.

¶ 193. A declaration charging a defendant with receiving lumber as plaintiff's agent to sell, and with collecting and not paying over the proceeds, cannot be supported by proof of a sale of the lumber to defendant, and the partial non-payment of the price by him as original purchaser.—Peppler v. Ratz, 38 Mich. 96.

¶ 194. A declaration on the common counts will not support a claim to recover for six months' services at $125, upon evidence of an express agreement for two years' employment at $1,500 a year, if satisfactory to the employer.—Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

¶ 195. A charge for money lent, in a bill of particulars, will not warrant evidence of the loan of a United States bond, but only of coin, bank-bills or some well known circulating medium popularly designated as money.—Waterman v. Waterman, 34 Mich. 490.

¶ 196. Under the count for money paid to defendant's use, plaintiff can put in evidence a note given by defendant, and secured by chattel mortgage upon horses which plaintiff afterward purchased of him, and to save which plaintiff paid the note, taking an assignment of the debt and security. Such note is also admissible under the count for money had and received.—Brown v. McHugh, 35 Mich. 50.

¶ 197. Under a bill of particulars limiting plaintiff's demands to pay for services rendered and money lent defendant, recovery cannot be had for money had and received by defendant for plaintiff's use.—Feiertag v. Feiertag, 73 Mich. 297.

¶ 198. In a suit for money had and received, plaintiff may testify as to payments made by defendant, although such items do not appear in the bill of particulars. It need not show credit items.—Cairbre v. McQuillen, 162 Mich. 679.

¶ 199. Where no objection is made to the form of action in an action of assumpsit to recover a judgment for the value of a second-hand automobile which defendant has lawfully received and wrongfully detained after cancellation of a contract for the sale of an automobile by defendant under which plaintiff was to turn in the second-hand car as part payment, both the question of title and right of possession may be tried as well as in an action of trover on defendant's denial of ownership and possession.—McDonald v. Young, 198 Mich. 620.

¶ 200. Defendant agreed to purchase certain wood of plaintiff. Plaintiff cut the wood and a portion of it was attacked by fire while lying in plaintiff's timber, undelivered. Plaintiff without the request of defendant rendered services in fighting the fire and sent defendant a bill of thirty-six dollars therefor. Defendant in a statement in which it failed to credit plaintiff with the proper amount of money due him credited plaintiff with this item. Held, plaintiff could not recover the thirty-six dollars in a suit in assumpsit for the price of the wood.—Kelley v. East Jordan Chemical Co., 162 Mich. 525.

§ 54. ——As to joint or several liability.

¶ 201. An action of assumpsit against parties jointly fails if there is no evidence of a joint liability or undertaking on their part. —Thompson v. Richards, 14 Mich. 172; Mace v. Page, 33 Mich. 38.

¶ 202. A joint action brought on a several obligation, sustains a verdict for the defendants as severally liable.—Larkin v. Butterfield, 29 Mich. 254.

§ 55. ——Under common counts with instrument annexed.

See generally Negotiable Instruments, XIV.

¶ 203. A declaration on the common counts with copy of a negotiable instrument appended is equivalent to an assertion that plaintiff is entitled to sue upon it in manner and form as set out.—Wilcox v. Sweet, 24 Mich. 355.

§ 56. ——Under special counts.

Proof of express contract under common counts, see ante § 53, ¶ 194.

Immateriality of variance where common counts cover the proof, see post § 57.

Declaring on express agreement and proving implied one, see Contracts, X; Sales, VIII, IX.

¶ 204. One cannot recover under a special count upon a promise which it does not count on.—Beecher v. Pettee, 40 Mich. 181.

¶ 205. Where a plaintiff especially pleads a written contract as evidencing her right to recover, she cannot base said right upon implied rights springing up outside the terms of the written instrument.—Hickey v. Lundy, 168 Mich. 336.

§ 57. ——Under joinder of special and common counts.

Admissibility of instrument under common counts joined with the special count, see post ¶ 230.

¶ 206. Where no special counts are needed in an action on a contract, in which both special and common counts are used, the objection that the contract as proved differs from that set forth in the special count is unimportant. Even if the contract were void recovery might be had upon the common counts.—Fuller v. Rice, 52 Mich. 435.

¶ 207. Where a plaintiff brought an action in assumpsit and filed a declaration with a special count and the common counts for money, the special count averring that the defendants were officers of a corporation with whom he entered into an optional contract for the purchase of their property and that he had paid $1,000, and that there had been fraudulent representations on the part of the defendants, by filing a bill of particulars for the $1,000 paid and interest thereon; plaintiff was not limited in his proofs to the common counts, and he could show that he was induced by the false statements to enter into the contract and had parted with his money through such misstatements. —Gubbins v. Ashley, 146 Mich. 453.

¶ 208. An attorney was sued upon common and special counts for his client's share of a judgment that he had agreed to collect for a certain compensation, which the testimony showed he was to be paid if he collected it without any compromise. The claim was compromised, however, by another person, who had an assignment of the judgment. held that the case should have been submitted to the jury upon the count for money had and received instead of the special counts which the proofs did not support, and that the defendant should have been allowed to prove as a setoff the value of his services and his disbursements in attempting to collect the judgment.—Dustin v. Radford, 57 Mich. 163.

¶ 209. A declaration in assumpsit contained general counts for work done and money paid, and a special count on a contract by defendant to pay plaintiff a certain sum for his services. The case was tried on the theory of a special count and the value of plaintiff's services was not shown. Held, that plaintiff, though the services were admitted, could not recover under the general counts.—Wyatt v. Herring, 90 Mich. 581.

¶ 210. Where the first two counts of a declaration allege guaranty of payment of a note, etc., and the third count is a common count in assumpsit, with copy of the note annexed, and an alleged indorsement on the back by defendant without guaranty over it, refusal to exclude the note under the third count as variance between declaration and proof is unimportant, as it was admissible under the other counts.—Roberts v. Hawkins, 70 Mich. 566.

¶ 211. Where the declaration contains a special count as well as the common counts, the introduction of a note in evidence under the common counts without objection will not preclude raising the objection that it varies from the special count.—Freeman v. Ellison, 37 Mich. 459.

§ 58. ——Declaring on common counts and proving breach.

See also ante ¶ 194, post ¶ 233.

¶ 212. Where a declaration in assumpsit is only on the common counts, damages for a breach of contract cannot be recovered thereunder.—Detroit River Transit Co. v. Aldrich, 176 Mich. 857.

¶ 213. An action on the common counts will not lie where proof of the breach of a contract is necessary to recovery.—Phippen v. Morehouse, 50 Mich. 537.

¶ 214. Money due upon a contract that has been fully performed is recoverable under the common counts; but the breach of a special contract cannot be shown in such action.—Flint & P. M. R. Co. v. Wayne Circuit Judge, 108 Mich. 80.

V. EVIDENCE.

§ 59. Burden of proof.

General rule as to burden, and general presumptions, see Evidence, II.

Burden of particular issues, see generally Contracts, X; and see topics treating of the issue presented, e. g., Payment; Fraud; Duress; etc.

¶ 215. Where the plaintiff in assumpsit relies upon the liability of the defendant which the law implies from facts and circumstances, it is just as essential to a recovery to prove all the facts and circumstances which create the liability alleged in the declaration as it is where a special contract is declared on to prove the contract as alleged. —Michigan Southern & Northern I. R. Co. v. McDonough, 21 Mich. 165.

¶ 216. When goods are purchased by another person without authority and are brought into a merchant's store without his knowledge or consent, and placed upon his shelves, there must be some evidence that he sold the goods and received the money therefor in order to make him liable to the vendor in an action for money had and received to his use.—Lesher v. Loudon, 85 Mich. 52.

¶ 217. An action to recover back $6 per car load for freight paid under protest at the rate of $22 per car for lumber transported by a railroad company, based on an alleged contract that, in consideration that plaintiff would build a mill and cause the pine timber on his lands near by to be sawed thereat and furnish the lumber to the company for transportation, the company would carry the same for $16 per car, will fail in the absence of evidence that such an undertaking, binding on the company, was in fact made. —Michigan Cent. R. Co. v. Edwards, 33 Mich. 16.

¶ 218. Where a party sues for the repayment of money paid under protest, and the defendant claims the amount under color of right, as having been paid out by him for plaintiff's benefit, the plaintiff has the burden of proving that defendant has no right to it; and if he does not do so the question of the admissibility of the receipt taken by defendant in proof of his payment becomes immaterial.—Congdon v. Preston, 49 Mich. 204.

¶ 219. A defendant in an action for money had and received, who admits the receipt of the money, must establish his affirmative defense by a preponderance of evidence.—Dillon v. Pinch, 110 Mich. 149.

¶ 220. Where it is proved that a certain sum was placed in defendant's hands to be expended for a specific purpose, and he has refused to account for it, the burden in assumpsit is upon him to show that it has been so expended, or what disposition has been made thereof.—People v. Swineford, 77 Mich. 573.

§ 60. Admissibility under common counts.

Issues presented and variance, see ante §§ 52-58.

[Note. So far as concerns the admissibility of evidence to prove particular facts, see topics treating of the contract or fact in question, e. g., Contracts, X; Sales, VIII, IX; Fraud; Mistake; and the like.]

Competency of evidence in general, such as best and secondary, opinions and conclusions, hearsay, documents, etc., see Evidence.

Evidence of values of goods or services, see Values.

¶ 221. An arrangement was made whereby A. was to deduct from the wages of his workmen the amounts due for goods sold to them by B.; but A., after making such deduction, with the consent of the workmen, refused to pay the same to B. Held, that B. had an action against A. for money had and received; that written statements of accounts furnished by A. were admissible against him under the bill of particulars, and that a question asked B. as to how much A. owed him was not necessarily improper, as being too general, especially where it appeared that details were gone into, and evidence of items submitted that was not given in the record. —Donkersley v. Levy, 38 Mich. 54.

¶ 222. One who sued to recover money lent testified that she had personally procured the money from another to whom it had been lent on a promissory note, and had then lent it to defendant; defendant testified that he had dealt exclusively with plaintiff's daughter, from whom he procured said note with plaintiff's indorsement, and had collected the money under an arrangement with the daughter to borrow it of her. Held not error to exclude evidence that the defendant had used the fund so received by him for the daughter's benefit.—Moynahan v. Connor, 30 Mich. 136.

¶ 223. One who is sued under the common counts for advertising done for him by plaintiff, cannot object to the introduction of testimony on the ground that the advertising was done under a written contract.—Record Pub. Co. v. Merwin, 115 Mich. 10.

¶ 224. The firm of A. & B., through B., borrowed from Mrs. B. and gave notes to other persons whom A. supposed to be the lenders. Two of these notes were payable to C. In a suit by Mrs. B. for the money lent, it was held inadmissible for A. to show in defense that he had made an arrangement with C. whereby the latter was to look to B. for payment of one of the notes, if he, A., would pay the other, and that he did pay it. C.'s promise was nudum pactum.—Smith v. Van Tine, 39 Mich. 491.

¶ 225 Where, on an exchange of lands, between A. and B., the former agrees to pay a certain part of the mortgage debt rest-

ing upon the land which he conveys, the rest of the debt being assumed by B., it is immaterial, as affecting A.'s liability to reimburse B. for money paid by the latter on the debt in excess of the amount so assumed, whether or not A. agreed to apply a certain fund in part payment of the debt. —Cummings v. Callahan, 104 Mich. 76.

¶ 226. The theory of rescission is properly excluded in an action to recover money paid on a contract alleged to have been fraudulently obtained, where no notice of rescission and offer to put defendant in statu quo was made until after the trial had begun.—Barbour v. Hurlburt, 137 Mich. 534.

§ 61. ——Written instruments; notes and bills.

¶ 227. A non-negotiable note not purporting to be for value received may be given in evidence under the common counts.—Rickey v. Morrison, 69 Mich, 139.

¶ 228. In a suit by the payee named in a note promising to pay money and containing a power of attorney to confess judgment, where a copy of the note is attached to the common counts with a notice that it constitutes plaintiff's sole cause of action, such note is admissible in evidence under the common counts.—Conrad Seipp Brewing Co. v. McKittrick, 86 Mich. 191.

¶ 229. Under the count for money paid to defendant's use plaintiff can put in evidence a note given by defendant and secured by chattel mortgage upon horses which plaintiff afterward purchased of him, and to save which plaintiff paid the note, taking an assignment of the debt and security. Such note is also admissible under the count for money had and received.—Brown v. McHugh, 35 Mich. 50.

¶ 230. Where a declaration to recover, because of misrepresentations, the amount paid for a contract appointing plaintiff general agent in certain counties, counted specially on the contract, mentioning the counties, and generally on the common counts, and the proofs showed that the contract had by subsequent agreement been changed by substituting other counties, the contract as changed was properly admitted in evidence because it was admissible under the common counts. —Angell v. Loomis, 97 Mich. 5.

§ 62. ——In action for reasonable worth.

¶ 231. Testimony tending to show the market value of plaintiff's services rendered under a contract void under the statute of frauds, the contract price being in dispute, is admissible under the quantum meruit.—Moore v. Capewell Horse Nail Co., 76 Mich. 606.

¶ 232. In an action by a father to recover on the quantum meruit for his minor son's services to defendant, evidence is admissible to show that in the course of the service the son embezzled from defendant more than the worth of such service.—Schoenberg v. Voigt, 36 Mich. 310.

¶ 233. Testimony showing a breach of a contract of employment, and damages because thereof, is inadmissible under a declaration on the common counts in assumpsit for work and labor performed for defendant at his request.—Loranger v. Davidson, 110 Mich. 605.

¶ 234. In an action to recover the reasonable value of services rendered by the plaintiff, the defendant may not show for what sum he might have hired others to render such services.—Ruttle v. Foss, 161 Mich. 132.

¶ 235. In an action to recover the reasonable value of services rendered by plaintiff to defendant in adjusting certain coal leases belonging to the latter, evidence of the quantity of coal in a field covered by one of the leases is inadmissible.—Ruttle v. Foss, 161 Mich. 132.

¶ 236. In an action to recover the reasonable value of services rendered by plaintiff to defendant, evidence of the character and value of plaintiff's previous employment is inadmissible.—Ruttle v. Foss, 161 Mich. 132.

§ 63. Weight and sufficiency.

See also ante ¶ 51.
To warrant direction of verdict or make question for jury, see post § 64.

[Note. The weight and sufficiency of the evidence to prove a given cause of action is generally treated in the topic relating thereto, e. g., Contracts, X; Sales, VIII, IX; and similar topics.]

Requisites and proof of accounts stated, see Account Stated.

¶ 237. An action on the common counts for money had and received to the plaintiff's use from the estate of plaintiff's father is supported by evidence that the father had assigned his property to another person in consideration that the latter should take care of his children; that the assignee had transferred the trust to defendant and paid him a certain sum of money for the children, defendant agreeing to pay each its proportion on becoming of age, and that he had not done so, and plaintiff had brought suit for her share on learning the facts.—Hosford v. Kanouse, 45 Mich. 620.

¶ 238. B., on dissolution of the firm of H. & B., assigned to H. all the assets, including a government claim which was after-

wards paid by a draft receipted by B. in the firm name; it was held that, without producing the draft in evidence, H. could recover of B. the amount on parol proof that B. had so disposed of the draft as to enable another to collect and withhold the avails from H. Proof that B. had actually received the money is unnecessary; B. is estopped from denying it.—Bullard v. Hascall, 25 Mich. 132.

VI. TRIAL, VERDICT AND JUDGMENT.

See generally Trial; Instructions; and specific topics like Contracts, X; Sales, VIII, IX; Negotiable Instruments, XIV; and other contract topics.

§ 64. Questions of fact and directing verdict.

General law of instructions, see Instructions.
Particular instructions, see Contracts, X; Sales, VIII, IX; and like topics.
As to direction of verdict, see generally Directing Verdict; and see also specific topics, e. g., Contracts, X; Sales, VIII, IX.

¶ 239. Where there was a contract to remove buildings from land, and a deed to the land recited that the removal was a part of the consideration for the deed, but the undisputed evidence was that other things were the sole consideration for the deed and that the promise to remove the buildings was not based on the deed, the court should rule as matter of law that the person removing them under the contract was entitled to be paid; and in action on the common counts for work and labor should instruct for a verdict accordingly.—Cutler v. Spens, 191 Mich. 603.

¶ 240. On writ of error by plaintiff in an action of assumpsit for money had and received, it being alleged that, of $1,500 admittedly turned over by plaintiff to defendant for the purchase of a saloon, defendant paid only $1,200 therefor, held that the trial court might properly have directed a verdict for defendant on evidence that the remainder of the money was necessarily paid out for plaintiff's benefit.—Hauser v. Goebel Brewing Co., 199 Mich. 168.

¶ 241. In a suit for services rendered by plaintiff's testator to defendant there was evidence that the testator was employed as private secretary for defendant's father who occupied the same offices with defendant; that the testator did outside work for others than his employer; that he sent a bill to defendant for services; and that defendant without accepting or rejecting the same returned it to the testator for correction, with the remark that the testator had omitted to charge for drawing his breath. There was no evidence of an express agreement between the testator and defendant. Held, that the trial court erroneously directed a verdict for defendant and should have submitted the case to the jury.—McCain v. Smith, 164 Mich. 683.

¶ 242. In assumpsit for money had and received, where it appeared that plaintiff, who was of age, and was living with defendant, her step-mother, was, during all the time covered by the declaration, engaged in dressmaking, and that defendant received her earnings, disputed questions of fact as the amount of such earnings, the agreement under which defendant received them, and the periodical settlements claimed by defendant to have been made, were for the jury to determine.—Feiertag v. Feiertag, 80 Mich. 489.

¶ 243. Plaintiff sued in assumpsit to recover money paid under a contract, and alleged that defendant induced him to make the contract by fraudulently misrepresenting certain material facts. Held, that the submission to the jury of special questions bearing on these and other material facts was proper.—Ward v. Cook, 158 Mich. 283.

¶ 244. In an action of assumpsit to recover money alleged to have been misappropriated by defendant while a clerk in plaintiff's store, evidence, in addition to proof of specific items, that the profits were less though the volume of business was greater and the cost of running it were less, and that defendant had expended and accumulated sums largely in excess of the salary received, raises a question for the jury whether sums in excess of the specific items mentioned, had been misappropriated.—Adams v. Elseffer, 132 Mich. 100.

§ 65. Verdict and findings and judgment.

See generally, Verdicts; Judgments.
Right to have conclusions of law specially found, see Verdicts and Findings, VII.

¶ 245. Where in a suit to recover for personal services rendered, the jury, in answer to special questions, find that there was no agreement that defendant should compensate plaintiff either by an interest in certain leases, by stock, or by cash, such finding does not exclude the possibility of an implied contract to pay the reasonable value of such services.—Ruttle v. Foss, 161 Mich. 132.

¶ 246. In a common assumpsit for the original amount of a compounded debt, which plaintiff claims is all due because of the breach of the composition agreement, the judgment should be for the balance due under the composition on proof that there was

no actionable breach of it and no good tender of the balance by the debtor or any sufficient payment into court for plaintiff's benefit; and a judgment for defendant is error, though the composition as proved prevents judgment for the full amount.—Browning v. Crouse, 40 Mich. 339.

ASSUMPTION to ASSURANCE.

Cross-References.

Assumption of Authority—
See Agency; Corporations, XVII, C, D; Partnership.
Assumption of Debt—
See Mortgages, VII, B; Novation.
As a payment or parting with value, see Payment, I; Negotiable Instruments, XIII, A; Notice and Record of Title, I, C.
As consideration for promise, see Contracts, V.
Guaranty or suretyship, see Guaranty; Suretyship.
Necessity of writing, see Frauds, Statute of.
Power of corporation, see Corporations, XII; Municipal Corporations, XI.
Assumptions of Fact—
In charge to jury, see Instructions; Indictment, IX, E.
In questions to witnesses, see Examination of Witnesses.
Hypothesis to experts, see Evidence, VI, B; Indictment, VIII.
As harmless error, see Harmless Error.
Assumption of Name—
See Names; Trade Marks and Trade Names.
Corporate names, see Associations; Corporations, III; Fraternal Associations.
Prosecution for crime under assumed name, see Indictment, I, V.
Parties in civil suits, service of process, and pleading, see Parties; Pleading: Process.
Assumption of Risk—
See Master and Servant, III, F.
Assurance—
In the sense of insurance or indemnity, see Indemnity; Insurance.
Against incumbrances or defects in title to land, see Covenants for Title.
As warranty of goods, see Sales.
Of safety as affecting doctrine of assumed risk, see Master and Servant, III.

ASYLUMS AND HOSPITALS.

TREATS of institutions for care and treatment of sick, disabled or unfortunate persons.

Analysis.

§ 1. In general.
§ 2. Contracts and property.
§ 3. Duties and liabilities for tort.

§ 1. In general.

Regulation of business of nursing and qualifications for nurses, see Medicine and Surgery.
Soldiers' homes, admission to same, and government of them by public, see Military and Naval Affairs.
Ascertainment of fact of insanity or other status for purpose of commitment to asylum or hospital, see Incompetents and Delinquents; Insane Persons, I, II.
Asylum for children as party to consent to adoption, see Adoption, ¶ 1.
For the statutes relating to asylums and hospitals, see indexes to the published statutes.

¶ 1. The insane asylum in Wayne County is a public and county building and not a state institution.—Superintendents of Poor of Wayne County v. Board of Auditors of Wayne County, 147 Mich. 384.

§ 2. Contracts and property.

Invalidity of contract with interested officer, see Contracts, IV; Public Contracts.

¶ 2. The trustees of the State Insane Asylum have no power to obligate the state for the payment of attorney's fees for drafting a revision of the state asylum laws, or proposed legislation.—Phelps v. Auditor General, 136 Mich. 439.

§ 3. Duties and liabilities for tort.

Extension of time to sue for false imprisonment, see Limitations of Actions, III, A.

¶ 3. An incorporated hospital organized and maintained not for private gain, but to care for and medically treat the sick, and to that end to manage a fund given in trust for the purpose, is not liable for injuries sustained by a patient through the negligence of its managers or employees; and the fact that patients able to pay are required to do so does not deprive the corporation of its eleemosynary character, or permit a recovery for damages on account of the existence of contract relations.—Downes v. Harper Hospital, 101 Mich. 555.

¶ 4. Whether, if there was a defect in the room wherein the patient was confined in a hospital not conducted for gain, by reason of which defect he escaped from the room and was killed there would be any liability on the part of defendant's trustees or of those entrusted with the care and treatment of him, quære.—Downes v. Harper Hospital, 101 Mich. 555.

¶ 5. A charitable hospital is not liable for the negligence of its employees.—Peake v. Grace Hospital, 130 Mich. 466.

¶ 6. Trustees of a hospital are not liable for the negligence of the house surgeon in treating a patient where they made his appointment upon recommendation of a medical board of twenty-five physicians and surgeons, and no charge of incompetency had ever been made against him though he had served for some time.—Peake v. Grace Hospital, 130 Mich. 466.

¶ 7. The defendant was a private institution for the detention of wayward girls. It kept its inmates from escape, and made them work without pay. It was designated by Act No. 271, Pub. Acts 1885, as a place to which the courts might commit girls convicted of certain offenses. Held, it was not such a governmental agency as would exempt it from liability for illegal detention of an infant.—Galvin v. House of Good Shepherd, 158 Mich. 361.

Liability of hospital, sanitarium, or asylum, for injury or death of patient or inmate by fire, see note, 10 N. C. C. A. 749-754.

ATTACHING PAPERS.

Cross-References.

Attaching Papers—
To pleadings, see generally Pleading, VIII.
Of affidavit to writ of attachment, see Attachment, § 43.
Of statements or papers to notices or claims, see specific topics treating of the notice, paper or claim.

ATTACHMENT.

TREATS of the seizure of the property of a defendant at the commencement of or during an action for the purpose of bringing such property under the jurisdiction in the action and the holding of it for the ultimate satisfaction of the plaintiff's claim when reduced to judgment, and of the procedure incident to such a seizure. Attachments on process from justices of the peace are excluded to a separate treatment in Justices of the Peace, IV, C. Process of garnishment to bring in a supposed debtor or bailee of the defendant and require disclosure is treated in Garnishment.

Analysis.

I. General Nature and Requisites.

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§ 2. Under Log Lien Law.
§ 3. Jurisdiction and venue of the writ.
§ 4. Prerequisites; cause of action existing.
§ 5. Commencement and pendency of attachment.

II. Grounds and Occasion for Attachment.

§ 6. In general; nature of the cause of action.
§ 7. Implied contract liability.

§ 8. Fraud, concealment or absconding.
§ 9. Disposal of property.
§ 10. Nonresidence.
§ 11. Against corporations.

III. Property Subject to Attachment.

§ 12. In general; contingent and immature rights.
§ 13. Choses in action; book accounts.
§ 14. Corporate stocks and shares.
§ 15. Chattel mortgage interests.
§ 16. Real estate and leasehold interests.
§ 17. Mortgage lien or equity of redemption.
§ 18. Equitable interests in land.
§ 19. Trust property and estates.
§ 20. Common and joint ownership; partnership property.
§ 21. Exemptions and property exempted.

IV. Procedure to Obtain Writ.

A. AFFIDAVIT, APPLICATION AND ALLOWANCE.

§ 22. In general.
§ 23. Averring and describing cause of action.
§ 24. ——Joint or several liability.
§ 25. ——Amount due or owing.
§ 26. Averment as to setoffs.
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I. GENERAL NATURE AND REQUISITES.

§ 1. In general; construction and policy of the statutes.

Policy as to dissolution proceedings, see post § 115.

¶ 1. Attachment is not the proper process to obtain possession of goods claimed by plaintiff as his own.—Mendelsohn v. Smith, 27 Mich. 2.

¶ 2. Attachment is a harsh and extraordinary remedy, unknown to the common law, and the statutory provisions therefor must be strictly construed, and cannot be extended beyond their terms.—Galloway v. Holmes, 1 D. 330; Welles v. Mayor, etc., of City of Detroit, 2 D. 77; Greenvault v. Farmers' & Mechanics' Bank of Michigan, 2 D. 498; Buckley v. Lowry, 2 Mich. 418; Tannahill v. Tuttle, 3 Mich. 104; Roelofson v. Hatch, 3 Mich. 277; Brigham v. Eglinton, 7 Mich. 291; King v. Harrington, 14 Mich. 532; Cross v. McMaken, 17 Mich. 511; Barker v. Thorn, 20 Mich. 264; Macumber v. Beam, 22 Mich. 395; Millar v. Babcock, 29 Mich. 526; Adams v. Abram, 38 Mich. 302; Mathews v. Densmore, 43 Mich. 461, reversed 109 U. S. 216, 27 L. ed 912, 3 Sup. Ct. Rep. 126; Van Norman v. Jackson County Circuit Judge, 45 Mich. 204; Fairbanks v. Bennett, 52 Mich. 61; Borland v. Kingsbury, 65 Mich. 59; Steere v. Vanderberg, 67 Mich. 530; Langtry v. Wayne Circuit Judges, 68 Mich. 451; Drake v. Lake Shore & M. S. R. Co., 69 Mich. 168; Nugent v. Nugent, 70 Mich. 52; Estlow v. Hanna, 75 Mich. 219; Jaffray v. Jennings, 101 Mich. 515; Cary v. Everett, 107 Mich. 654.

¶ 3. Statutory attachment proceedings are in derogation of the common law, and the statute must be strictly complied with.—Dutcher v. Grand Rapids Fire Ins. Co., 131 Mich. 671.

¶ 4. Proceedings by attachment are entirely statutory in their inception, and the statute must be looked to in order to ascertain their requisites. They have no founda-

tion outside of statutes, and must therefore in all things essential, conform to them.—Knack v. Berlin, 150 Mich. 550.

¶ 5. Proceedings by attachment are statutory in their inception, and as such are to be strictly construed.—De Carie v. Marks, 171 Mich. 167.

§ 2. Under Log Lien Law.

Necessity of affidavit to give jurisdiction, see post § 22, ¶ 49.
Mode of levy under Log Lien Law, and service requisite to complete jurisdiction, see post VI, A-C; and post § 80, 83.
Requisites of writ for attachment of logs, see post § 46.
Jurisdictional amount involved under Log Lien Act, see Comp. L. 1915, § 14849.

¶ 6. Attachment proceedings under the log lien law are purely statutory and must be followed substantially.—Davison v. Davison, 99 Mich. 625.

§ 3. Jurisdiction and venue of the writ.

Acquiring jurisdiction for personal judgment or for entry of default and judgment against the property, see post VII, XII.
Combining claims to give jurisdiction under Log Lien Law, see Forestry, III.
Necessity of strict procedure, see ante §§ 1, 2.
Necessity of affidavit, see post § 22.
Necessity of averments as to county of residence, see post § 27.
Place for levy, see post § 49.
Effect of dissolution to oust jurisdiction, see post § 125.
Effect of want of jurisdictional amount on priority of resultant judgment over other attachment, see post § 98.
County in which to apply for dissolution when commissioner is disqualified, see post ¶ 301.
Right to sue in attachment to gain venue not otherwise open, see Venue.
Jurisdiction of action between nonresidents on foreign cause, see Courts, V.
Necessary jurisdictional amount in controversy, see Jud. Act, Chap. XXVI, § 5; Comp. L. 1915, § 13032.

¶ 7. Under Comp. L. 1897, § 10555, providing that any creditor shall be entitled to proceed by attachment against a non-resident debtor in the circuit court of any county where property of the debtor subject to attachment may be found, jurisdiction may be obtained in this state of an action to which all parties are non-residents, where the subject matter is a note executed in the state of such parties, valid in that state, but which would have been invalid if made in this state.—State Bank of Eldorado v. Maxson, 123 Mich. 250.

¶ 8. How. St., § 7986, requires attachment proceedings to be begun in the county where one of the parties resides, if the debtor has property there, unless the debtor is a nonresident of the state.—Stringer v. Dean, 61 Mich. 196; Schloss v. Joslyn, 61 Mich. 267.

¶ 9. The writ of attachment must, under the statute, be sued out in the county where one of the parties resides, if the debtor has property there, and the fact that the property in the defendant's county of residence is land that is claimed to be encumbered to its full value does not alter the rule.—Schloss v. Joslyn, 61 Mich. 267.

¶ 10. Under How. St., § 8137, as amended by Laws 1887, Act. No. 242, attachment may issue against a domestic corporation other than a railroad or navigation company, in the county of its location, in favor of one also a resident of that county, in like cases as in suits between individuals; though before the amendment no substituted service could be made on such a corporation in other than the county of its home office.—Michigan Dairy Co. v. Runnels, 96 Mich. 109.

§ 4. Prerequisites; cause of action existing.

Commencement of the action, see post § 5.
Completion of procedure by filing declaration and serving on person, see post § 77 et seq.
Filing the declaration to complete the action, see post § 77.

¶ 11. To entitle a party to commence a suit by attachment he must have a cause of action at the time he makes his affidavit and sues out his writ; he cannot declare for one accruing afterwards.—Galloway v. Holmes, 1 D. 330; Hale v. Chandler, 3 Mich. 531; and see Hinchman v. Town, 10 Mich. 508.

¶ 12. The filing of a statement of lien is a condition precedent to the right to maintain a suit by attachment under the Log Lien Law.—Eales v. Francis, 115 Mich. 636.

§ 5. Commencement and pendency of attachment.

Filing the declaration, see post § 77.
Inception of lien, see post § 91.
Commencement of actions for limitation purposes, see Limitations of Actions, V.

¶ 13. An attachment proceeding is begun when the writ issues, not when the declaration is filed.—Galloway v. Holmes, 1 D. 330.

II. GROUNDS AND OCCASION FOR ATTACHMENT.

§ 6. In general; nature of the cause of action.

Necessity for existing cause of action, see ante § 4.
Against joint parties, necessity of grounds good against all, see post § 20.
Averments and description in affidavit, see post, §§ 23-25.
Averments of grounds where debt is not yet due, see post § 29.
Necessary and sufficient averments in log lien attachments, see post § 30.
Dissolution for want of good cause or because grounds averred do not exist, see post §§ 112, 113.
Quashal of writ for insufficiency of cause as declared on, see post ¶ 290.
In justice's courts, see Justices of the Peace, IV, C.
Inhibition against replevin of attached goods, see Replevin, I.
General statute defining grounds, see Jud. Act, Chap. XXVI, § 1, Comp. L. 1915, § 13028.
Against joint parties, see Jud. Act, Chap. XXVI, § 33; Comp. L. 1915, § 13060.
Provisions where action is on tort, see Jud. Act, Chap. XXVI, § 22; Comp. L. 1915, § 13049.
In actions for trespass on lands waived to sue in assumpsit, see Jud. Act, Chap. XXVI, § 44; Comp. L. 1915, § 13071.
After action is begun, see Jud. Act, Chap. XXVI, § 36; Comp. L. 1915, § 13063.
On debts not yet due, see Jud. Act, Chap. XXVI, § 35; Comp. L. 1915, § 13062.
Under Log Lien Law, see Comp. L. 1915, § 14847.

¶ 14. The remedy by attachment is not limited to the case of liquidated damages; it may be based upon demand arising ex contractu, the amount of which is capable of ascertainment by some standard referable to the contract itself, sufficiently certain to enable the plaintiff by his affidavit to aver it, in the words of the statute, "as near as may be," or a jury to find it.—Roelofson v. Hatch, 3 Mich. 277.

¶ 15. Where by reference to the contract, the amount of damages for its breach are reasonably ascertainable, the remedy of attachment under the attachment statutes lies.—Showen v. J. L. Owens Co., 158 Mich. 321.

§ 7. Implied contract liability.

¶ 16. Attachment lies upon the implied assumpsit arising out of a clerk's embezzlement of his employer's money; it sounds in contract.—Farmers' National Bank of Constantine v. Fonda, 65 Mich. 533.

§ 8. Fraud, concealment or absconding.

Absconding, defined, see also post ¶ 352.
Sufficiency of averments of grounds in affidavit see post §§ 27-29.
Evidence on motion to dissolve, see post §§ 122-124.

¶ 17. Where, at the time plaintiff agreed to indorse certain paper for defendant, amounting to about $1,000 as represented, the latter represented her other indebtedness to be $1,200, whereas it was really more than $3,000, the fact that plaintiff indorsed paper such as agreed to the amount of $1,800, not knowing that there was more of it which defendant had secretly paid from the proceeds of her stock in trade, thereby depleted, did not show part of the claim was with notice and hence unaffected by the fraud, and prevent plaintiff's right to an attachment as for fraud for all sums for which he had become liable and which, by the agreement between plaintiff and defendant, were due and payable from the latter to the former.—May v. Newman, 95 Mich. 501.

¶ 18. Application of the proceeds of a mortgage in preference of such creditors as came into a composition agreement to discharge liabilities as indorser is not a fraud on other creditors.—Iosco County Sav. Bank v. Barnes, 100 Mich. 1.

¶ 19. The intent to defraud must be found to exist as a fact in order to maintain the writ of attachment. It is not enough to show that the debtor has conveyed or mortgaged his property to pay or secure honest debts to one creditor excluding others.—First Nat. Bank v. Steele, 81 Mich. 93.

§ 9. Disposal of property.

By corporation, see post § 11.
Sufficiency of averments of grounds, see post §§ 27-29.

¶ 20. Attachment proceedings cannot properly rest on the ground merely that the debtor's mortgagees in possession are, with his assent, selling his stock at private sale instead of at auction, as provided in the mortgage, and are closing out the remnant at barter.—Densmore v. Mathews, 58 Mich. 616.

¶ 21. Attachment cannot be based upon a debtor's executing chattel mortgages to secure bona fide creditors, or to procure money actually used in payment of honest debts, though such mortgages cut off, and are intended to cut off, another creditor's redress.—Gore v. Ray, 73 Mich. 385.

¶ 22. Those who sell goods while a chattel mortgage by the buyer is withheld from file are not in fact defrauded so as to warrant

attachment, their rights not being jeoparded by the mortgage; and such attachment based on that ground should be dissolved because the mortgage was void under How. St., § 6193.—Lord v. Wirt, 96 Mich. 415.

¶ 23. Evidence of circumstances indicating that the debtor's property is being disposed of, or seized by others, and that there is danger that the creditor may lose his claim, is sufficient to justify the allowance of the writ before the maturity of the debt under Pub. Acts 1889, No. 149.—Mosher v. Bay Circuit Judge, 108 Mich. 503.

§ 10. Nonresidence.

¶ 24. One who stays most of his time in this state, but claims that his home is in another state from which he came, and where his wife lives, and who frequently visits and lives with her, is a non-resident subject to attachment.—Loder v. Littlefield, 39 Mich. 512.

§ 11. Against corporations.

Proper county, see ante ¶ 10.
Proper procedure for writ, see post § 22, ¶ 49a.
Sufficiency of averments of grounds, see post § 27, ¶ 70a.
Attachability of shares and certificates, see post § 14.
Against corporations, see Jud. Act, Chap. XXVI, § 3; Comp. L. 1915, § 13030.

¶ 25. How. St., §§ 7986, 7987, providing that any creditor shall be entitled to proceed by attachment against "his debtor" in the circuit court of the county in which either of them shall reside, etc., and that an affidavit shall set out the cause for issuing an attachment (among the causes being that the debtor is a foreign corporation), embrace domestic corporations in the term "debtor"; but in the case of a domestic corporation the cause shown by the affidavit must be one of those grounds, e. g., fraudulently transferring its property; which it might do by or through its agents.—Michigan Dairy Co. v. Runnels, 96 Mich. 109.

¶ 26. Since How. St., § 8137, as amended by Laws 1887, Act No. 242, providing for a method of serving corporations through agents in any county where the plaintiff resides, also providing that in any county other than that where the principal office is located the first process may be a writ of attachment to be served in the same manner as other writs of attachment, and further providing that it shall not apply to railroad and navigation companies, merely extends a remedy, it does not repeal by implication section 7986, which gives the right to a writ of attachment generally against debtors.—Michigan Dairy Co. v. Runnels, 96 Mich. 109.

(1 Mich. Dig. 88)

III. PROPERTY SUBJECT TO ATTACHMENT.

§ 12. In general; contingent and immature rights.

Right to release attached crops on bonds, see post ¶ 161.
Property subject to levy in general, see Executions, IV; Exemptions.

¶ 27. Any property subject to execution is subject also to attachment.—King v. Hubbell, 42 Mich. 597.

¶ 28. Growing crops may be attached.—King v. Moore, 10 Mich. 538.

§ 13. Choses in action; book accounts.

¶ 29. While books of account may be evidences of debt, their seizure on a writ of attachment is not the attaching or seizure of the debt itself, nor are they so intimately connected with the demands charged therein as to make the seizure of the books equivalent to the seizure of the demands; and there is no means by which such demands can be transferred by a direct levy and sale.—Rosenthal v. Muskegon Circuit Judge, 98 Mich. 208.

§ 14. Corporate stocks and shares.

Transfer of shares by execution and sale in general, see Corporations, XXIV, B.

¶ 30. An attachment cannot be levied upon corporate stock where the defendant has regularly assigned his interest therein.—Van Norman v. Jackson Circuit Judge, 45 Mich. 204.

¶ 31. Shares of stock in which the debtor has only a beneficial interest, and the legal title to which is vested in a third person as trustee, are not subject to attachment.—Gypsum, Plaster & Stucco Co. v. Kent Circuit Judge, 97 Mich. 631.

¶ 32. Under Comp. L. 1897, § 7009, 7012, 7020, 10335, 10336, 10339, 10562 (How. St., 2nd Ed., §§ 7798, 7801, 7809, 13036, 13037, 13040, 13363), the shares of stock in a mining company are personal property, transferable on the books of the company, and the share or interest of a stockholder may be taken in execution or reached by attachment, a copy of the execution or attachment being left by the officer with the clerk, treasurer, or cashier of the company.—Jellenik v. Huron Copper Mining Co., 177 U. S. 1, 44 L. ed. 647, 20 Sup. Ct. Rep. 559, reversing 82 Fed. 778.

§ 15. Chattel mortgage interests.

¶ 33. Prior to Laws 1861, Act. No. 214 (see How. St., § 7682), mortgaged goods and chattels were not subject to seizure and sale against the mortgagor except during the time he was entitled to retain possession by ex-

press agreement with the mortgagee, but they may now be taken.—Tannahill v. Tuttle, 3 Mich. 104; Eggleston v. Mundy, 4 Mich. 295; Bacon v. Kimmel, 14 Mich. 201; Haynes v. Leppig, 40 Mich. 602; King v. Hubbell, 42 Mich. 597.

¶ 34. In the case of a chattel mortgage the mortgagee's possession does not invalidate an attachment levy.—Barber v. Smith, 41 Mich. 138.

¶ 35. A mortgagee of chattels, like an attaching creditor, has only a lien thereon until sale, but under How. St., § 7682, a creditor can levy an attachment on mortgaged property at any time before foreclosure, but only to get control of the equity of redemption, which pertains to the whole and is not apportionable.—Wilson v. Montague, 57 Mich. 638.

§ 16. Real estate and leasehold interests.

¶ 36. The right to the possession of real estate for a term of years, if subject to execution at all, must be as a chattel interest and not as real estate.—Grover v. Fox, 36 Mich. 453.

§ 17. Mortgage lien or equity of redemption.

¶ 37. The interest of a mortgagee in lands is not subject to attachment.—Columbia Bank v. Jacobs, 10 Mich. 349.

§ 18. Equitable interests in land.

Trust estates, see post § 19.
Mortgagee's interest, see ante § 17.

¶ 38. The whole interest of the purchaser of land under an executory contract having been assigned in good faith and the assignee being in possession, such interest cannot be attached by a creditor for a debt assumed before the assignment even though the creditor may have been ignorant of the assignment.—Dumas v. Geer, 144 Mich. 377.

§ 19. Trust property and estates.

¶ 39. Trust estates in lands are not liable to attachment.—Trask v. Green, 9 Mich. 358; Maynard v. Hoskins, 9 Mich. 485; Gorham v. Wing, 10 Mich. 486.

¶ 40. The estate of a cestui que trust is not subject to attachment or execution.—Feldman v. Preston, 194 Mich. 352.

¶ 41. Trust property held by a trustee is not subject to direct attack and seizure by attachment for his personal liability or debts contracted as trustee.—Feldman v. Preston, 194 Mich. 352.

¶ 42. The equitable interest of a trustee in trust property, consisting of a lien thereon for earned compensation or advances made to the trust estate by him, is not subject to attachment in an action against him individually and as trustee.—Feldman v. Preston, 194 Mich. 352.

§ 20. Common and joint ownership; partnership property.

Averment in affidavit as to cause of action, see post § 24.

¶ 43. An attachment against partnership property is unauthorized unless grounds for issuing it exist against all the partners. And the separate property of one partner cannot be attached unless a cause for issuing the writ against him is shown by the affidavit.—Edwards v. Hughes, 20 Mich. 289.

¶ 44. A levy on a partner's interest, if it can be made at all, cannot be made on specific chattels.—Haynes v. Knowles, 36 Mich. 407.

¶ 45. In view of the history of How. St., § 8015, which consists of an amended earlier law, and provides that "when two or more persons are jointly indebted as joint obligors, partners, or otherwise, and an affidavit shall be made * * * so as to bring one or more of such joint debtors * * * amenable to attachment, then the writ of attachment shall issue against the property and effects of such as are so brought," an innocent copartner's individual property is not liable to attachment for a firm debt fraudulently contracted by the other member of the firm. To give that construction would be tantamount to holding that the amendment accomplished no change in the law and had no object.—Jaffray v. Jennings, 101 Mich. 515.

§ 21. Exemptions and property exempted.

Appraisal and selection, see post § 56.
Immateriality of question of exemptions in action for wrongful attachment, see post ¶ 399.
What property is exempt, see Exemptions.
Homesteads, and exemptions of homesteads, see Homesteads.
Applicability of exemption laws, see Jud. Act, Chap. XXVI, § 8; Comp. L. 1915. § 13035.

¶ 46. Attachment will not run for property exempt from execution, such as a horse, wagon and harness used in defendant's business and transferred by him to a third person, whether absolutely or by way of security.—Emerson v. Bacon, 58 Mich. 526.

IV. PROCEDURE TO OBTAIN WRIT.

A. AFFIDAVIT, APPLICATION AND ALLOWANCE.

§ 22. In general.

Necessity of strict conformity to statute, see ante §§ 1, 2.
Positiveness of affidavit, averments on information and belief, see post § 31.
Affidavits by agents, see post § 32.
Title and caption of affidavit, see post § 33.
Oath, jurat and signature of affidavit, see post § 34.
Filing and indorsements, see post § 35.
Amendments, see post § 36.
Application for second writ, see post § 37.
For attachment under Log Lien Act, see post § 30.
Mode of challenging truth of affidavit, see post § 109.
Waiver of objections by appearance and plea, see post § 107.
Affidavit as proper evidence in suit for wrongful attachment, see post § 144.
Affidavit of publication, see post § 89.
Under the Log Lien Act, necessity for statement with affidavit, see also Forestry, III.
Before justices, see Justices of the Peace, IV, C.
Statutory contents, see Jud. Act, Chap. XXVI, § 2; Comp. L. 1915, § 13029.
On attachment for trespass to lands, see Jud. Act, Chap. XXVI, §§ 44, 45; Comp. L. 1915, §§ 13071, 13072.

¶ 47. The affidavit is essential to the jurisdiction, and the statutory requirements therefor must be strictly complied with.—Wight v. Warner, 1 D. 384; Greenvault v. Farmers' & Mechanics' Bank of Michigan, 2 D. 498; Wilson v. Arnold, 5 Mich. 98; Goodrich v. Burdick, 26 Mich. 39; Wells v. Parker, 26 Mich. 102; Mathews v. Densmore, 43 Mich. 461, reversed 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126; Borland v. Kingsbury, 65 Mich. 59; Burnside v. Davis, 65 Mich. 74; Estlow v. Hanna, 75 Mich. 219.

¶ 48. There can be no valid writ of attachment without a sufficient affidavit.—Beebe v. Morrell, 76 Mich. 114.

¶ 49. The affidavit for attachment under the Log Lien Act is jurisdictional, and if it omits any material statutory allegation it will afford no protection to the officer executing the writ.—Woodruff v. Ives, 34 Mich. 320.

¶ 49a. 3 Comp. L. 1897, § 10468, relating to attachment suits against corporations, is general in its terms and operations and applies in all cases except those where a special and exclusive method of service and process is provided for.—Greacen v. Buckley & Douglas Lumber Co., 167 Mich. 569.

§ 23. Averring and describing cause of action.

As to joint liability, see post § 24.
As to amount due, see post § 25.
Description in notice as published, see post § 88.

¶ 50. The affidavit must state the character, whether express or implied, of the contract upon which plaintiff claims.—Wilson v. Arnold, 5 Mich. 98; People v. Blanchard, 61 Mich. 478.

¶ 51. The statute, How. St., § 7987, requires the affidavit in attachment to state that the indebtedness is due upon contract, express or implied, or upon judgment.—People v. Blanchard, 61 Mich. 478.

¶ 52. It is enough to state that the indebtedness is upon express contract without specifying more particularly the contract's nature.—Drew v. Dequindre, 2 D. 93.

¶ 53. An averment that there is a debt due to plaintiff from defendants upon express and implied contract is equivalent to averring that the debt is due upon express and upon implied contract, and is sufficient.—Buehler v. De Lemos, 84 Mich. 554; Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

¶ 54. It is not enough to state that defendant is "indebted" to plaintiff in an amount specified, without averring that such sum is "due."—Cross v. McMaken, 17 Mich. 511; Mathews v. Densmore, 43 Mich. 461, reversed 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126.

¶ 55. An affidavit which states that "there is justly due" to the plaintiff a specified sum, as near as the deponent can estimate the same, is not open to the objection that it contains no allegation that the indebtedness sworn to is due.—Nicolls v. Lawrence, 30 Mich. 395.

¶ 56. An affidavit for attachment under Comp. L. 1897, § 10556, must contain a statement "that the defendant is indebted to the plaintiff," etc.; hence an affidavit which does not contain this allegation, but says that defendant is "indebted to deponent," one of the plaintiffs, is jurisdictionally defective.—Butcher v. Cappon & Bertsch Leather Co., 148 Mich. 552.

§ 24. ——Joint or several liability.

Conjunctive averments, see also post § 28, ¶ 80.
Debt not yet due from partners, see post ¶ 83.
Amendment to show individual names, see post § 36.

¶ 57. An affidavit imports a joint indebtedness if it avers that "A. and B., the defendants named in the annexed writ of attachment, are justly indebted to" the plaintiff therein.—Geiges v. Greiner, 68 Mich. 153.

¶ 58. An affidavit that certain named persons, "a co-partnership under the firm name of the Lake Huron & Southwestern Railway Company, are indebted" to affiant, etc., imports a joint partnership debt, and will support an attachment against such of them as are nonresidents.—Miller v. Bay Circuit Court, 41 Mich. 326.

¶ 59. Joint indebtedness is imported by allegation that two defendants named "are jointly indebted" to plaintiff.—Geiges v. Greiner, 68 Mich. 153; Sword v. Lenawee Circuit Judge, 71 Mich. 284.

¶ 60. An affidavit that A. and B. are justly indebted to plaintiff in a sum named, and that said sum is now due from A. upon express contract, imports a joint indebtedness, and, therefore, sufficiently alleges that there is a debt due from B. upon express contract.—Sword v. Lenawee Circuit Judge, 71 Mich. 284.

§ 25. ——Amount due or owing.

Averment as to absence of setoffs, see post § 26.
Averments of reasons for attachment for debt not yet due, see post § 20.
Judgment for greater amount, see post § 134.

¶ 61. The amount claimed to be due must be stated.—Hale v. Chandler, 3 Mich. 531.

¶ 62. An averment that the indebtedness is $3,000 "as near as can be specified by this deponent" sufficiently states the amount.—Barker v. Thorn, 20 Mich. 264.

¶ 63. An affidavit that states positively the fact of the indebtedness and the amount "as near as deponent can estimate the same" is sufficient though made by plaintiff's agent; the affiant must be understood as speaking of his own knowledge as to the fact of indebtedness, and the qualifying clause must be understood as limiting only the statement of its exact amount, which the statute permits to be thus stated.—Nicolls v. Lawrence, 30 Mich. 395.

§ 26. Averment as to setoffs.

¶ 64. The affidavit is void if it fails to state that the debt is due "over and above all legal setoffs."—Wells v. Parker, 26 Mich. 102.

¶ 65. If the affidavit states positively the amount due over and above all legal setoffs, it is not objectionable for omitting the qualifying words "as near as may be."—Grover v. Buck, 34 Mich. 519.

§ 27. Averments as to grounds and reasons.

Sufficiency of reasons and proof, see ante §§ 8-10.
Stating diverse grounds in disjunctive, see post § 28.
Positiveness of affidavit, information and belief, see post § 31.
Dissolution on traverse of averments in affidavit, see post § 113.
Allegations of denial or traverse in petition to dissolve, see post §§ 117, 118.
Burden of proof and evidence on motion to dissolve, see post §§ 122-124.
When debt is not yet due, see Jud. Act, Chap. XXVI, § 35; Comp. L. 1915, § 13062.
For attachment after action begun, see Jud. Act, Chap. XXVI, § 37; Comp. L. 1915, § 13064.

¶ 66. The reason for the issue of the writ must be shown by facts and circumstances so detailed as to enable the circuit judge to satisfy himself therefrom that the writ ought to issue.—Howell v. Muskegon Circuit Judge, 88 Mich. 361.

¶ 67. The affidavit in attachment need not state either that one of the parties resides in the county of issue, or that defendant has no property in the county where he resides, or is a nonresident of the state; the averments prescribed by How. St., § 7987, are sufficient.—Stringer v. Dean, 61 Mich. 196.

¶ 68. It is not enough that the affidavit should aver that defendant has absconded from the state; it must set forth that he has done so to the injury of his creditors.—Hewitt v. Terry, 56 Mich. 591.

¶ 69. An attachment affidavit is void if it omits "not" from the statutory averment that defendant is a nonresident, and has "not" resided in this state for one month next preceding the date of the affidavit.—Freer v. White, 91 Mich. 74.

¶ 70. An affidavit stating that the two defendants "are not residents of the state of Michigan, and have not resided therein for three months immediately preceding the time of making this affidavit, and that [they] reside in the state of New York," sufficiently shows that neither of the defendants has resided in Michigan within three months.—Dorr v. Clark, 7 Mich. 310.

¶ 70a. Under Comp. L. 1897, § 10468, an affidavit for attachment is sufficient which merely states that the defendant debtor corporation has its principal office outside the county of plaintiff's residence, and it is not necessary to set up that defendant has property located in plaintiff's county.—Greacen v. Buckley & Douglas Lumber Co., 167 Mich. 569.

¶ 71. An affidavit for attachment showing the indebtedness of a defendant, facts entitling the deponent to relief if the debt had been due, fraud because of the removal of his goods and disposal to various other parties, and a necessity for the writ before the debt comes due, entitles the deponent to a writ of attachment under How. St., § 8016a, as to the requirements for issuing writs of attachment.—E. H. Chase & Co. v. Wayne Circuit Judge, 118 Mich. 358.

¶ 72. A statement that affiant knows that defendant has assigned, disposed of or concealed his property with intent to defraud his creditors is not sufficient; the facts attending such disposition or concealment of the property, and the value relative to that of the rest of the debtor's property, must be set forth.—Howell v. Muskegon Circuit Judge, 88 Mich. 361.

¶ 73. The fact that other creditors have levied upon a part of the debtor's property, or that he has not enough property to pay his debts, will not warrant an attachment; and the allegation that plaintiff will lose his debt if the writ is not issued before the debt becomes due is a mere conclusion of fact—Howell v. Muskegon Circuit Judge, 88 Mich. 361.

¶ 74. Where, in an action begun by attachment against a nonresident, the gist of the action is the alleged negligent failure of defendant, a physician, to remove plaintiff's left eye, which had been injured, and which defendant was treating, before the right eye had become so far diseased as to render its removal also necessary, an affidavit which, after stating how and when the injury was received, the employment of defendant, and frequent suggestions to him by plaintiff, in view of the inflammation in both eyes and the increasing impairment of the vision of the right eye, of the advisability of the removal of the injured eye, avers that on or about a certain date the plaintiff, after consultation with other physicians and surgeons, became of the opinion that it was necessary to remove the left eye, in order to save the right eye, is insufficient, as, conceding that plaintiff was possessed of sufficient skill to express an opinion upon the subject, the affidavit shows that he did not do so, but relied upon the unsworn statements of other physicians, the precise nature of which does not appear.—McCrea v. Muskegon Circuit Judge, 100 Mich. 375.

§ 28. ——Stating grounds in alternative or conjunctive.

Allegations in petition to dissolve, see post §§ 117, 118.

¶ 75. The affidavit may allege that defendant "has assigned, disposed of and concealed," and also that he "is about to assign, dispose of and conceal, his property with intent to defraud his creditors." Several good reasons may co-exist for suing out the writ, and one does not destroy the other where all are consistent.—Detroit Free Press Co. v. Drs. K. & K. U. S. Medical & Surgical Ass'n, 64 Mich. 605.

¶ 76. An affidavit stating that defendant has assigned, etc., or is about to assign his property is fatally defective for being in the alternative.—Kegel v. Schrenkheisen, 87 Mich. 174.

¶ 77. An affidavit, in attachment proceedings, which is in the alternative is void.—Dutcher v. Grand Rapids Fire Ins. Co., 131 Mich. 671.

¶ 78. The use of the disjunctive "or," in an averment that defendant "fraudulently contracted the debt or incurred the obligation respecting which the suit is brought," will not invalidate the affidavit.—Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

¶ 79. The use of the disjunctive "or," in an averment in an affidavit in attachment that defendant "is about to assign, dispose of, or conceal her property, with intent to defraud her creditors," will not invalidate the affidavit, as it states but one ground for the writ.—Jones v. Peek, 101 Mich. 389.

¶ 80. An affidavit in attachment sufficiently charges both defendants with a wrong where it recites that "this deponent has good reason to believe and does believe that the said C. and H. have assigned, disposed of and concealed their property with intent to defraud their creditors."—Van Benschoten v. Fales, 126 Mich. 176.

§ 29. ——On debts not yet matured or due.

Presentment of affidavit to judge, see post ¶ 109.

¶ 81. An affidavit under Laws of 1889, Act No. 149, § 32 (How. St., § 8016a), for attachment before the debt is due, must show reasons for immediate issue of the writ, and such showing must consist of facts within affiant's knowledge, and not of mere conclusion of fact.—Howell v. Muskegon Circuit Judge, 88 Mich. 361.

¶ 82. Under the statute (Laws 1889, Act No. 149) authorizing attachment before the debt is due, an affidavit that defendants who are copartners have recently executed a chattel mortgage covering all the firm property, and that the mortgagee's assignee has taken possession and is rapidly selling, and that one of the partners has executed a bill of

sale of all his personal property, and the firm is wholly insolvent, is not sufficient to support an attachment, it not being claimed that the chattel mortgage and bill of sale were not given to secure bona fide debts, and the facts alleged being consistent with an honest purpose on defendant's part to secure their just claims.—Pierce v. Johnson, 93 Mich. 125.

§ 83. An affidavit for attachment under Pub. Acts 1889, No. 149, showed that the debt was evidenced by copartnership notes indorsed by the payee, that the notes were made and negotiated upon a joint venture, and that the indorser himself negotiated them fraudulently. Held, that the affidavit was sufficient to authorize an attachment against the indorser as well as the makers, even though presentation and notice of nonpayment might be necessary to hold the indorser before judgment taken—a point not decided.—Mosher v. Bay Circuit Judge, 108 Mich. 508.

§ 30. Averments under Log Lien Act.

Date of affidavit with respect to issuance of writ, see post § 34.

Statement of lien and other papers under the act, see Forestry, III.

Affidavit in circuit court under Log Lien Act, see Comp. L. 1915, § 14850.

§ 84. Where an affidavit for writ of attachment under Laws 1873, Act No. 185, alleges that plaintiffs performed labor upon the logs sought to be attached, but fails to specify the kind of labor or services performed, or to show that it was labor or services of the specific character prescribed by the statute, it is fatally defective. The defect cannot be waived by appearing and pleading to the merits.—Woodruff v. Ives, 34 Mich. 320.

§ 85. A judgment enforcing a lien upon logs for labor done thereon (How. St. §§ 8412-8427) was affirmed by the equal division of the Supreme Court, which did not agree that the affidavit filed by the claimants was sufficient to sustain the judgment, if not objected to before. The objections considered fatal were that it did not allege that the parties represented by plaintiff had united their claims, or that they had designated plaintiff as their agent or attorney to enforce the lien, or that the respective sums claimed were less than $300 each, or as to who was the owner of the logs.—Babcock v. Cook, 55 Mich. 1.

§ 86. An affidavit under How. St. § 8413, showed that the logs were separate lots belonging to different owners, and that some of the labor mentioned was not such as entitled plaintiff to a lien, and it did not show that the labor not supporting a lien was not the only labor performed upon the logs of the objecting defendant. Held, that the affidavit was sufficient.—Pack, Woods & Co. v. Iosco Circuit Judge, 70 Mich. 135.

§ 87. Under How. St., § 8419, the affidavit need not show how much work was done on each lot of logs, where the work was done for a contractor on four lots, all of which were attached.—Pack, Woods & Co. v. Iosco Circuit Judge, 70 Mich. 135.

§ 88. Under How. St., § 8419, an affidavit which states that "the said plaintiff, and each of said claimants, have filed a claim for the amount due each," sufficiently avers the filing of a statement of the lien.—Pack, Woods & Co. v. Iosco Circuit Judge, 70 Mich. 135.

§ 89. Where it appeared from the statement filed and from the evidence that the labor was performed within thirty days before filing the statement of lien, the affidavit for attachment was held sufficient though it did not state the date of the last day of labor.—Wiggins v. Houghton, 89 Mich. 468.

§ 90. The affidavit for an attachment issued under the Log Lien Law (Laws 1887, Act No. 229) need not state who owns the logs upon which such lien is claimed.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104; Wiggins v. Houghton, 89 Mich. 468.

§ 91. The affidavit for attachment under the Log Lien Law (Laws 1881, Act No. 145) need not state that the defendant employer was the owner of the logs, or that the work was done for the owner or for whom, or who is the owner. If it states everything that the statute requires in prescribing its form, it suffices.—Reilly v. Stephenson, 62 Mich. 500.

§ 92. An affidavit under How. St., § 8419, need not describe the logs as the property mentioned in the annexed writ, where the writ and affidavit described the logs by certain marks and as being in a certain drive.—Pack, Woods & Co. v. Iosco Circuit Judge, 70 Mich. 135.

§ 31. Knowledge or grounds of affiant's belief. Positiveness as to amount due, see ante § 25.

§ 93. The affidavit must state positively, and not on information and belief only, that the defendant is indebted to the plaintiff, and the amount of such indebtedness as near as may be, over and above all legal setoffs.—Wilson v. Arnold, 5 Mich. 98.

§ 94. An affidavit which states that deponent "has this deponent has good reason to believe, has disposed of his property," etc.,

is sufficiently positive in its allegation that affiant has good reason to believe the fact stated.—Nicolls v. Lawrence, 30 Mich. 395.

¶ 95. The affidavit is bad if it states only that the affiant believes that the debtor is about to remove his property, and does not state that he has any reason to believe it. —Hunt v. Strew, 39 Mich. 368.

¶ 96. Laws 1893, Act No. 89, amending How. St., §§ 8025a-8025d, providing for the commencement of actions of tort against non-residents by attachment, should be strictly construed, and the facts required to be stated in the affidavit for the writ must be set out upon the knowledge of the affiant, and with reasonable certainty.—McCrea v. Muskegon Circuit Judge, 100 Mich. 375.

¶ 97. The statute (Pub. Acts 1889, No. 149) authorizes the issue of the writ upon an affidavit complying with the requirements of the previous general statute, except that, instead of stating the indebtedness to be due, it shall set up facts sufficient to satisfy the circuit judge of the propriety of allowing the writ to issue before the debt is due. Held, that, as under the general statute, the writ may issue where the requisite facts, except the fact of indebtedness, are stated on information and belief.—Mosher v. Bay Circuit Judge, 108 Mich. 508.

§ 32. Affidavit by agent or attorney.

¶ 98. If the affidavit for attachment states that the affiant "is the agent of" the plaintiff, it is a sufficient averment of agency.—Adams v. Kellogg, 63 Mich. 105.

¶ 99. If the affidavit is not made by the plaintiff it must appear on its face to have been made by some one in his behalf.—Borland v. Kingsbury, 65 Mich. 59.

¶ 100. Where an affidavit for an attachment in the circuit court is made by one who states that he is "the attorney for the plaintiff named in the annexed writ," etc., it sufficiently appears by legal inference that he made it in plaintiff's behalf, and the writ (to which, in the circuit court, the affidavit must be attached) identifies the plaintiff.—Stringer v. Dean, 61 Mich. 196.

§ 33. Title and caption of affidavit.

¶ 101. An unentitled affidavit is not void when fully identified by being annexed to the writ which gives full title of the cause.—Beebe v. Morrell, 76 Mich. 114.

§ 34. Oath, jurat, signature and date.

To petition to dissolve, see post § 119.

¶ 102. Where the affidavit was sworn to before a person not authorized to administer oaths, it was held that the whole proceedings were void for want of jurisdiction, and that a purchase of land under them by one who was a party to the proceeding could not be sustained.—Greenvault v. Farmers' & Mechanics' Bank of Michigan, 2 D. 498.

¶ 103. An affidavit sworn to before a deputy county clerk is good, though it does not appear that the clerk was absent at the time (Comp. L. 1857, § 4041, How. St., § 573). —Dorr v. Clark, 7 Mich. 310.

¶ 104. Affidavit is good though the name of the county for which notary was appointed is not appended to his signature to jurat, where the caption of affidavit names county. —Smith v. Runnells, 94 Mich. 617.

¶ 105. Previous to the amendment of March 16, 1861 (How. St., § 7987), it was held that the affidavit must be made on the same day of the issuing of the writ.—Drew v. Dequindre, 2 D. 93; Buckley v. Lowry, 2 Mich. 418; Wilson v. Arnold, 5 Mich. 98; Fessenden v. Hill, 6 Mich. 242.

¶ 106. It makes no difference in respect to the date that the party or his agent making the affidavit resided at a distance from the office of the clerk issuing the writ, and that the affidavit was transmitted to the clerk as soon as practicable by the usual course of mail.—Wilson v. Arnold, 5 Mich. 98.

¶ 107. An affidavit for attachment in a log lien case is void if sworn to before the day when the writ issues; How. St., § 7987. allowing a day's interval, does not apply to these proceedings.—McPherson v. McGillis, 93 Mich. 525; Northern Mich. Lumber Co. v. Lyon, 95 Mich. 584.

§ 35. Filings and indorsements.

Date with reference to issuance of writ, see ante § 34.
Time for issuance of writ after filing, see post § 42.
Indorsements on the writ, and attachment of the affidavit, see post § 43.
Filing of the writ and return, see post § 69.

¶ 108. The failure of the clerk to indorse upon an affidavit for attachment the time it was received, or his neglect to keep it on file, or his attaching it to the writ of attachment, will not affect the validity of the writ.—Beebe v. Morrell, 76 Mich. 114.

¶ 109. Before the clerk can issue an attachment under Laws of 1889, Act No. 149, § 32 (How. St., § 8016a), the statutory affidavit indorsed with the order of allowance by the circuit judge must be presented to

him; indorsement of order upon the writ will not suffice.—Howell v. Muskegon Circuit Judge, 88 Mich. 369.

§ 36. Amendments of affidavits.
See also post ¶ 258.
Of the bond, see post § 40.
Of the writ, see post § 47.
Curative amendments, see post §§ 103, 104.

¶ 110. An affidavit for attachment that is jurisdictionally defective is not subject to amendment.—Butcher v. Cappon & Bertsch Leather Co., 148 Mich. 552.

¶ 111. After an attachment case had been started, where the affidavit gave the firm name of the plaintiffs "Evans & Walker, of Detroit, Michigan," and averred that their Christian names were unknown to affiant, the goods were replevied on account of this defect in the affidavit, but the court held it could be amended.—Barber v. Smith, 41 Mich. 138.

¶ 112. No statute now in force permits amendments to affidavits for attachment; such amendments are not admissible under the general statute of amendments, How. St., § 7631.—Freer v. White, 91 Mich. 74.

¶ 113. An affidavit in attachment in favor of a copartnership doing business under the firm name of the Spearman Iron Company did not state the names of the partners, but did show that the Spearman Iron Company was located at a certain place, that the affiant was its agent, and that it was the concern with which the defendant had the dealings which were the basis of the suit. Held, that the real plaintiff was sufficiently denoted by the affidavit, and that an amendment showing plaintiffs' names was therefore permissible.—Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

§ 37. Application for alias or pluries writ.

¶ 114. Syllabus 2 of Van Benschoten v. Fales, 126 Mich. 176, states: "No new affidavit is required to support an alias or pluries writ of attachment, where the property has been seized under the original writ and the further writ is desired merely to subserve the purposes of a summons." (Counsel's contention was that the original affidavit was faulty and no new one was made to take its place. The point in the syllabus seems to be a correct implication from the decision.—Editor.)

B. BOND OR SECURITY.

§ 38. In general.
Bond by defendant to release from levy, see post VI, D.
Waiver of defects by appearance and plea, see post § 107.
Nature of liability on bond, and satisfaction or discharge of bond and sureties thereon, see post XIV.
General law of bonds, see Bonds.
Provisions as to tort actions, see Jud. Act, Chap. XXVI, § 22; Comp. L. 1915. § 13049.

§ 39. By agent of plaintiff.

¶ 115. The bond required to be executed by a nonresident plaintiff, his agent or attorney, by Sess. L. 1842, p. 118, § 3, might when executed by such agent or attorney, be, in form, his personal obligation and be executed by him in his own name describing himself as such agent, and not in the name or on behalf of his principal.—Walbridge v. Spalding, 1 D. 451.

¶ 116. Where the bond is not in the name of the plaintiff in the attachment, but is the personal obligation of his agent, no power under seal need be shown authorizing its execution by the agent.—Walbridge v. Spalding, 1 D. 451.

§ 40. Amendment of bond, and new bonds.
Curative effect of bond where inventory was defective, see post ¶ 261.

¶ 117. If the bond is defective, How. St., § 7771, permits a new one to be filed, and jurisdiction is not lost.—Kidd v. Dougherty, 59 Mich. 240; Adams v. Kellogg, 63 Mich. 105.

V. THE WRIT, ISSUANCE AND DELIVERY, AND RECALL.

§ 41. In general.
Execution of the writ and levy under it, see post VI, VII.
Return to the writ, see post VI, E.
By justices, see Justices of the Peace, IV, C.
General requisities of process, see Process.
Writs of execution, see Executions.
Writ as justification of sheriff acting under it, see Sheriffs, IV, A.
Form under Log Lien Law, see Comp. L. 1915, § 14849.
On attachment after action begun, see Jud. Act, Chap. XXVI, § 38; Comp. L. 1915, § 13065.
When against joint parties, see Jud. Act, chap. XXVI, § 33; Comp. L. 1915. § 13060.

§ 42. Issuance of writ.
Time of affidavit with respect to issuance, see ante § 34.
Presentment of affidavit to judge, see also ante ¶ 109.
Application for alias or second writ, see ante § 37.

Indorsement as showing issuance before affidavit filed, see post ¶ 250.
Presumptions as to regularity, see post § 102.

¶ 118. The statute relating to attachments (How. St., § 8020) requires the clerk of court, on filing the affidavit, to issue the writ which writ shall recite the commencement of the action.—Beebe v. Morrell, 76 Mich. 114.

¶ 119. The day allowed by How. St., § 7987, subd. 6, to intervene between the date of the jurat to an affidavit for attachment and the issue of the writ does not begin to run until after the expiration of the day upon which the affidavit is executed, and the writ may issue after the intervening day has expired.—Horton v. Monroe, 98 Mich. 195.

§ 43. Indorsements and attaching affidavit.

Conclusiveness of indorsement as to time of filing, see post ¶ 250.
Attachment to writ, see Jud. Act, Chap. XXVI, § 2; Comp. L. 1915, § 13029.
Indorsement of security for costs, when against corporation, see Jud. Act, Chap. XXVI, § 4; Comp. L. 1915, § 13031.

¶ 120. There was a sufficient compliance with the law requiring the attorney for the plaintiff in attachment proceedings to subscribe or indorse the writ by writing his name and address thereon to support judgment, where, in such proceedings, it appears that the affidavit and writ of attachment and return were all inclosed in the cover bearing the signature of plaintiff's counsel, and the copies served were inclosed in a similar cover, although the writ itself was not signed by such counsel; since there is no presumption that the cover was not attached to, and therefore a part of the original writ when filed, and the return shows "service of copy."—Van Slyck v. Arseneau, 140 Mich. 154.

¶ 121. The provision of section 10556, Comp. L. 1897, requiring the affidavit in an attachment suit to be annexed to the writ is mandatory.—Yale State Bank v. Fletcher, 173 Mich. 585.

§ 44. Directions, description and command in writ.

Of writ to attach logs for lien, see post § 46.
Amendment of descriptions, see post ¶ 128.
Effect of misnomer, see post § 111.
Effect of imperfect name where writ is still amendable, see post ¶ 253.
Description in inventory, see post § 55.
Direction and command of writ, see Jud. Act, Chap. XXVI, § 6; Comp. L. 1915, § 13033.

¶ 122. Under 2 How. St., § 7991, and C. C. Rule 1e, which followed the amendatory act of 1895—providing that in case any property of a defendant in attachment is found and seized in the county (in which the writ issues), but not sufficient to satisfy the demand and costs, then the officer shall seize other property of the defendant wherever found in the state, and shall serve a copy of the attachment and inventory upon defendant if found in either of such counties, but if not found in either county where property has been seized, service on him may be had in any county within the state wherein the defendant may be—a writ which commanded service if the defendant "can be found in either county where property has been seized under the writ," was in substantial compliance with said amendatory act and not open to the objection that it did not command the sheriff to whom the writ was issued, to serve the defendant if he could be found within the county of issue.—Skeels v. Oceana Circuit Judge, 119 Mich. 290.

§ 45. ——Return day.

Time for return to writ, see post § 69.
Time to appear and plead, see post § 79.

¶ 123. A writ tested February 7, 1867, and made returnable April 2, without naming the year, must be understood as referring to April of the then current year.—Nash v. Mallory, 17 Mich. 232; and see Vinton v. Mead, 17 Mich. 388.

§ 46. ——Writ to attach logs for lien.

Interpretation of return to writ, see post § 71.

¶ 124. A writ of attachment under Laws 1881, Act No. 145, to enforce a lien on logs for labor, is not void because it authorizes service to be made on the owner at any time on the return day, and therefore may authorize service after judgment has passed; since in such a case the judgment would not be binding for want of reasonable notice.—Reilly v. Stephenson, 62 Mich. 509.

¶ 125. Where a statement of lien, affidavit for attachment, and declaration all describe the property as "about 400,000 feet of pine saw-logs (marks, if any, unknown) now lying upon" certain lands, and the officer returns that he seized about 100,000 feet of the logs mentioned and described in the writ, and some of the logs had been cut and skidded when plaintiff began work, but all belonged to the same owner, as no rights of third persons intervened, a judgment for lien upon all the logs was proper.—Huntoon v. O'Brien, 79 Mich. 227.

¶ 126. Description of property in a writ of attachment to enforce a lien upon logs need not be more precise than is required in replevin; and a description as "about 200,000 feet of pine and hemlock timber, and

also about 300 cords of slabs," is sufficient.—Dillon v. Howe, 98 Mich. 168.

§ 47. Amendment of writ.

Of the bond for the writ, see ante § 40.
Curative amendments in general, see post §§ 103, 104.

¶ 127. The general statute of amendments applies to attachment proceedings.—Drew v. Dequindre, 2 D. 93; Barber v. Smith, 41 Mich. 138.

¶ 128. Attachment proceedings in favor of persons whose surnames only are given in the writ, but who are otherwise identified, are not void, but may be amended, and the full names may be inserted by leave of the court.—Barber v. Smith, 41 Mich. 138.

VI. THE LEVY AND ITS INCIDENTS, AND RETURN OF WRIT.

A. IN GENERAL; HOW, WHEN AND WHERE MADE.

Fees of sheriff, see Sheriffs, III.

§ 48. Mode and sufficiency of levy.

Time for execution and sale, see post § 138.
Presumptions as to levy on defendant's property, see post § 102, ¶ 257.
Effect to create lien, and extent of lien, and priorities, see post VIII.
Return to the writ, see post VI, E.
For personal service, see post §§ 80-84.
See also Executions, VI.
Completion of levy where sheriff goes out of office, see Sheriffs, III.
Right of sheriff to indemnification before executing writ, see Sheriffs, IV, A.
Applicability of provisions of executions and exemption laws, see Jud. Act, Chap. XXVI, § 7; Comp. L. 1915, § 13034.
How made on shares of stock, see Jud. Act, Chap. XXVI, § 10; Comp. L. 1915, § 13037.
Mode as to real estate, see Jud. Act, Chap. XXVI, §§ 10-14; Comp. L. 1915, §§ 13037-13041.
How to be executed, see Jud. Act, Chap. XXVI, § 8; Comp. L. 1915, § 13035.
Under Log Lien Act, see Comp. L. 1915, § 14848.

¶ 129. In case of an attachment of a growing crop constructive possession on the officer's part is all that is necessary.—Grover v. Buck, 34 Mich. 519.

¶ 130. A sheriff making an attachment upon machinery bolted to the freehold need not in order to make good or retain his levy detach and remove the property from the place he found it, and such is under his custody and control where he has placed a deputy in charge of it.—Patch v. Wessels, 46 Mich. 249.

§ 49. Place for levy.

For personal service, see post § 80.

¶ 131. How. St., § 6831, subd. 2, as to the issuance of attachments, permits attachment of property in counties other than that in which the defendant resides, where removal of the property is about to be made with fraudulent intent, and treats neglect or refusal to pay as equivalent to evidence of fraudulent intent, where the debtor is about to remove his property.—Stock v. Reynolds, 121 Mich. 356.

§ 50. ——Property in transit.

¶ 132. Property in transit, such as a car of wheat shipped to a purchaser by a defendant, is in the county and is subject to attachment while passing through the county, and being held at a station awaiting a freight train, within How. St., § 6831, subd. 2, which provides for the issuance of an attachment against a defendant upon affidavit "that he is about to remove any of his property from the county in which such application is made, or from the county where the defendant resides," with fraudulent intent, "or that he has removed or is about to remove himself or his property from the county, and refuses or neglects to pay or secure the payment of the debt.—Stock v. Reynolds, 121 Mich. 356.

¶ 133. Under Comp. L. 1897, § 10761, governing levy and attachment of forest products, including lumber and shingles, and providing that "in case such products are in transit or are in possession of any booming company or other person or corporation for the purpose of being driven or sorted and delivered to the owners, or to satisfy statutory liens, then levy and attachment of such products may be made by serving a copy of said attachment upon the person or corporation driving or holding the same who shall from the time of such service be deemed to hold the same, both on their own behalf and on the behalf of such sheriff or other officer, to the extent of such attachment lien until the same can be driven and sorted out; and when driven and sorted out, said sheriff or other officer may receive such products," a carload of shingles may be attached by service of notice upon a station agent of a railroad company in whose possession it is for transit to a point within the state, such case being within the clause "in case such products are in transit."—Lake v. Pere Marquette R. Co., 132 Mich. 190.

§ 51. Amount of levy.

Effect on the proceedings of excessive levy, see post ¶ 249.
Liability of sheriff for excessive levy, see Sheriffs, IV.

¶ 134. An attachment cannot be levied for any greater sum than that actually due when the writ issued.—Hinchman v. Town, 10 Mich 508.

§ 52. Indorsement of levy on writ.

¶ 135. The fact that no levy is indorsed upon an attachment is immaterial where the sheriff's return upon the writ recites a levy and is accompanied by the appraisal.—Grover v. Buck, 34 Mich. 519.

§ 53. Notice of levy on real estate.

Necessity to attach lien, see post § 92.
Filing the notice with the register, see post § 93.
Superiority of resumed homestead over prior levy with subsequent notice of attachment, see Homesteads, IV.

¶ 136. Notice of the levy of an attachment on land must be definite and certain to be good as against persons holding in good faith under conveyances subsequent to the institution of suit.—Davis Sewing Mach. Co. v. Whitney, 61 Mich. 518.

¶ 137. A sheriff's notice of attachment was held ineffectual where by mistake it failed to describe the land attached.—Barnard v. Campau, 29 Mich. 162.

B. INVENTORY, APPRAISAL AND SETTING OUT EXEMPTIONS.

§ 54. In general; necessity for.

Sufficiency of return to show inventory, appraisal and service of copies, see post § 70.
Necessity and sufficiency of service of copies, see post §§ 82-84.
Statutory provisions, see Jud. Act, Chap. XXVI, § 8; Comp. L. 1915, § 13035.

¶ 138. It is the duty of an officer levying on attachment on the stock in trade of a judgment debtor to have an inventory and appraisal made out, and permit the debtor to select the amount exempt from execution; and, on the debtor failing to do so, to make the selection for him. And if the officer neglect this duty he is liable to the debtor for the value of the property exempt.—Wyckoff v. Wyllis, 8 Mich. 48.

¶ 139. In attachment of logs in transit no inventory is required in view of the provisions of How. St., § 8427f (Log Lien Law, § 6), expressly providing that levy and attachment shall be made by serving a copy of the attachment on the person or corporation driving or holding the logs, and further that such person or corporation shall be deemed to hold them for himself and the sheriff until the logs can be driven and sorted out.—McGuire v. Saginaw Circuit Judge, 101 Mich. 275.

¶ 140. Under attachment for the enforcement of a log lien under Comp. L. 1897, §§ 10756-10770, no appraisal is necessary.—Ruggles v. Muskegon Circuit Judge, 124 Mich. 472.

¶ 141. When logs are attached under Laws of 1887, Act No. 229 (How. St., §§ 8427a-8427p), the property need not be appraised; nor need service be made upon a log owner who is not a defendant, either of an inventory or of a certified copy of the writ.—Federspiel v. Johnstone, 87 Mich. 303, separate appeal in same case, 87 Mich. 309.

§ 55. Sufficiency of inventory.

Sufficiency of certification of copy served, see post § 84.

¶ 142. An inventory in attachment proceedings is not sufficient where it merely describes the property attached as "One carload household furniture."—Knack v. Berlin, 150 Mich. 550.

¶ 143. An inventory of land taken on writ of attachment is sufficient, although the state and county are omitted, where they are named in the attached certificate of the officer making the levy.—John D. Gruber Co. v. Montcalm Circuit Judge, 183 Mich. 477.

§ 56. Appraisal and selection of exemptions.

See also ante ¶ 138.
Statutory provisions as to appraisal, see Jud. Act. Chap. XXVI, § 9; Comp. L. 1915, § 13036.

¶ 144. An officer levying an attachment on property of which a certain amount is exempt from execution must, under Comp. L. 1871, §§ 6102-6103 (How. St., §§ 7687-7688), appraise it and give the defendant an opportunity to select that which he is entitled to retain, whether a writ is issued by a justice or from the circuit court.—Michels v. Stork, 44 Mich. 2.

¶ 145. Where the appraisals of attached property are referred to in and form a part of the return, they must be considered in connection therewith.—Horton v. Monroe, 98 Mich. 195.

¶ 146. In attaching a defendant's part interest in land, an appraisal of the whole tract, irrespective of the extent of his interest, held sufficient.—Drew v. Dequindre, 2 D. 93.

§ 57. ——Who may act as appraisers.

¶ 147. Defendant in attachment cannot object in a collateral proceeding that the appraisers were members of his own family, and consequently not disinterested, and were not freeholders, not sworn, where, though

personally served and not shown to have been ignorant of the facts, he made no such objection in the attachment suit, the return averring that the appraisers were disinterested freeholders and duly sworn; the statutory requirement of disinterested freeholders as appraisers is for his protection, and it cannot be presumed that members of his family have an interest adverse to his.—Grover v. Buck, 34 Mich. 519.

¶ 148. In an attachment suit one of the appraisers of the property attached was the county clerk who issued the writ. The return of the sheriff and the oath taken by the appraisers showed them to be disinterested parties as required by statute. Held, that the duties of county clerk and those of appraiser are not incompatible, and that there is no reason why the county clerk, if otherwise qualified, cannot act in capacity of appraiser the same as any other disinterested resident freeholder.—De Carle v. Marks, 171 Mich. 167.

C. CUSTODY AND CARE OF PROPERTY.

§ 58. In general.

Right to release, and bond for, release, see post VI, D.
Lien and priorities under the levy, see post VIII.
Title and conflicting claims, see post XI.
Right and title of sheriff in goods levied on, see also generally Sheriffs, IV, G.
How and by whom to be kept, see Jud. Act, Chap. XXVI, § 15; Comp. L. 1915, § 13042.

¶ 149. Attached property is under the control of the officer attaching it, and not of the plaintiff in attachment, and the latter is not responsible for its detention after dissolution of the writ; it is for the defendant to see to the enforcement of the order restoring the property.—Blanchard v. Brown, 42 Mich. 46.

¶ 150. An attaching officer who sells part of the attached goods and allows the rest to be removed beyond the court's jurisdiction, becomes a trespasser ab initio, and is liable in trover for conversion.—Terry v. Metevier, 104 Mich. 50.

§ 59. Of goods in transit.

¶ 151. Under Comp. L. 1897, § 10761, governing attachment of forest products while in transit or while in the hands of a booming company or other person or corporation, for the purpose of being driven or sorted and delivered to the owner, and providing for delay of possession in the latter case, a carload of shingles attached while in possession of a railroad company for transportation, should be delivered at once to the sheriff or other attaching officer.—Lake v. Pere Marquette R. Co., 132 Mich. 190.

§ 60. Under attachment of chattel mortgage interest.

¶ 152. Where mortgaged chattels are attached in a suit against the mortgagor, the rights of the attachment creditor and of the mortgagee must be protected as far as possible without interfering with each other. The officer need only take temporary possession for the purpose of making an inventory and appraisement, which perfects his lien, and his right to take such possession cannot be defeated by any stipulation in the mortgage that the mortgagee may take possession when he deems himself insecure. But the mortgagee has the first lien, and, having a right to foreclose at a definite time, is entitled to possession, which the officer should then surrender to him on demand unless he believes the mortgage to be fraudulent or satisfied, in which case he may refuse to recognize it. If he surrenders it the mortgagee must also respect the subsequent lien, and the mortgagor's release to him would be ineffectual.—King v. Hubbell, 42 Mich. 597.

¶ 153. In case of a levy on the equity of redemption under a chattel mortgage, under How. St., § 7682, the levying officer may hold possession long enough to perfect his levy.—Wilson v. Montague, 57 Mich. 638.

¶ 154. An officer who has attached mortgaged goods is not necessarily entitled as against prior mortgagees to hold undisturbed until completion of his inventory.—Rosenfield v. Case, 87 Mich. 295.

¶ 155. By levying on mortgaged goods under an attachment subject to the mortgages, the officer recognizes the validity of the mortgages, and cannot as against the mortgagee hold possession on the ground that the mortgages are being fraudulently used to defeat other creditors.—Rosenfield v. Case, 87 Mich. 295.

§ 61. Duration of custody and right.

On levy under chattel mortgage, see ante § 60.

¶ 156. When an attachment suit is discontinued the right to detain the goods ceases.—Orr v. Keyes, 37 Mich. 385.

¶ 157. When an attachment proceeding has gone down the officer still holds the property until notified, or until he learns that the suit is discontinued.—Vanneter v. Crossman, 39 Mich. 610.

¶ 158. Property once discharged from levy by the officer's voluntary act cannot be reclaimed by him.—Weber v. Henry, 16 Mich. 399.

§ 62. Care and protection of property.

Effect of release on liability for expenses, see post ¶ 235.

Sale of perishable property and disposal of proceeds, see post §§ 139-140.

Fees and expenses for keeping, see Sheriffs, III; and see Costs.

Duty of sheriffs in general, see Sheriffs, IV.

Liability of sheriffs and constables for neglect or malfeasance, see Sheriffs, IV.

¶ 159. The duties and liabilities of officers in possession of attached property are in the nature of a bailment. The officer must use due diligence to keep such property safely to satisfy the execution, but he is not an insurer, and is not, like a common carrier, answerable for a loss of the goods by fire; he should be held to greater, though reasonable, care than owners usually take of their property, for the reason that goods so held are more liable to be molested than goods not under seizure.—Fletcher v. Kalkaska Circuit Judge, 81 Mich. 186.

§ 63. Rights under attachment of land.

When lien attaches, see post § 92.

¶ 160. A levy of an attachment on land does not dispossess the owner.—Smith v. Collins, 41 Mich. 173.

D. RELEASE ON BOND OR OTHERWISE.

§ 64. In general; when authorized.

Effect of dissolution to release, see post § 126.

Discharge of attachment by act of parties or by operation of law, see post § 129.

On justice's attachment, see Justices of the Peace, IV, C.

Giving release bond as appearance, see Appearance, § 8, ¶¶ 29, 30.

Statutory provisions for release on bond, see Jud. Act, Chap. XXVI, §§ 15-17; Comp. L. 1915, §§ 13042-14034.

In attachments begun after action, see Jud. Act, Chap. XXVI, §§ 40, 41; Comp. L. 1915, §§ 13067, 13068.

¶ 161. The provision for a bond is applicable in case of the attachment of a growing crop, and may be important to prevent its removal.—Grover v. Buck, 34 Mich. 519.

§ 65. Persons entitled to release.

Persons entitled to move for dissolution or quashal, see post §§ 105-108.

¶ 162. Comp. L. 1871, § 6409 (How. St., § 7998), seems to contemplate the giving of the bond only by the defendant or other person in whose possession the property may be found.—King v. Hubbell, 42 Mich. 597.

§ 66. The bond, and its operation and effect.

Transfer of bond to plaintiff, see post § 67.

Giving bond as waiver of defective procedure, see post § 108.

Measure and amount of liability, see post § 146.

Liabilities on bond, and discharge of the bond, see post XIV.

Who may complain of qualification of sureties, see post ¶ 416.

Return of bond, see Jud. Act, Chap. XXVI, § 21; Comp. L. 1915, § 13048.

¶ 163. The bond must run to the sheriff, who holds it in trust, and the plaintiff in attachment has no right to sue on it or transfer it until failure of execution, and then only in the sheriff's name, unless the latter has assigned the bond to him.—Forrest v. O'Donnell, 42 Mich. 556.

§ 67. Assignment or transfer of bond.

Right of assignee to sue in own name, see post § 149; and see also Assignments, IV.

¶ 164. An assignment of the release bond by the sheriff to the plaintiff is a thing which the plaintiff may require as a matter of right, and is valid if signed by the sheriff, though not in his name of office.—Dorr v. Clark, 7 Mich. 310.

¶ 165. An assignment of a judgment in attachment does not carry the legal title to the bond if it does not expressly purport to do so.—Forrest v. O'Donnell, 42 Mich. 556.

§ 68. Rights in released property.

Custody after quashal or release, see ante § 61.

Right to reclaim released goods, see ante ¶ 158.

Liability for subsequent expense of keeping property, see post ¶ 235.

¶ 166. Where suit is brought for the purchase price of certain chattels, and an attachment is levied on the property claimed to have been sold to defendants, the giving by the latter of a bond to release the property from the writ is not a recognition of it as theirs, and can have no force as a ratification of its unauthorized purchase by another as their agent.—Woods v. Robertson, 31 Mich. 64.

¶ 167. A sheriff having relinquished his rights in attached property, where the statutory bond had been given him, could not secure the attachment debtor in his possession from interference of third parties for whose acts the sheriff was not responsible.—Patch v. Wessels, 46 Mich. 249.

E. RETURN OF WRIT.

§ 69. In general; time for return and filing.

Filing the affidavit, see ante § 35.
Leave to make further return, see post § 74.
Extending time to permit publication, see also post ¶ 181.
Premature return as defeating publication of service, see post § 86.
Return on return day, effect, see post ¶ 212
To justice, see Justices of the Peace, IV, C.
Return of sale under execution, see post § 141; and see generally Executions, IX.
General law as to returns to process, see Process, II, D; and see also Executions, IX.

¶ 168. A circuit court writ of attachment, unless personally served, cannot be returned before the return day.—King v. Harrington, 14 Mich. 532; Myers v. Prosser, 40 Mich. 644; Drew v. Claypool, 61 Mich. 233.

¶ 169. A sheriff's return to a circuit court writ of attachment, bearing date as of a day prior to the return day of the writ, and certifying to the seizure of property upon a previous day, and to the inability of the officer to find the defendant, is insufficient to confer jurisdiction, although not filed until the return day, since no presumption can arise in such case that the officer continued to search for the defendant beyond the date of his return.—Millard v. Hayward, 107 Mich. 219.

¶ 170. A writ of attachment was indorsed by the clerk as "Filed January 16, 1908." The officer made a return on January 29th that he was unable to find the defendant. Held, that such a return made after the officer had filed the writ invalidated the attachment proceedings.—Holmes v. King, 158 Mich. 445.

§ 70. Sufficiency and interpretation of return.

Stating as a conclusion that "due diligence" was used, see post ¶ 217.

¶ 171. A return by a sheriff to a writ of attachment, which commands him to seize the property of the defendant therein named, that by virtue of the command of the writ he has levied upon certain described property, sufficiently shows that the property taken belonged to the defendant.—Horton v. Monroe, 98 Mich. 195.

¶ 172. A sheriff's return on a writ of attachment that "I served a certified copy of the within writ upon D. * * * and I served a certified copy, together with a copy of the inventory on C." is fairly interpreted as showing the service of a certified copy of the writ upon C.—Watson v. Dingman, 120 Mich. 443.

¶ 173. A return stated that "I have, on the 18th day of January, 1884, attached the following property, * * * and I do further return that I am unable to find the defendant," etc. The return day was February 5. Held, that the date at the commencement of the return referred to the seizure only; and that the further return took effect from the filing, which was on the return day.—Hitchcock v. Hahn, 60 Mich. 459.

§ 71. ——Under Log Lien Law.

Showing as to service or diligence, see post § 72.
To support service on agent, see also post ¶ 215.
Under Log Lien Act, see Comp. L. 1915, § 14853.

¶ 174. In case of the attachment of logs in a drive with others, the service of the writ amounts to a seizure of all the logs answering the description in the writ; and as there can be no assorting of the logs, if the provisions of the act are followed, until they reach the terminus of the drive, a reference in the memorandum of the sheriff to the quantity of logs must be taken simply as an estimate of the amount attached.—McGuire v. Saginaw Circuit Judge, 101 Mich. 275.

¶ 175. An officer's return to an attachment of logs in transit in a drive, that he seized a certain number of logs in that drive, will not be regarded as a specific levy on a part only of the drive, such as to bring the attachment within the general requirement that in ordinary attachments an inventory must be made and a copy served with the writ.—McGuire v. Saginaw Circuit Judge, 101 Mich. 275.

§ 72. Showing as to service or reasons for failure.

See also ante ¶ 173.
Sufficiency to support publication, see post § 87.

¶ 176. Proceedings in attachment are void if the return fails to show service of a certified copy of the inventory of the property seized upon either the principal defendant or the owner of the attached property.—White v. Prior, 88 Mich. 647.

¶ 177. A return of an attachment on logs that the property was not of the officer's knowledge in the possession of any one, does not give the court jurisdiction of the property under How. St., § 6841, requiring that "if the defendant cannot be found within the county, the officer shall leave a copy of the attachment and inventory at the last place of residence of defendant."—White v. Prior, 88 Mich. 647.

¶ 178. It is essential to the validity of attachment proceedings under the Log Lien Law (Pub. Acts 1887, No. 229), where the property attached was not in transit, that it appear from the officer's return that a copy of the inventory was served upon the principal defendant.—Sheridan v. Colton, 113 Mich. 112.

¶ 179. A return of an officer in an attachment suit on a log lien, showing service one day before the return of the writ, is fatal. —Reynolds v. Marquette Circuit Judge, 125 Mich. 445.

¶ 180. In attachment proceedings under the Log Lien Law, a return made by the officer serving the writ that the owners are non-residents, and that within the life of the writ he has served a resident agent of the owners, is good, inasmuch as it follows Comp. L. 1898, § 10761.—Pepin v. Nault, 149 Mich. 180.

§ 73. Compelling return.

¶ 181. Where a sheriff neglects or refuses to make his return to a writ of attachment, application must be made to the court for an order requiring him to do so, and the time for the return of the writ may be extended for the purpose of obtaining constructive service on a non-resident defendant.—McLaughlin v. Jackson Circuit Judge, 147 Mich. 379.

§ 74. Further returns and amendments.

Amendments and cure of defects in general, see post § 103.
Interpretation of two returns together, see ante ¶ 173.
Of return of sale under judgment, see post § 141.

¶ 182. Where an attachment has been returned before the return day without personal service, a further return cannot be made without leave of court.—Myers v. Prosser, 40 Mich. 644.

¶ 183. A void publication based on an insufficient return of attachment (it did not show that defendants could not be found) is not validated nor is jurisdiction conferred by a subsequent ex parte order of the court —made after defendants had appeared specially and moved to quash—authorizing the sheriff to amend his return so as to show that defendants could not be found; where the sheriff had already made such amendment evoked by a motion to quash but without notice to the adverse party.—Cochrane v. Johnson, 95 Mich. 67.

¶ 184. An offer to amend a return of an officer in attachment in a log lien proceeding "as to the diligence shown and the character of agency of" the party served, is properly refused as falling short of the requirements for the basis of substituted service under Comp. L. 1897, § 10761.—Reynolds v. Marquette Circuit Judge, 125 Mich. 445.

¶ 185. The filing of an amended return of service of a writ of attachment does not have the effect of entirely superseding the original return unless so intended, and jurisdictional averments in the original return will be given effect though not repeated in the amended return.—Pepin v. Nault, 149 Mich. 180.

§ 75. Conclusiveness and effect of return.

Appraisals as part of return, see also ante ¶ 145.
Presumptions as to regularity of proceedings, see also post § 102.
Effect of amendment of return to supersede original, see ante ¶ 185.
Taking date of return as time from which to compute time for publication, see post ¶ 210.
Return of original inventory as "true copy," see also post ¶ 251.

¶ 186. Where the indorsement on a writ fo attachment shows that it was not levied subject to a mortgage lien, it cannot be contradicted in an action of replevin brought by the mortgagee against the attaching creditor.—Wallen v. Rossman, 45 Mich. 333.

¶ 187. In an action against a sheriff for damages to whiskey while in his custody under a writ of attachment, it was error to permit the jury to treat the return as amended so as to show that the quantity of whiskey claimed was not in fact seized by him on the writ, although his return showed that it was.—Standard Wine Co. v. Chipman, 135 Mich. 273.

§ 76. Filing return and writ.

¶ 188. Where action has to be taken by an attorney on the return of a writ of attachment, it is permissible for the sheriff, after indorsing the return of a writ not personally served, to leave the writ and return with the attorney instead of filing it with the clerk.—Watson v. Toms, 42 Mich. 561.

¶ 189. A writ of attachment is mesne process and must be returned by the officer, and when so returned remains in the custody of the clerk as a part of the files in the case. —Fletcher v. Morrell, 78 Mich. 176.

VII. FURTHER STEPS IN THE ACTION; PLEADING, SERVICE OR PUBLICATION.

§ 77. In general; filing declaration and completing jurisdiction.

When action is deemed commenced, see ante § 5.

Initiatory proceedings from application to return of the writ, see ante IV-VI.
Showing as to time of service, see ante § 72.
Time for substituted service, see post § 85.
Curing irregularities after jurisdiction attaches, see post §§ 103, 104.
Judgment and entry thereof, sale, and disposal of proceeds, see post XII.
Effect of judgment as depending on personal service, see post § 135.
Justice practice on attachments, see Justices of the Peace, IV.
In log lien proceedings, see also Forestry, III.
Giving dissolution bond to pay judgment, if rendered, as general appearance, see Appearance, § 8, ¶¶ 29, 30.
Same practice as in personal action by summons, see Jud. Act, Chap. XXVI, § 32; Comp. L. 1915, § 13059.
Filing declaration, and procedure thereon, and answers, see Jud. Act, Chap. XXVI, §§ 23, 24; Comp. L. 1915, §§ 13050, 13051.
Jurisdiction and procedure when personally served, see Jud. Act, Chap. XXVI, § 19; Comp. L. 1915, § 13046.
Jurisdiction on personal service of foreign corporation, see Jud. Act, Chap. XXVI, § 43; Comp. L. 1915, § 13070.
On attachment made after action is begun, see Jud. Act, Chap. XXVI, § 39; Comp. L. 1915, § 13066.

¶ 190. Where there has been no personal service and no appearance, a declaration cannot be filed, nor can default be entered until proof of publication of notice of attachment has been filed, and a judgment founded on such premature proceedings is void and may be attacked collaterally.—King v. Harrington, 14 Mich. 532; Wells v. Walsh, 25 Mich. 344; Woolkins v. Haid, 49 Mich. 299; Steere v. Vanderberg, 67 Mich. 530; Nugent v. Nugent, 70 Mich. 52.

¶ 191. Delay in filing declaration until more than twenty days after return day of writ is cured by filing it subsequently where no appearance or default has been entered.—Smith v. Runnells, 94 Mich. 617.

¶ 192. A failure to file a declaration within fifteen days after the issuance of a writ of attachment, as required by Act No. 30, Pub. Acts 1907, and Circuit Court Rule No. 2, does not deprive the court of jurisdiction, since said provision of the statute is not mandatory.—Goodspeed v. Smith, 161 Mich. 688.

¶ 193. Comp. L. 1897, §§ 10572, 10574, providing for six weeks' notice of attachment and that plaintiff on filing an affidavit of the publication * * * for six successive weeks * * * may file his declaration in the suit, do not require that filing be withheld until full six weeks has expired; and accordingly where the affidavit and declaration were filed after the sixth publication, but before full six weeks, but the default for want of answer was not entered until full twenty days after the full six weeks, the court had jurisdiction.—Kurtz v. Gartner, 141 Mich. 262.

¶ 194. In attachment proceedings, jurisdiction is acquired by proper publication and proof thereof, following the statutory preliminary steps.—Goodspeed v. Smith, 161 Mich. 688.

¶ 195. Where service has been had upon one defendant, jurisdiction is not lost by attempting to bring in a nonresident defendant by publication; publication is required only where neither defendant can be found.—Smith v. Runnells, 94 Mich. 617.

¶ 196. Where property has been seized, and the writ returned not personally served, publication of notice as required by statute is intended as a substitute for personal service, and is necessary to confer jurisdiction.—Thompson v. Thomas, 11 Mich. 274; King v. Harrington, 14 Mich. 532; Wells v. Walsh, 25 Mich. 344.

§ 78. Requisites of declaration; conformity to writ.

Quashal of writ for insufficiency of declaration, see post ¶ 290.
Rules relating to joinder of counts, see Pleading, II.

¶ 197. The declaration in an attachment suit, pleading a conversion of logs, is not demurrable for varying from the affidavit for the writ stating the cause of action as a trespass to land. The proper remedy is by summary application to the court to set aside the declaration for irregularity.—Longyear v. Minnesota Lumber Co., 108 Mich. 645.

§ 79. Appearance and plea.

As waiving defects and objections, see post § 107; and see Appearance, § 11.
After default, see post § 137.

¶ 198. A defendant brought in by publication has the same time in which to serve notice of retainer, and to plead, after the filing of affidavit of publication, as he would have had after a return of the writ personally served.—Thompson v. Thomas, 11 Mich. 274; Wells v. Walsh, 25 Mich. 344.

¶ 199. Where a defendant has been brought in by publication, he may appear and plead as a matter of right; and the court cannot impose terms on his doing so in cases where terms could not have been imposed if the writ had been personally served.—Thompson v. Thomas, 11 Mich. 274.

§ 80. Mode and place for personal service.

Command and directions of writ as to place, see ante § 44.

Substituted service and publication, see post §§ 85-89.

Citation and service thereof on petition to dissolve, see post § 120.

On justices' attachments, see Justices of the Peace, IV, C.

¶ 200. Service of an attachment cannot be made in a foreign county until after service has been made in the county where the process issued. Service in a foreign county in the first instance cannot be made the basis for proceeding by publication.—Stearns v. Taylor, 27 Mich. 88.

¶ 201. How. St., § 7991, as amended by Pub. Acts 1895, Act No. 129, was broad enough to allow service upon a defendant in attachment, who could not be found in the county where the property was seized, by serving the writ and inventory upon him in the county in which he was, but where no property was seized.—Skeels v. Oceana Circuit Judge, 119 Mich. 290.

§ 81. ——Against joint debtors.

Premature return as to one, see also post ¶ 252.

¶ 202. Where, in attachment against two joint debtors, their joint property is seized and service is made upon one, it is not necessary, under Comp. L. 1871, §§ 6413, 6414, How. St., §§ 8002, 8005 to proceed by publication against the other—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

§ 82. Papers and copies to be served.

Sufficiency of return of service of copies, see ante § 70.

¶ 203. Service of a copy of the attachment as well as of the inventory of goods is required for sufficient personal service of a writ of attachment under Comp. L. 1871, § 6402, How. St., § 7991, the provisions of which must be substantially followed.—Stearns v. Taylor, 27 Mich. 88.

¶ 204. Where in an attachment suit no certified copy of the inventory in attachment is served upon defendant, and defendant does not appear in the case, a judgment is invalid.—Rameau v. Valley, 168 Mich. 569.

§ 83. ——Under Log Lien Law.

¶ 205. Since in attachment of logs afloat and in transit no inventory is required, and to require one would make nugatory How. St., § 8427f; Log Lien Law, § 6, it is not required that service of the writ of attachment should include service of a copy of the inventory, as in ordinary cases under the general attachment statutes, the provisions of How. St., § 8427k Log Lien Law, § 11, being that all writs of attachment issued under "this act, * * * shall be served * * * as ordinary writs of attachment * * * except as herein otherwise provided."—McGuire v. Saginaw Circuit Judge, 101 Mich. 275.

§ 84. ——Sufficiency and authentication of copies.

¶ 206. Service of an attachment is not void for want of a certificate to the copy served where it was in fact a true copy and was accompanied by a duly certified copy of the inventory of the property attached; such a defect is merely formal.—Leonard v. Woodward, 34 Mich. 514.

¶ 207. An attachment of real property is not invalid merely because the copy of the writ and inventory served upon the defendant was not certified to by the sheriff, where it was impossible that defendant could have supposed the service to be other than of authentic papers, and the papers were sufficient as fully to advise him of the nature of the proceedings and the property which had been levied upon as though the signature of the sheriff had appeared to the formal certificate.—De Carle v. Marks, 171 Mich. 167.

§ 85. Substituted service by publication.

Necessity to give jurisdiction, see ante § 77.

Time for plea on substituted service, see ante § 79.

Grounds and conditions for publication, see post § 86.

Completion of publication as basis for taking and entering default, see post § 136.

Necessity of completion before filing declaration, see ante ¶ 190.

Where one joint defendant is personally served, see ante ¶ 202.

General law as to substituted service and publication, see Process.

Provisions as to publication, see Jud. Act. Chap. XXVI § 20; Comp. L. 1915, § 13047.

¶ 208. If a plaintiff in attachment does not publish notice of the proceedings within thirty days after return day of the writ as required on failure to obtain personal service on the defendant (R. S. 1838, p. 508, § 6), the court loses jurisdiction to proceed; publication after the statutory period will not preserve the attachment lien.—Millar v. Babcock, 29 Mich. 526.

¶ 209. Substituted service cannot be made until after the time for personal service has expired.—Farr v. Kilgour, 117 Mich. 227.

¶ 210. Comp. L. 1871, § 6414 (How. St., § 8003), provides that within thirty days

after the return of a writ of attachment notice by advertisement may be given to absent defendants. Held, that the date of the return as indorsed upon the writ and signed by the sheriff may properly be taken as the date from which to compute the time for advertising, though the writ is not actually filed until after notice is given.—Watson v. Toms, 42 Mich. 561.

§ 86. Grounds and basis for publication.

Service of proper copies, see also ante § 82.

¶ 211. A premature return of the summons will not, in attachment, support publication or a judgment by default.—King v. Harrington, 14 Mich. 532; Drew v. Claypool, 61 Mich. 233.

¶ 212. In attachment cases, 1897 Circuit Court Rule 1, subd. a, requires the sheriff to make return on the writ in cases of substituted service, immediately "after" the return day, thus giving all of the return day for service, and therefore a return "on" the return day, is no basis for substituted service, and jurisdiction would not be acquired.—Sweet v. Gibson, 123 Mich. 699.

¶ 213. The lien of a plaintiff in attachment is not lost by the sheriff's neglect to return the writ until the day after the return day, and, if personal service has failed, proceedings to publish in the defendant, based upon such return, which shows the necessary statutory facts, may properly be taken.—Horton v. Monroe, 98 Mich. 195.

§ 87. ——Showing of diligence and return not found.

Sufficiency of return, see ante § 70.
As essential to valid return, see ante § 72.
Subsequent amendment to show basis in return, see also ante ¶ 183.

¶ 214. How. St., § 8003, which authorizes publication against a defendant in attachment if it appear by the return that he could not be found, does not contemplate a search in the sense that the sheriff must make a tour of the entire county to find the defendant, and a return that, after diligent inquiry, he is unable to find the defendant named in the writ, as therein commanded, is sufficient.—Horton v. Monroe, 98 Mich. 195.

¶ 215. The officer's return should show that the owner of logs attached could not be found in his bailiwick, as a preliminary fact to authorize substituted service upon the agent of such owner.—Noyes v. Hillier, 65 Mich. 636.

¶ 216. Publication of notice is not authorized by a return showing that property was attached, but that neither of the two defendants was personally served, and failing to show that they could not be found; How. St., § 8003, requires that it must appear by the return that they could not be found.—Cochrane v. Johnson, 95 Mich. 67.

¶ 217. Under a statute permitting substituted service where "defendant cannot be found," a return that the officer "used due diligence in trying to get service on the defendant," does not authorize substituted service.—White v. Prior, 88 Mich. 647.

¶ 218. Under Comp. Laws 1897, § 10761, substituted service in attachment for log lien is not shown to be authorized where the return does not show that personal service could not be had, and it is affirmatively shown on a hearing on a motion to quash that personal service could have been had on the defendant.—Reynolds v. Marquette Circuit Judge, 125 Mich. 445.

§ 88. Notice and publication thereof.

Requisites of publication to support default, see also post § 136.

¶ 219. Where a log lien attachment on logs is returned executed on the logs with defendant not served and the owners nonresident and not served, a published notice not describing the property as logs or showing that a log lien is to be enforced is insufficient to confer jurisdiction over either the principal defendant or the log owner in proceedings to enforce labor liens under Laws 1887, Act No. 229.—Streeter v. McMillan, 74 Mich. 123.

¶ 220. In an attachment case against Benjamin W. Bourne and William H. Denton, nonresidents, where no one is personally served with process, the court does not get jurisdiction because of the publication of a notice describing the defendants as B. W. Bourne and "William H. Dunton."—Schoenfeld v. Bourne, 159 Mich. 139.

§ 89. Proof of publication; affidavit.

Nunc pro tunc filings, see post § 104.
Necessity to support default, see post § 136.

¶ 221. An affidavit of publication of a notice in attachment which declares that a notice annexed has been published for six successive weeks "preceding the said 23d day of September," there being nothing in the affidavit or papers referring to or identifying any month of September, and the notice itself not being dated, is void.—King v. Harrington, 14 Mich. 532.

¶ 222. In an affidavit of publication the affiant described himself as "printer and publisher of the Three Rivers Herald, a public newspaper, printed, published and circulated

in the county of St. Joseph," etc. Held, that this was a sufficient averment that he was such printer and that the paper was so published.—Farmers' National Bank of Constantine v. Fonda, 65 Mich. 533.

¶ 223. An affidavit that a notice in attachment has been published once in each week for six successive weeks, commencing August 31, and ending October 5, shows a sufficient publication, it appearing that the affidavit and the declaration were filed November 9. —Horton v. Monroe, 98 Mich. 195.

§ 90. Abatement and revival of attachment.

Abatement of lien, see post § 97.
Abatement of action in general, see Abatement and Revival.
Election between revived writ and claim against estate, see Election and Waiver.
Presumption on appeal as to suit by declaration having been begun before one by attachment, see Appeal and Error, ¶ 1534.
Effect of commencement of other suit for same debt on same day as abatement of attachment, see also Abatement and Revival, ¶ 53.
Assignment as invalidating or setting aside attachment, see Assignments for Creditors, § 26.
Effect of assignment on pending action by attachment, see Assignments for Creditors, § 37.
Effect of bankruptcy proceedings, see Bankruptcy, § 17.

¶ 224. Under Comp. L. 1897, § 9425, plaintiff in an attachment suit may, after the death of the defendant, proceed to judgment by reviving the suit against the administrator.—Lafferty v. Lafferty, 139 Mich. 176.

VIII. LIEN AND PRIORITIES.

§ 91. In general; inception of lien.

Duration and termination, see post § 94.
Titles and conflicting claims in hostility to attachment, see post XI.
Superiority or inferiority of homestead, see Homesteads, IV.

¶ 225. An attachment does not bind property sold between its issue and levy.—Hunt v. Strew, 39 Mich. 368.

§ 92. ——On attached land.

Effect of filing of notice on pre-existing rights, see post § 93.

¶ 226. An attachment lien on land does not become fixed until notice of the levy is filed with the register of deeds, as required by How. St., § 7995, and until then there is no foundation for a judgment in rem, and nothing to prevent defendant from occupying the land as a homestead.—Davis Sewing Mach. Co. v. Whitney, 61 Mich. 518.

§ 93. Filing notice of levy on land.

Giving notice as incident of levy, see ante § 53.
Necessity to attach lien, see ante § 92.
General law as to notice of title or incumbrance thereon, either by equitable doctrine of notice or under the Recording Acts, see Notice and Record of Title.

¶ 227. The filing in the office of the register of deeds of a certified copy of the attachment, etc., as provided by Comp. L. 1857, §§ 4754, 4755, How. St., § 7995, merely gives the attaching creditor a lien upon the debtor's attachable interest in the land and in no way interferes with the previously acquired rights of third persons.—Columbia Bank v. Jacobs, 10 Mich. 349.

¶ 228. R. S. 1838, p. 507, requiring an attachment levy to be filed in the registry of deeds, did not make the filing of an attachment levy operate as constructive notice, inasmuch as no provision was made giving it force by way of priority over conveyances. —Millar v. Babcock, 25 Mich. 137.

¶ 229. Filing in the register's office a certified copy of an attachment on lands is not notice of the attachment proceedings to third parties.—French v. De Bow, 38 Mich. 708.

¶ 230. Under How. St., § 7993, providing for the attachment of real estate, and stating that the levy shall be made in the manner provided by law for the seizure of such property on execution, and section 7995, providing that the real estate attached shall be bound, and the attachment thereon shall be a lien thereon from the time when a certified copy of the attachment, with a description of the real estate attached, shall be deposited in the office of the register of deeds in the county where the real estate is situated, and section 7996, providing that each register of deeds shall note on every such certified copy the time of its receipt and record in a book kept for such purpose the names of the parties in such writ, designating who is plaintiff and who defendant, the time when the land was attached and the time when such copy was deposited, and section 8017, providing that any attachment on real estate shall also be discharged upon the record thereof by the register of deeds in whose custody it shall be, whenever there shall be presented to him a certificate, executed by plaintiff, his personal representatives or assigns, specifying that such attachment has been removed or otherwise satisfied or discharged, or a certified copy of the action of the court removing the same, an attach-

ment upon real estate is nothing more than a statutory mode of recording a lien on real estate, in anticipation of a judgment and sale of the same to pay the debt.—Lant v. Manley, 75 Fed. 627.

§ 94. Duration of the lien.

Publication of service to continue lien, see also ante ¶ 208.
Effect of delay in returning to writ, see ante ¶ 213.
Effect of delaying execution, see also post ¶ 373.

¶ 231. An attachment lien continues until an execution can be levied.—Avery v. Stephens, 48 Mich. 246.

¶ 232. The office of the writ of attachment is simply to hold the property until the issue of execution on a valid judgment, which cannot be delayed by the creditor beyond a reasonable time, when such judgment does not follow.—Trowbridge v. Bullard, 81 Mich. 451.

§ 95. Rights under the levy and lien.

As to amount of lien or loss of lien, see post §§ 96, 97.
Right of custody and duty of caring for the property, see ante VI, C.

¶ 233. Rights acquired by attachment are inchoate until judgment and levy of execution.—Fuller v. Hasbrouck, 46 Mich. 78.

¶ 234. An attachment lien secured by one creditor does not inure to the benefit of other creditors, or deprive the debtor of the power of alienation.—Hauser v. Beaty, 93 Mich. 499.

§ 96. Amount of lien and items included.

¶ 235. Expenses of taking care of goods under attachment are not, it seems, a lien on the property after the goods have been released by a supersedeas bond and the case is ended; and it is doubtful if such expenses are taxable as costs.—Genesee County Sav. Bank v. Ottawa Circuit Judge, 54 Mich. 305.

§ 97. Abatement or loss of lien.

Abatement of writ and attachment proceedings, see ante § 90.
Effect of appeal on lien of attachment, see Appeal and Error, § 135.

¶ 236. The discontinuance of a suit in attachment by the original plaintiff did not impair the right of a creditor who, under R. S. 1838, had previously filed his declaration in the cause, to proceed to judgment, nor affect his lien upon the property attached.—People v. Calhoun Circuit Judges, 1 D. 417.

¶ 237. Attachment lien secured in suit against firm is not lost by reviving suit against surviving partner.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 238. Where a creditor has attached firm property in an action against the firm, he does not lose his lien by the death of one of the partners if the suit is revived and prosecuted against the survivor.—Van Kleeck v. McCabe, 87 Mich. 599.

¶ 239. While abandonment of the lien of an attachment may be largely a question of intent, secret intent to retain a lien will not control where the acts clearly indicate an opposite intent.—Lafferty v. Lafferty, 139 Mich. 176.

¶ 240. Under How. St., § 5946, providing that a claimant having a lien upon real estate of deceased, by attachment previous to his death, may, on obtaining judgment, have execution against such real estate, the lien secured by attachment upon real estate of the deceased debtor before his death may be enforced as if he were alive, and proceedings in execution and sale and procedure by bill in aid of the execution may take place without regard to the settlement of his estate in the probate court.—Lant v. Manley, 75 Fed. 627.

§ 98. Priorities between attachments or levies.

Other levies which would come into priority as reason for denying dissolution, see post § 114.
Priority of execution levies, see Executions, V.
On attached chattels, see Jud. Act, Chap. XXVI, § 11; Comp. L. 1915, § 13038.
On lands attached, see Jud. Act, Chap. XXVI, §§ 12, 13; Comp. L. 1915, §§ 13039, 13040.

¶ 241. Where an attachment creditor took judgment for two demands one of which was not due when the writ was issued, it was held that the judgment was a fraud upon a subsequent attaching creditor, of whose claim plaintiff was aware, and that the lien of the judgment, so far as it was founded on the demand not due, should be postponed to the lien of the subsequent attaching creditor.—Hale v. Chandler, 3 Mich. 531.

¶ 242. A. sued out of the circuit court an attachment, which was levied upon the property of his debtor. At the time of suing it out only $11 of his demand was due, but he subsequently recovered judgment for the whole amount on the debtor's admission. B. also sued out an attachment against the debtor, which was levied on the same property after that of A., but he recovered judgment first, and caused execution to be levied on the property. B. then filed a bill in

chancery to have his lien decreed to have priority over that of A. It was held: (1) That complainant by his attachment acquired a lien on the property, subject only to any lien which A. could lawfully hold under the statute, and that this lien of complainant could not be affected by a subsequent recovery of a judgment to which he was not a party. (2) That he had a right to show, notwithstanding A.'s judgment, that the demand for which it was rendered was not due when the attachment was levied. (3) That less than $100 being due A. when his attachment was levied, the circuit court had no jurisdiction, and the whole amount of A.'s judgment was postponed to B.'s lien.—Hinchman v. Town, 10 Mich. 508.

¶ 243. B. included in his judgment a demand which he believed to be due but which was not so. It was held that he did not, by so including it, debar himself from the right to have his priority protected in equity as to the amount included which actually was due.—Hinchman v. Town, 10 Mich. 508.

¶ 244. The question of priority between A.'s judgment and that portion of B.'s which was not due when his attachment was levied must be determined by the levy of execution; and B.'s being first levied gave him the first lien.—Hinchman v. Town, 10 Mich. 508.

§ 99. Priority over mortgage, transfer or lien.

See also post ¶ 371.

Attachability of mortgagor's interest in chattels, see ante § 15.

Conclusiveness of return as to priority, see ante ¶ 186.

Sale before levy but after issue of writ, see ante ¶ 225.

Conflicting claims of title, see post XI.

Priorities of liens in general, see Liens.

Priority and superiority of particular rights, liens and estates, see specific topics dealing with them, e. g., Executions; Chattel Mortgages; Mortgages; Dower; Homesteads.

Over subsequent advances by chattel mortgagee, see Chattel Mortgages, § 79.

Equitable notice of title or incumbrance to land and constructive notice by record of title, see generally Notice and Record of Title.

Effect of levy to avoid assignment made but not filed, see Assignments for Creditors, § 5, ¶ 19.

Levy as prior to assignment not yet accepted, see Assignments for Creditors, § 26.

Validity of assignment in anticipation of attachment, see Assignments for Creditors, § 14.

Avoidance of levies by bankruptcy within time thereafter, see Bankruptcy.

¶ 245. An attachment here upon goods brought into this state takes precedence over a mortgage of them executed and filed in another state, whence they were subsequently brought, but not filed in Michigan.—Corbett v. Littlefield, 84 Mich. 30.

¶ 246. An unrecorded land mortgage has priority over a subsequent attachment levy, though the attaching creditor had no notice of such mortgage at the time he commenced his attachment.—Campbell v. Keys, 130 Mich. 127.

¶ 247. An attachment on personalty in an action by an employee for wages takes priority over a prior unrecorded trust deed, in its nature partly a mortgage on realty and partly a chattel mortgage, though the plaintiff as such employee had actual knowledge of the existence of the mortgage.—City Bank & Trust Co. v. Hurd, 179 Mich. 454.

¶ 248. Comp. L. 1897, § 9224, adopted in 1889 as an amendment to "An act relative to levies of executions on real estate" and providing that "the lien thus obtained shall * * * be valid against all prior grantees and [mortgagees] mortgages of whose claims the party interested shall not have actual nor constructive notice," does not affect section 10564 governing attachments, so as to make an execution levy following a levy of attachment relate back so as to give a lien at the date of attachment superior to an unrecorded mortgage existing at that time.—Campbell v. Keys, 130 Mich. 127.

IX. OBJECTIONS TO WRIT, DISSOLUTION, QUASHAL, AND DISCHARGE.

§ 100. Defects and errors in general.

Requisites and sufficiency of affidavit in general, see ante IV, A.

Failure to indorse levy on writ, see also ante ¶ 135.

Defects in inventory, see also ante ¶ 142.

Sufficiency and interpretation of the return, see ante § 70.

Showing required in return as to service or reasons for failure, see ante § 72.

Defective certification of copies served, see ante § 84.

Certificate supplying defect in inventory, see ante ¶ 143.

Sufficiency of affidavit of publication, see ante § 89.

Grounds for quashal or dissolution, see post §§ 111-113.

Materiality in action for wrongful attachment, see post § 143.

Sufficiency of writ to justify sheriff acting under it, see Sheriffs, IV, A.

¶ 249. Proceeding to enforce a log lien are not vitiated by an excessive levy.—Backus v. Barber, 107 Mich. 468.

¶ 250. The clerk's indorsement on a writ of attachment showed the same to have been

filed January 16, 1908. The affidavit was filed January 17, 1908. Held, the proceedings in attachment were invalid, as the clerk's indorsement could not be treated as a mere clerical error.—Holmes v. King, 158 Mich. 445.

¶ 251. In an attachment suit, where the sheriff in making his return certifies by mistake that the inventory is a "true copy" when it is the original, an objection that no inventory was made and filed is technical and without merit.—Yale State Bank v. Fletcher, 173 Mich. 585.

§ 101. Objections open to collateral attack.

Necessity of affidavit, see ante § 22.
Deficiencies in return, see also ante ¶¶ 176, 177.
Oath before person not authorized to administer oaths, see also ante § 102.
Misnomer in notice as published, see ante ¶ 220.
In action on release bond, see post § 147.
On collateral attack on execution sale, see Executions, VII, F.
Collateral attack on judgments, see Judgments, VII.

¶ 252. Service having been made upon one of two joint debtors of an attachment on which their joint property had been seized, and jurisdiction thereby obtained, it is not a valid ground of objection to the introduction in evidence of the attachment proceedings, judgment, execution and levy, that the writ of attachment was prematurely returned as to the other joint debtor who was not served.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

¶ 253. Where the validity of a writ of attachment which does not give the plaintiffs' names in full is brought into question in a collateral suit while the original proceedings are yet open and correction is still possible, evidence of the issue of the writ cannot be rejected on the ground that the writ is void.—Barber v. Smith, 41 Mich. 138.

¶ 254. A writ of attachment issued by the federal court under Mich. Comp. Laws 1871, § 6433, when offered in an action of trespass in a state court against the marshal serving it, is evidence of the authority of the court to command him to attach the property of defendant in that suit, is not void, although it might be avoided on a proper proceeding because of insufficiency of the affidavit, and affords protection to such officer.—Matthews v. Densmore, 109 U. S. 216, 27 L. ed. 912, 3 Sup. Ct. Rep. 126, reversing 43 Mich. 461.

§ 102. Presumptions and evidence as to irregularities.

Sufficiency and time of filing of declaration, see ante § 77.
Failure to serve copy of inventory, see also ante ¶ 204.
On collateral attack on judgment, see Judgments, VII.

¶ 255. Where the affidavit was made the same day that the writ issued, and speaks of being annexed to the writ, it will be presumed that the writ did not pass from the clerk's hands until the affidavit was made, and it is of no consequence whether or not the writ was filled out before the making of the affidavit. Where two acts are done at the same time, that will take effect first which ought in strictness to have been done first in order to give it effect.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

¶ 256. On a bill in aid of plaintiff's execution, evidence that an affidavit in an attachment suit was filed on the date the writ was issued, is not sufficient to show the affidavit remained in the clerk's custody and was not attached to the writ as required by section 10,556 Comp. L. 1897.—Yale State Bank v. Fletcher, 173 Mich. 585.

¶ 257. In trover where an attachment against the goods and chattels of a partner is levied upon specific partnership property, item by item, the appraisal being made in like manner, there is no room for any presumption that the levy is upon defendant's partnership interest only.—Haynes v. Knowles, 36 Mich. 407.

§ 103. Amendments and cure of defects in general.

Nunc pro tunc amendments, see post § 104.
Of affidavit, see ante § 36.
Of the bond for attachment, see ante § 40.
Of return to writ, see ante § 74.

¶ 258. Although the statute of 1839 (Sess. L., p. 228) declared that no writ should be quashed "on account of any defect in the affidavit on which the same issued, provided the plaintiff, his agent or attorney, shall, whenever objection shall be made, file such affidavit as is required by law," it was held that where the original affidavit was void, because sworn to before a person not authorized to administer oaths, this act did not authorize the filing of a new affidavit after judgment and sale of the attached lands.—Greenvault v. Farmers' & Mechanics' Bank of Michigan, 2 D. 498.

¶ 259. Even if a new affidavit could be allowed it could not make valid the title of the purchaser of the land under the attachment proceedings against one to whom it had been mortgaged by the defendant while the proceeding was pending.—Greenvault v. Farmers' & Mechanics' Bank of Michigan, 2 D. 498.

¶ 260. After trespass has been brought for the seizure of goods under an attachment which was not properly served, the defect in service cannot be cured, for the purpose of defeating the action in trespass, by taking out a new attachment.—Fairbanks v. Bennett, 52 Mich. 61.

¶ 261. Giving of a bond in attachment will not aid a defective inventory, where the bond is given and the property delivered to a person not a party to the proceedings, and not shown to have represented defendants. —Knack v. Berlin, 150 Mich. 550.

¶ 262. After jurisdiction in attachment proceedings is once acquired by proper personal or substituted service, no good reason exists why irregularities may not be waived or corrected.—Goodspeed v. Smith, 161 Mich. 688.

§ 104. Nunc pro tunc filings and amendments.

See also ante ¶¶ 259, 260.
Subsequent amendment of return, see ante ¶ 188.
Subsequent filing of declaration, see ante ¶ 191.

¶ 263. Refusal by the circuit court to allow the affidavit of publication in an attachment suit to be filed nunc pro tunc is justified by the fact that the attached property has been sold to plaintiff under execution issued upon the void judgment.—Savidge v. Ottawa Circuit Judge, 105 Mich. 257.

¶ 264. On an application for leave to file affidavit of publication in attachment nunc pro tunc the point that defendant is estopped from attacking the ensuing execution sale is not necessarily controlling, although it may possibly be raised on the trial of any issue involving the title to the property derived through such sale.—Savidge v. Ottawa Circuit Judge, 105 Mich. 257.

§ 105. Persons entitled to move to dissolve or quash.

Waiver of objection to appraisers, see also ante ¶ 147.
Waiver of objections by appearance or plea, see post § 107; and see also Appearance, § 11.
Allegations of right in petition, see post § 117.
Title to the property and conflicting claims to it, see post XI.
Objections to affidavit open after sale on execution, see Executions, VII, F.

¶ 265. The attachment cannot be dissolved on the application of a defendant who has no claim to have the property restored to him.—Price v. Reed, 20 Mich. 72.

¶ 266. If a defendant in attachment owns and is entitled to have restored to him a portion of the property, he has as clear a right to move for dissolution as if he owned it all.—Patterson v. Goodrich, 31 Mich. 225.

¶ 267. A partner is entitled to have the writ dissolved and the property restored to him where partnership property has been seized without any grounds for the writ having been shown against him.—Edwards v. Hughes, 20 Mich. 289.

¶ 268. A husband in joint possession with his wife of land belonging to her, but used as the family homestead, can apply for a dissolution of an attachment thereon.—Rowe v. Kellogg, 54 Mich. 206; and see Patterson v. Goodrich, 31 Mich. 225.

¶ 269. An attachment levied upon property after it has been conveyed in trust to sell for the benefit of specified creditors, will be set aside at the instance of the trustees in order that they may sell the property to advantage.—Geer v. Traders' Bank of Canada, 132 Mich. 215.

¶ 270. A judgment against partners in an attachment suit will not be vacated, and the writ of attachment quashed, at the instance of a defendant against whom the writ was good, on the ground that it was erroneously issued against the other defendants.—Warren v. Winterstein, 114 Mich. 647.

§ 106. ——Assignor or assignee.

Right of trustees for creditors, see ante ¶ 269.
Bill in equity by assignee, see post § 128.
General effect of assignments, see Assignments, III.

¶ 271. Where the debtor has assigned the property attached he cannot take proceedings for dissolution, as he has no claim to have the property restored to him.—Chandler v. Nash, 5 Mich. 409.

¶ 272. Assignees of an insolvent cannot move for a dissolution of an attachment improperly levied on his land.—Rowe v. Kellogg, 54 Mich. 206; Gott v. Hoschna, 57 Mich. 413.

§ 107. Waiver of objections by appearance or plea.

See also post ¶ 286.
Appearance as waiving objection that suit was not begun at time of attachment, see Appearance, § 11, ¶ 50.

¶ 273. Judgment rendered after general appearance and plea to the merits in attachment proceedings is good notwithstanding any irregularities prior to such appearance, etc.

—Crane v. Hardy, 1 Mich. 56; Manhard v. Schott, 37 Mich. 234; Bryant v. Hendee, 40 Mich. 543.

¶ 274. A defendant in attachment by appearing and pleading to the action does not preclude himself from applying for a dissolution.—Hyde v. Nelson, 11 Mich. 353.

¶ 275. By appearance and plea to merits defendant in attachment waives all objections to the affidavit for the writ.—Gunn Hardware Co. v. Denison, 83 Mich. 40.

¶ 276. A general appearance by a defendant named in a writ of attachment, and the filing of a plea to the merits, is a waiver of defects in the affidavit for the writ.—John D. Gruber Co. v. Montcalm Circuit Judge, 183 Mich. 477.

¶ 277. A fatal defect in an affidavit for a writ of attachment under the Log Lien Act was not waived by appearing and pleading to the merits.—Woodruff v. Ives, 34 Mich. 320.

¶ 278. Where the bond has but one surety the defect is waived by defendant's appearance.—Bryant v. Hendee, 40 Mich. 543.

¶ 279. A defendant who does not rely on a motion to quash a writ of attachment because of defective service of the writ and inventory, and who brings a proceeding to dissolve the attachment on other grounds, cannot claim that the circuit court has no jurisdiction to render a judgment for costs in the dissolution proceeding when he is defeated.—Stock v. Reynolds, 121 Mich. 356.

§ 108. ——By giving release bond.

¶ 280. Where the defendant has procured a release of the property attached, by executing a bond to the sheriff, he cannot afterwards apply for a dissolution of the attachment.—Paddock v. Matthews, 3 Mich. 18.

¶ 281. Where an attachment under How. St. § 8016a, was granted on an insufficient affidavit, and the property seized was in the possession of a third party who obtained a release by giving bond to pay any judgment that might be recovered against the defendants, such bond, neither of the defendants being a party thereto, does not operate as a waiver of their right to move to quash the attachment.—Pierce v. Johnson, 93 Mich. 125.

§ 109. Modes of taking objections.

By bill to quash or vacate, see post § 128.

¶ 282. The truth of the grounds for the issuance of a writ of attachment alleged in the affidavit can be contested only in the manner provided by section 10595, Comp. Laws 1897, How. St., 2nd Ed., § 13400, that is, by a motion for dissolution.—John D. Gruber Co. v. Montcalm Circuit Judge, 183 Mich. 477.

¶ 283. The only mode by which a defendant in attachment can contest the truth of the facts stated in the affidavit upon which the attachment was issued is by an application for a dissolution of the attachment. He cannot, by plea in abatement, put the facts stated in the affidavit in issue.—Bower v. Town, 12 Mich. 230.

¶ 284. The defendant can only move the court to set aside the proceedings where some defect or irregularity is apparent in the writ or affidavit. If he claims that the case does not authorize an attachment he must take proceedings before a circuit court commissioner for its dissolution.—Roelofson v. Hatch, 3 Mich. 277.

§ 110. Time for motion or petition.

Effect of judgment on dissolution proceedings, see post § 135.

¶ 285. An attachment levied on defendant's goods may be dissolved on his motion made after judgment rendered against him for the debt for which the action was brought.—Gore v. Ray, 73 Mich. 385.

¶ 286. A motion to set aside attachment proceedings because the writ was issued for unliquidated damages, made after defendant has caused his appearance to be entered, is unseasonable, and its allowance irregular.—Roelofson v. Hatch, 3 Mich. 277.

§ 111. Grounds for quashal or dissolution.

Right to quash after giving bond for release, see ante ¶ 281.

Want of jurisdiction as ground for quashal, see also post ¶ 327.

Petition to dissolve as waiver of defect of jurisdiction available on motion to quash, see ante ¶ 279.

Alleging and stating grounds, see post § 117.

Suits to assert conflicting claims, see post XI.

¶ 287. Attachment proceedings are not void by reason of the use of the name George instead of John as a given name of one of the defendants, where the defendants are described as partners under the firm name, and there is no question of their identification in the community.—Van Benschoten v. Fales, 126 Mich. 176.

§ 112. ——Want of good cause for writ.

¶ 288. The commissioner can only dissolve an attachment for reasons going to

show that the plaintiff has not "a good and legal cause" for suing out such writ. This includes nothing but an inquiry into the facts or the sufficiency of the affidavit. Other defects are beyond his jurisdiction.—Vinton v. Mead, 17 Mich. 388.

¶ 289. The provision in Comp. L. 1871, § 6430, How. St., § 8028, that if a circuit court commissioner "shall be satisfied that a plaintiff has not a good and legal cause for suing out the writ" he may order an attachment dissolved, refers to the state of facts made to appear at the hearing before him, and not to what appeared to the plaintiff when the affidavit was made; the "good and legal cause" for suing out the writ must be one existing in fact, and not merely in the belief of the plaintiff, however well founded that belief may have appeared to him to be.—Folsom v. Teichner, 27 Mich. 107.

¶ 290. Though an affidavit for attachment states a cause of action it is a sufficient ground for quashing a writ of attachment issued thereon if the cause of action as pleaded is not one sufficient to support the attachment.—Feldman v. Preston, 194 Mich. 352.

§ 113. —Nonexistence of grounds averred.

¶ 291. A writ of attachment issued on the ground that the debt sued for was fraudulently contracted will be dissolved if it appears that part of said claim is not affected by such fraud.—Estlow v. Hanna, 75 Mich. 219.

¶ 292. Where an attachment has been issued on an affidavit in good faith that "the plaintiff has good reason to believe that the defendant has absconded from the state," a showing that the defendant had not in fact absconded will authorize a dissolution of the attachment.—Folsom v. Teichner, 27 Mich. 107.

¶ 293. Where the alleged fraud set up by a plaintiff as the basis of the issuance of a writ of attachment was, if it existed at all, not in the making of the contract on the part of defendant but in refusal by him to carry it out, held that defendant's motion to quash the writ was improperly denied.—Feldman v. Preston, 194 Mich. 352.

§ 114. Reasons against dissolution; other pending writs.

¶ 294. It is no bar to the dissolution of an attachment upon property the right to which defendant has not relinquished, that an execution has meanwhile been levied upon it in favor of a third party.—Drs. K. & K. U. S. Medical & Surgical Ass'n v. Post & Tribune Job Printing Co., 58 Mich. 487, overruling Johnson v. De Witt, 36 Mich. 95.

¶ 295. Later attachments do not preclude the debtor from obtaining a dissolution of an earlier one.—Schall v. Bly, 43 Mich. 401; Sheldon v. Stewart, 43 Mich. 574.

§ 115. Dissolution or quashal procedure in general.

On justices' attachments, see Justices of the Peace, IV, C.

Pendency of dissolution proceeding as ground for dismissal of other action, see Discontinuance, Dismissal and Nonsuit, III.

Applications to dissolve attachments, and procedure thereon, see Jud. Act, Chap. XXVI, §§ 48-51; Comp. L. 1915, §§ 13075-13078.

¶ 296. Proceedings to dissolve an attachment are a special statutory remedy, not according to the course of the common law.—Chandler v. Nash, 5 Mich. 409; Genesee County Saving Bank v. Michigan Barge Co., 52 Mich. 164; Rowe v. Kellogg, 54 Mich. 206; Gore v. Ray, 69 Mich. 114.

¶ 297. The proceeding to dissolve an attachment is not to be disfavored or construed with unreasonable strictness, but the remedy cannot be extended beyond the statute.—Rowe v. Kellogg, 54 Mich. 206.

¶ 298. The statute providing for dissolution proceedings applies to attachments levied only on land.—Edgarton v. Hinchman, 7 Mich. 352.

¶ 299. The court out of which an attachment issues is not vested with exclusive jurisdiction in regard to proceedings for dissolution; and the circuit court for the county of Kent in chancery has jurisdiction of a bill by the assignee of an insolvent debtor to dissolve an attachment on the assigned property issued from the superior court of Grand Rapids.—Turner v. Hatch, 100 Mich. 65.

§ 116. ——Jurisdiction of commissioners.

Jurisdictional allegations, see post ¶ 306.

Jurisdictional scope of commissioner's inquiry, see also ante ¶ 288.

Constitutionality of laws giving commissioners and notaries jurisdiction, see Constitutional Law, II.

¶ 300. The statute authorizing circuit court commissioners to dissolve attachments applies to justices' as well as to circuit court attachments.—Albertson v. Edsall, 16 Mich. 203.

¶ 301. Where the circuit court commissioner is disqualified from acting, the application may be made to a commissioner of an adjoining county, and need not be made to

the circuit judge for the county of suit.—Hayn v. Farrar, 36 Mich. 258.

¶ 302. To maintain the officer's jurisdiction it must affirmatively appear upon the record.—Chandler v. Nash, 5 Mich. 409.

§ 117. ——Motion, petition and other papers. Issues for decision on hearing, see post § 121.

¶ 303. Dissolution proceedings before a circuit court commissioner need not be entitled as in the original suit; the proceeding is a special one, and the statute so treats it as an independent judicial office and not as a reference in the cause itself.—Hayn v. Farrar, 36 Mich. 258.

¶ 304. The application for a dissolution of an attachment must show that property of the defendant has been attached.—Chandler v. Nash, 5 Mich. 409; Osborne v. Bowles, 20 Mich. 277; Macomber v. Beam, 22 Mich. 86.

¶ 305. An application for dissolution of an attachment must describe the attached property.—Osborne v. Bowles, 20 Mich. 277; Macomber v. Beam, 22 Mich. 86.

¶ 306. An application which does not describe the property, and may show that a parcel of the real property to the value of more than $5.00 was attached, and is now in possession of the sheriff, does not confer jurisdiction upon the circuit court, unless so sued out it should appear.—Nash v. Hyde, 20 Mich. 327.

¶ 307. A statement that an said attachment writ was [illegible] the goods and [illegible] of this defendant [illegible] ment.—Osborne v. Bowles, 20 Mich. 277.

¶ 308. Though an affidavit recites that the property [illegible] the writ [illegible] is not necessary that it should state on the hearing that the property was [illegible] Bowles, 42 Mich. 487.

¶ 309. The application should contain an [illegible] possession.—Nash v. De Witt, 5 Mich. 409; Bowles, 42 Mich. 487.

¶ 310. [illegible] the writ [illegible] ment [illegible] right to possession of the property.—Smith v. [illegible] 173.

¶ 311. The [illegible] same persons there.—Osborne v. Bowles, 20 Mich. 277.

¶ 312. A petition which prays for the dissolution of an attachment for the reason that the affidavit made for it was false, and that the petitioner was not (as alleged therein) about to assign or dispose of his property with intent to defraud his creditors, and which is verified by the petitioner's oath, is held not open to objection after a hearing on the merits for insufficiency, in that it does not directly, under oath, negative the cause assigned for suing out the writ.—Patterson v. Goodrich, 31 Mich. 225.

¶ 313. An application for the dissolution of an attachment by one of the defendants, alleging that she has not assigned, disposed of, or concealed, or attempted to assign, dispose of, or conceal, her property, or any part thereof, with intent to defraud her creditors, is sufficient to cover all property owned by her, whether individually or jointly with a codefendant, the affidavit alleging that they had so done with "their" property.—Cottrell v. Hathaway, 108 Mich. 479.

§ 118. ——Traversing or denying affidavit.

¶ 314. A petition to dissolve an attachment is not bad because it denies, alternatively, that defendant has assigned, disposed of or concealed his property with intent, &c.—First National Bank v. Steele, 81 Mich. 83.

¶ 315. A petition for dissolution of attachment is bad which denies, conjunctively, that defendant "has assigned, disposed of, and that he is about to assign, dispose of, and conceal, his property with intent to defraud his creditors, or that he has made any fraudulent disposition whatever of his property with such intent."—Shaw v. Hays, 113 Mich. 244.

¶ 316. An affidavit for an attachment charging that "the defendant is about to remove his property from said county and refuses and neglects to pay or secure payment of his debt," is not sufficiently denied by a petition for dissolution, which contains a denial, not in broad terms the charge limited to a neglect and refusal to pay" with a traversing intent.—Shaw v. Reynolds, 111 Mich. 350.

¶ 317. A denial of the misleadingness in a petition for dissolution of an attachment, which omits a statement of the affidavit that the defendant refuses and neglects to pay the plaintiff's claim," and is important when the affidavit does not charge a refusal to pay," with the traversing intent.—Shaw v. Reynolds, 111 Mich. 350.

§ 119. ——Verification of petition.

¶ 318. An application for the dissolution of an attachment must be verified by oath.—Osborne v. Bowles, 20 Mich. 277.

§ 120. ——Citation and service thereof.

Service of citation on attorney, see Attorneys, § 16.

Rules as to services of notices other than process in general, see Notices.

¶ 319. Unless a party follows up his application with proper citation the whole proceeding will be void.—Pearson v. Creslin, 16 Mich. 281.

¶ 320. R. S. 1838, p. 3, § 3, subd. 11, How. St., § 8028, requires that a citation for the dissolution of an attachment shall be served at least three days before the return day. Held, that the day of service and the day of return must both be excluded in computing the time.—Dousman v. O'Malley, 1 D. 450.

¶ 321. Under How. St., § 8028, requiring a citation for dissolution of attachment to be "served three days at least before the return day thereof," Sunday is to be excluded in computing the three days; accordingly service on the fourth day before return day is bad.—Caupfield v. Cook, 92 Mich. 626.

¶ 322. Under How. St., § 8028, requiring the citation in proceedings to dissolve an attachment to be served on the plaintiff at least three days before the return day, a service made on the fourth day before the return day, one of the intervening days being a Sunday, is insufficient.—First Nat. Bank v. Williams Milling Co., 110 Mich. 15.

¶ 323. Under How. St., § 8028, providing that the citation in proceedings to dissolve an attachment shall be served by reading it to the plaintiff, if found within the county, and, if not, that it may be served upon his agent or attorney, service upon the attorney of a triplicate original instead of a copy and without reading the citation to him is insufficient.—Cleland v. Clark, 111 Mich. 336.

§ 121. ——Hearing, issues and trial.

See also ante ¶ 288.

Office and scope of motion to quash or petition to dissolve, see also ante § 109.

¶ 324. An application for dissolution is in the nature of a motion and can be disposed of at chambers. (Comp. L. ch. 201, How. St ch. 275.) But there must be a hearing and a trial of the questions of fact involved before a judge or circuit court commissioner, and he is to adjudicate questions of both law and fact, and may apply the rules that govern the trial of such issues.—Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 164.

¶ 325. Proceedings in applications for dissolving attachments stand upon the same basis as other suits, so that the rights of the parties upon the hearing are to be adjudicated as they were at the time the proceedings were commenced, unless the defendant, by his own acts, has lost his right to the possession of the property; and the right to determine the legality of the issue of the writ and the levy thereunder remains, and is not affected by a judgment in the main case.—Calvert Lithographing, Engraving & Map Pub. Co. v. Doctors K. & K. U. S. Medical & Surgical Ass'n, 61 Mich. 336.

¶ 326. Proceedings to dissolve an attachment are interlocutory, and do not affect the merits of the main action.—Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 164.

¶ 327. A defendant in attachment may appear and move to quash the writ and vacate the judgment for want of jurisdiction, and may support his motion by affidavits showing that plaintiff, under How. St., § 7986, had no right to proceed in attachment; and where upon the face of the proceedings no want of jurisdiction to issue the writ or enter judgment appears, plaintiff is entitled to frame an issue upon each motion and contest the questions raised outside of the record.—Stringer v. Dean, 61 Mich. 196.

¶ 328. Where a motion to quash a writ of attachment is based on a denial by the defendant of the truth of the plaintiff's affidavit on which the attachment was issued, stating that the defendant was guilty of fraud in contracting with the plaintiff, the fundamental question is whether the defendant is shown to have been guilty of some material deceptive act, word or concealment done, said or suffered by him with intent to induce and which did induce the plaintiff to enter into the contract sued upon and consent to the debt, and not merely whether he subsequently dishonestly breached the contract and thereby wronged or defrauded the plaintiff.—Feldman v. Preston, 194 Mich. 352.

¶ 329. A writ of attachment is good if the party who sues it out has good reason to believe that a proper cause exists for it; but in proceedings to dissolve it the existence of reasons for his belief is not necessarily in issue, but the court inquires whether the defendant had actually done as plaintiff believed.—Blanchard v. Brown, 42 Mich. 46.

¶ 330. A question as to the existence of the indebtedness cannot be tried in a proceeding to dissolve an attachment, as the contention that there was no debt to refuse payment of, is addressed to the merits of the action.—Stock v. Reynolds, 121 Mich. 356.

¶ 331. The question whether log lien proceedings under Comp. L. 1897, §§ 10756-

10770, are void because the relators included in their statement more than was due, can only be disposed of at the hearing and cannot be tried upon ex parte affidavits in a motion to quash.—Ruggles v. Muskegon Circuit Judge, 124 Mich. 472.

§ 122. ——Presumptions and burden of proof.

¶ 332. Plaintiff has the burden of showing that attachment should not be dissolved.—Carver v. Chapell, 70 Mich. 49.

¶ 333. On an application for dissolution the burden of proof is upon plaintiff to sustain the averments in the affidavit for the writ as to the existence of the statutory causes authorizing its issue.—Iosco County Sav. Bank v. Barnes, 100 Mich. 1.

¶ 334. Upon proceedings to dissolve an attachment plaintiff has the burden of showing affirmatively, sufficient cause for issuing the writ, existing and continuing at the time of the hearing of the motion to dissolve.—McMorran v. [illegible], 111 Mich. [illegible].

¶ 335. In dissolution proceedings the burden is upon the plaintiff in attachment to show cause why the attachment should not be dissolved, and he must establish the existence of such facts as justified the issuance of the writ.—Mumford v. Ryan, 72 Mich. 386; Brown v. Kimball, 76 Mich. 74; Genesee County Sav. Bank v. Michigan Buggy Co., 82 Mich. 164; Carver v. Chapell, 70 Mich. 49.

¶ 336. Proof is not admissible from mere hearsay of account, and where an attachment is issued on the ground of fraud, the burden of proving it is upon the plaintiff.—[illegible] v. Wells, 44 Mich. 527.

¶ 337. [illegible]

¶ 338. [illegible]

¶ 339. [illegible]

¶ 340. [illegible]

¶ 341. [illegible]

¶ 342. [illegible]

den of proof is on the plaintiff to sustain the truth of the affidavit on which the writ was issued.—Feldman v. Preston, 194 Mich. 352.

¶ 343. In action begun by attachment based on the ground of assignment of property with intent to defraud creditors, the burden is on plaintiff to prove the grounds alleged in the affidavit; and proof that defendant stated to plaintiff that he owed only certain debts, whereas there were others, coupled with proof that he then gave a chattel mortgage to secure plaintiff and all the others does not shift the burden to defendant to show that the debts secured by the mortgage were bona fide.—Rickel v. Strelinger, 102 Mich. 41.

§ 123. ——Admissibility of evidence.

Weight and sufficiency, see post § 124.
General law of evidence, see Evidence.
Examination and cross-examination of witnesses, see Examination of Witnesses.

¶ 344. In a proceeding to dissolve an attachment, evidence is admissible that the debt for the same has been secured by mortgage, and the defendant can be examined as to its execution.—Brown v. Kimball, 76 Mich. 74.

¶ 345. In a proceeding to dissolve an attachment sued out on plaintiff's belief that defendant had disposed of and was disposing of property with intent to defraud creditors, it being shown that the property seized was exempt from execution, it did not become defendant, but was bound by his duty to surrender the same to the officer, and not to plaintiff.—Carver v. Chapell, 70 Mich. 49.

¶ 346. In proceedings to dissolve an attachment, evidence that one [illegible] the attachment was defendant's homestead is not [illegible]. Though [illegible] the time when defendant had a right to dispose of property with intent to defraud creditors, and not to plaintiff.—Carver v. Chapell, 70 Mich. 49.

¶ 347. At the hearing of a motion to dissolve a writ of attachment against [illegible] is competent for [illegible] to show what interest the [illegible] had in the stock of goods.—Feldman v. [illegible], 194 Mich. 352.

¶ 348. [illegible]

¶ 345. An attachment having been issued on an affidavit that defendant was about to remove his property from the state with intent to defraud his creditors, defendant took proceedings before a circuit court commissioner for its dissolution. On the hearing defendant testified that when the writ was served he did not know that he was owing any one. This evidence was given with a disclaimer of any intent to raise the question of an indebtedness to the plaintiff in this proceeding. It was held that the evidence was proper as bearing on the question of fraudulent intent.—Hyde v. Nelson, 11 Mich. 353.

¶ 346. On motion for the dissolution of an attachment, evidence that the defendant a short time previous made an arrangement with a person to take his property under a pretended sale, in order to cover the same from the defendant's creditors, and that the person took possession of it under this arrangement, is material and should be admitted.—Parker v. Luce, 14 Mich. 9.

¶ 347. Although, to justify the issue of a writ of attachment on the ground of a fraudulent disposition of property, the intent to defraud must have existed at the time the writ issued, the subsequent conduct of the parties may properly be considered, upon an application to dissolve the writ, for the purpose of throwing light upon such intent; e. g., the execution of a subsequent chattel mortgage and what was done under it.—McMorran v. Moore, 113 Mich. 101.

¶ 348. On motion to dissolve attachment evidence of the amount of money paid by defendant to plaintiff during their business dealings is inadmissible on the question of fraudulent concealment, though it might be relevant to the ground of fraud.—Finlay Brewing Co. v. Prost, 111 Mich. 635.

¶ 349. The giving of a chattel mortgage by an insolvent debtor to a trustee to secure bona fide debts is no evidence of an intent to defraud anybody, but is evidence of an attempt to secure the mortgagor's creditors. —Rickel v. Strelinger, 102 Mich. 41.

¶ 350. Upon the hearing on a petition to dissolve an attachment, evidence by defendant to show that he did not owe plaintiff anything, or did not believe that he owed him anything is admissible for the purpose of showing want of bad faith in dealing with the property.—Dimmock v. Cole, 130 Mich. 601.

§ 124. ——Weight and sufficiency of evidence.

¶ 351. In proceedings to dissolve an attachment evidence is insufficient to support an allegation in the affidavit, that plaintiff had good reason to believe defendant was about to dispose of his property to defraud his creditors, if it relates only to a mortgage by the debtor to his wife, to secure a past bona fide indebtedness and future advances and a mortgage to creditors in good faith made for the extension of credit to him and the furnishing him with more goods so as to enable him to go on with his business.—Armstrong v. Cook, 95 Mich. 257.

¶ 352. Evidence that a debtor is temporarily absent from the county for health's sake does not show that he has absconded, so as to justify attachment. "Absconding" involves the design to withdraw clandestinely, to hide or conceal oneself, for the purpose of avoiding legal proceedings.— McMorran v. Moore, 113 Mich. 101.

¶ 353. The conveyance by a debtor two years prior to the attachment of his property, and at a time when he was not indebted to any considerable extent as compared with his assets, which aggregated in value upwards of $500,000, of his homestead to his wife in exchange for other real estate owned by her, is not evidence of an intent to defraud his creditors.—Iosco County Sav. Bank v. Barnes, 100 Mich. 1.

¶ 354. Evidence tending to show that a debtor, shortly prior to executing a chattel mortgage to a trustee to secure his creditors, stated to a member of a firm to which he was indebted that he had no debts aside from that of said firm and one other creditor, who was also secured by the mortgage, will not establish the fact that other claims secured by the mortgage, and which purport to have been incurred several months prior to the making of said statements, are not bona fide.—Rickel v. Strelinger, 102 Mich. 41.

¶ 355. Where, in proceedings for the dissolution of attachments based upon the claim that the indebtedness sued for was fraudulently contracted, it appears that the reports of a commercial agency, upon the strength of which the credit was extended, were based upon the sworn reports of the defendant corporation to the Secretary of State, and that said reports were false, and could have been made for no other purpose than that of establishing a false credit, said claim is sufficiently established.—Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

¶ 356. The giving of a mortgage for $100,000 and receiving thereon only $50,000, is not evidence of fraud or concealment where all the money received but $6,000 was paid out to creditors and the reason for the discrepancy in amount is explained—the mortgage itself having been given to raise

money for the adjustment of debts for which the mortgagor was liable as indorser or otherwise; nor is the refusal to disclose to one creditor the place where the $6,000 is kept, evidence of fraud, when it is kept for the purpose of carrying out such adjustment, and to pay interest on the amount necessary to do so.—Iosco County Sav. Bank v. Barnes, 140 Mich. 1.

§ 357. On a motion to dissolve the writ defendant in an attachment suit based upon the alleged concealment of property with intent to defraud creditors cannot overcome proof of judgments against him and a false denial to the officer that he had property subject to levy by showing that the judgments were rendered against him as accommodation indorser; since the obligation to pay such debts is the same as to pay debts otherwise contracted.—Finley Brewing Co. v. Prost, 111 Mich. 635.

§ 358. Findings of fact in a proceeding to dissolve an attachment that the defendant had sold two carloads of wheat to the plaintiff, that one car was shipped and paid for, that the other car was not up to the grade agreed upon and was returned, the plaintiff being repaid for it, and that the defendant refused to send another car when demanded, the price of wheat having advanced, justifies a conclusion that the defendant denied liability and refused to pay any sum due upon the claim of the plaintiff in view of a refusal to dissolve the attachment which otherwise would have been dissolved.—Stuck v. Bayliss, 121 Mich. 356.

§ 359. An order dissolving an attachment will not be disturbed where there is evidence tending to show that defendant did not know that he was indebted to plaintiff, though plaintiff's claims were established, the evidence sufficiently showed an intent to defraud creditors.—Tannock v. Cole, 13 Mich. 481.

§ 360. Under Comp. Laws 1897, § 7304, providing that the requirements of an affidavit in attachment, a levy under attachment for personal property, consisting of property which can be set off in value to the amount of the debt, that the defendant cannot be found in the county, and that the garnishee has no property in his hands, or not enough to satisfy the debt, after paying prior claims, are jurisdictional, and must appear in the record to support the judgment, if the garnishee has property in his hands worth $1,000, which after paying prior claims of $1,000 of unsecured debts—Ed. Note.—Dissolution, see 111 Mich. 635.

§ 125. Order of dissolution and its effect.

See post § 126.

Dissolution of garnishment, see post § 127.

Effect of judgment on the [illegible] proceedings, see post § 145.

Effect on liability on bond where plaintiff recovers on the debt, see post § 145.

Dismissal as consequence, see Discontinuance, Dismissal and Nonsuit.

Discharge of real estate attachment on the record, see Jud. Act. Chap. XXVI, § 47; Comp. L. 1915, § 13074.

§ 361. Dissolution of attachment does not oust jurisdiction if personal service has been had.—Hills v. Moore, 40 Mich. 210; overruled by Borland v. Kingsbury, 65 Mich. 39; Burnside v. Davis, 65 Mich. 74.

§ 362. Dissolution of an unjust attachment does not affect third party's execution lien.—Drs. K. & K. U. S. Medical & Surgical Ass'n. v. Post & Tribune Job Printing Co., 58 Mich. 487.

§ 126. Review of dissolution.

Nature, office and scope of certiorari in general, see Certiorari.

Reviewability on error of dissolution proceedings, see Appeal and Error, § 16.

Final orders reviewable by writ of error, see Appeal and Error, § 32.

Appeal or error as affecting rights under attachment, see Appeal and Error, IX.

§ 363. No appeal lies from a circuit judge to the circuit court in dissolution proceedings on attachment.—Harvey v. Pealer, 53 Mich. 572.

§ 364. Dissolution proceedings are collateral to the main suit and a commissioner's order of dissolution is interlocutory only releasing the property from the lien of the writ; it is not a judgment, nor is an order of the court affirming it on certiorari.—Gray v. York, 44 Mich. 415.

§ 365. Error does not lie to review proceedings to dissolve attachment.—Gore v. Ray, 6 Mich. 114.

§ 127. ——Appeal from commissioner.

Appeal, error or certiorari from decision of circuit court, see Appeal and Error; Certiorari.

Provisions as to appeals from decision of circuit commissioner, see Jud. Act. Chap. XXVI, § 32; Comp. L. 1915, § 13059.

§ 366. On appeal from the dissolution of an attachment the circuit court, instead of proceeding with the trial, ordered an issue to be tried in which plaintiff had waived and abandoned his appeal, and without allowing any testimony to be given the jury affirmed the dissolution and ordered the property to be restored to defendant, held error.—Detroit Iron Works Co. v. Drs. K. & K. U. S. Medical & Surgical Ass'n, 54 Mich. 605.

¶ 367. Where an attachment has been dissolved by a commissioner and the goods taken off by other parties, a resort by plaintiff, pending appeal from such dissolution, to other means of collection, which proved ineffectual, cannot be treated as an abandonment or waiver of the appeal.—Detroit Free Press Co. v. Drs. K. & K. U. S. Medical § Surgical Ass'n, 64 Mich. 605.

§ 128. Bill to quash or vacate.

Right of assignee for creditors to move for dissolution, see also ante § 106.
Bill by subsequent attaching creditors, see post § 132.
Power of chancery in supervision of assigned estate to set aside attachments, see Assignments for Creditors, § 38.
Power of equity to dissolve void attachment in aid of assignment at suit of assignee, see Assignments for Creditors, § 40.

¶ 368. A bill in equity lies to set aside an attachment lien on the ground of fraud where the affidavit was made without any honest belief in the facts sworn to, and where plaintiff has not lost his equity.—Byles v. Rowe, 64 Mich. 522, affirming lower court by equal division.

¶ 369. An insolvent's assignee may file a bill in equity for the purpose of dissolving attachments improperly levied on such insolvent's lands.—Gott v. Hoschna, 57 Mich. 413.

¶ 370. As an assignee for the benefit of creditors cannot intervene in an attachment suit and move for a dissolution of the writ as affecting the assigned property, his remedy to have the attachment set aside is in chancery.—Turner v. Hatch, 100 Mich. 65; Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

¶ 371. Where, in proceedings in equity by the assignee of an insolvent debtor to dissolve attachments of the assigned property, it appears that only part of the indebtedness was due when the attachment suits were commenced, and there is nothing to indicate any fraudulent intent on plaintiffs' part in averring the amount of their claims, or any collusion between them and the debtor, their liens will be sustained for the amount so due, it appearing that there was sufficient cause for the issue of the writs.—Emerson v. Detroit Steel & Spring Co., 100 Mich. 127.

§ 129. Discharge by act of parties or operation of law.

Revival on death of party, see ante § 90.
Discharge of release bond by act of discontinuance, see post § 148.
Effect of delay in taking and entering default, see post ¶ 387.
Dissolution or annulment of attachment by bankrutpcy, see Bankruptcy, § 9.

¶ 372. Whether tender of an amount in litigation can discharge an attachment, quere. And, if it could, it would not make valid a transfer of the property attached, if void as against the creditor, or prevent assailing it on execution, except as to intervening bona fide purchasers or encumbrancers.—Chase v. Welsh, 45 Mich. 345.

¶ 373. An attachment levy is not released by a delay of a little more than two months in levying execution thereunder.—Geiges v. Greiner, 68 Mich. 153.

X. PROCEEDINGS IN AID OF WRIT OR LEVY.

§ 130. In general.

[Note. Actions for tortious interference with goods or property under levy, involving the rights or interests of the sheriff or of the parties, will ordinarily depend on the sufficiency of the plaintiff's rights in the property or on the fact of the interference. See generally ante VI, C, post XI; and see topics Conversion; Trespass; Sheriffs, IV. In aid of executions there may be a bill in aid of the writ. As to such bills, see Creditors' Suits; Executions, VII, F; and also Fraudulent Conveyances.]
Revival of proceedings after death of defendant, see ante § 90.

¶ 374. Whether a bill in equity lies to protect and enforce the lien of attachment, quære.—Van Norman v. Jackson Circuit Judge, 45 Mich. 204.

¶ 375. Where execution in an attachment suit brought to enforce a lien for labor on logs has been returned unsatisfied because the defendant owners, who were duly served in the suit, have removed the logs attached beyond the officer's reach, plaintiff may recover the amount of his lien in trover or case against such owners.—Goodrow v. Buckley, 70 Mich. 513.

XI. TITLE AND CONFLICTING CLAIMS TO PROPERTY.

§ 131. Title and transfers of interest.

See also post ¶ 379.
Rights of other creditors, see also ante ¶ 234.
Inchoate nature of right until judgment and sale, see ante § 95.
Title or right to property as basis for application to dissolve, see ante § 105.

Effect of transfer on right to move for dissolution, see ante § 106.
Application of transferee to set aside default, see post § 137.
Outstanding title as defense to action on release bond, see post § 147.
Rights of carrier surrendering chattels on attachment, see Carriers, II, C.

¶ 376. In an attachment proceeding, where defendant had parted with the title to the realty in question before leaving the jurisdiction, the right to the title was between his grantee and the plaintiff in attachment; and the attachment defendant has no interest in the question of title.—Peterson v. Swenningston, 178 Mich. 294.

§ 132. Conflicting claims and suits thereon.

Who may give bond for release, see ante § 65.
Right to move for dissolution, see ante §§ 105-108.
Bill to quash or have relief, see ante § 128.
Right of attachment defendant to litigate title after transfer, see ante ¶ 376.
Attachment plaintiff as proper party in foreclosure, see Foreclosure, III, B.
Interventions in log lien suits, see Forestry, III.
Who may question fraudulent conveyance, see Fraudulent Conveyances, II, III.
Impropriety of replevin generally to retake attached goods, see Replevin, I.

¶ 377. Subsequent attaching creditors cannot contest the attachment proceedings in the name of the debtor; but they may by bill in chancery contest the lien on the ground of fraud.—Hale v. Chandler, 3 Mich 531.

¶ 378. An attaching officer can seize goods that are subject to a chattel mortgage, and can hold them for the purposes of inventory and appraisal until he ascertains that there is nothing above the mortgage debt; but, if he attaches in defiance of the mortgage, claiming it to be void as against the attachment creditor, the mortgagee may bring replevin against him at once without demand.—Merrill v. Denton, 73 Mich. 628.

¶ 379. In trover by the vendee of goods against a sheriff, who attached them at the suit of the vendor's creditors, plaintiff, as between the vendor and himself, is the owner, and the only defence available to defendant is that the sale was made with intent to defraud creditors.—Bendetson v. Moody, 100 Mich. 553.

¶ 380. Where the defendant in a criminal prosecution forfeited his bail, and his bondsman to reimburse himself levied an attachment upon defendant's property, a third party could not intervene and claim the property levied on.—Peterson v. Swenningston, 178 Mich. 294.

§ 133. Evidence of right or title.

See also post ¶ 402.
Presumptions and evidence as to fraudulency against creditors, see Fraudulent Conveyances, V.
The title or right will generally depend on a sale or other transfer of title or on some other issue of fact which is elsewhere specifically treated. See for example, Chattel Mortgages; Sales; Mortgages; Fraudulent Conveyances; Fraud; Notice and Record of Title.
For the general law of evidence on questions of competency, see Evidence.

¶ 381. In an action of assumpsit on a bond given by a claimant of attached property where there was a sale of the stock and fixtures of a saloon, including the tax certificate, the mere fact that the attempted sale of the tax certificate was illegal, and that the conduct of the business was unlawful, would not warrant a jury, where undisputed evidence showed the transaction to be bona fide, in disregarding the undisputed testimony, and finding that the buyer was in fact carrying on the business for the seller.—Rogan v. Gustafson, 151 Mich. 508.

XII. JUDGMENT, SALE, AND DISPOSAL OF PROCEEDS.

§ 134. Judgment in general.

Provisions as to payment of proceeds of sale, see also post § 140.
Completion of lien on land as basis for judgment in rem, see ante ¶ 226.
Judgment as measure of liability on release bond, see post § 146.
Effect of discontinuance as to part of defendants on liability on bond, see post ¶ 415.
On justice's attachments, see Justices of the Peace, IV, C.
General law and practice as to judgments, see Judgments.
Dismissal for want of further prosecution after dissolution, see Discontinuance, Dismissal and Nonsuit.
Provisions as to judgment and execution, whether on personal service or appearance or on published service, see Jud. Act, Chap. XXVI, §§ 25-27; Comp. L. 1915 §§ 13052-13054.

¶ 382. The plaintiff is not limited in his recovery by the amount sworn to be due in the affidavit on which the attachment was issued, if, by the proof, a greater amount is shown to be due.—Pew v. Yoare, 12 Mich. 16.

¶ 383. Judgment rendered in an attachment suit for want of appearance and plea cannot exceed the sum sworn as due in the affidavit, with interest.—Rose v. Newaygo Circuit Judge, 74 Mich. 332.

§ 135. ——Operation and effect.

Priorities between judgments, see ante § 98.
Effect on pending dissolution proceedings, see ante ¶ 325.
Effect where service as to one joint defendant is lacking because of premature return, see also ante ¶ 252.
Effect of judgment for plaintiff to discharge bond, see post § 145.
Dissolution of attachment after judgment, see ante § 110.

¶ 384. Where there is no personal service a judgment in attachment binds the property only, and falls if the lien is not perfected or if the attachment is dissolved.—Davis Sewing Machine Co. v. Whitney, 61 Mich. 518; Churchill v. Goldsmith, 64 Mich. 250.

¶ 385. Judgment for the debt does not oust dissolution proceedings.—Gore v. Ray, 73 Mich. 385.

§ 136. ——Taking default and judgment thereon.

Time for default and judgment, see also ante ¶ 190.
General law of defaults, see Defaults.

¶ 386. Judgment based on attachment and publication is void if based on default entered under declaration filed before filing of proof of publication.—Steere v. Vanderberg, 67 Mich. 530; Nugent v. Nugent, 70 Mich. 52.

¶ 387. In attachment proceedings an omission to enter a default at the earliest practical time does not render the court without jurisdiction or make void the proceedings.—Goodspeed v. Smith, 161 Mich. 688.

¶ 388. In an attachment suit in which notice has been given by publication, and in which defendant has not appeared, a default entered without the filing of the affidavit of publication required by Laws 1891, Act No. 8, is premature, and judgment thereupon is void.—Savidge v. Ottawa Circuit Judge, 105 Mich. 257.

¶ 389. A judgment in an attachment suit where defendant is brought in by publication, based upon the entry of his default before the expiration of thirty days from the filing of proof of the publication of the statutory notice, is void.—Trowbridge v. Bullard, 81 Mich. 451.

(1 Mich. Dig. 85)

¶ 390. In attachment proceedings, where the record shows a judgment without a lawful default after filing a declaration, the judgment is void on the face of the record.—Goodspeed v. Smith, 161 Mich. 688.

§ 137. ——Setting aside judgment or default.

In general, see Defaults, VI; Judgments, V, VI.

¶ 391. Where the defendant is a nonresident and had no notice of the proceedings in season to make his defence, and has been guilty of no laches, the circuit court may, in the exercise of a sound discretion, set aside the judgment and permit him to plead, even though a term has elapsed.—Loree v. Reeves, 2 Mich. 133; Hurlburt v. Reed, 5 Mich. 30.

¶ 392. A judgment in an attachment suit cannot be set aside for irregularity, on the motion of a person to whom the property attached had been conveyed by the defendant, after service of the attachment, but who is a stranger to the record.—People ex rel. Hyde v. Calhoun Circuit Judges, 1 D. 417.

§ 138. Execution and sale.

Provisions in order for sale as to payment of proceeds, see post ¶ 397.
Continuation of lien until time for execution, see ante § 94.
Sale of perishables pending the action, see post § 139.
Effect of delaying execution to discharge lien, see ante §§ 94, 129.
Priority of execution levy, relation back to attachment on land, see ante ¶ 248.
Nature of rights before execution and sale under the judgment, see ante § 95.
General law of executions and procedure on executions, see Executions.
Sale of encumbered property, see Jud. Act, Chap. XXVI, § 34; Comp. L. 1915, § 13061.

¶ 393. The order for sale of the real property attached, under R. S. 1838, must have been directed to the sheriff in office, and not to his predecessor who served the writ.—Crane v. Hardy, 1 Mich. 56.

¶ 394. In order to make a levy upon and sale of an equitable interest available, proceedings must be taken within one year thereafter to determine the rights and equities of the judgment debtor in the premises.—Grover v. Fox, 36 Mich. 453.

§ 139. Sale of perishable property.

Sale of perishable property, see Jud. Act, Chap. XXVI, §§ 29-31; Comp. L. 1915, §§ 13056-13058.

¶ 395. Where a writ of attachment, returnable Sept. 11, was levied on growing corn, the circuit court properly refused on motion to make an order for the sale of the stalks after husking as perishable property, being without jurisdiction, when it appeared that no personal service had been made upon the nonresident defendant and there had been no general appearance on his behalf, that the sheriff's return was filed Oct. 9, and the first publication of notice required under Comp. L. 1897, § 10572, was made on Oct. 15.—McLaughlin v. Jackson Circuit Judge, 147 Mich. 379.

¶ 396. Lumber and shingles are not perishable property, within the meaning of that term as used in How. St., § 8011, which authorizes the sale, on the order of the court or judge thereof, of "perishable property" seized under a writ of attachment.—Mosher v. Bay Circuit Judge, 108 Mich. 579.

§ 140. Payment and disposal of proceeds.

¶ 397. Where one creditor only obtained judgment in a suit commenced by writ of attachment, it was not necessary that the order of sale of the property attached, authorized by R. S. 1838, p. 511, § 17, should require the money arising from the sale to be paid into court; but if it required the same to be paid to the plaintiff, this would not vitiate either the order or the proceedings under it.—People ex rel. Hyde v. Calhoun Circuit Judges, 1 D. 417.

§ 141. Return of sale, and further proceedings.

Return on executions in general, see Executions, IX.

¶ 398. Where the sheriff's return of sale does not show all the steps required by law to make the sale valid, the circuit court may, upon application founded upon affidavit, grant an amendment of the return.—People ex rel. Hyde v. Calhoun Circuit Judges, 1 D. 417.

XIII. LIABILITY FOR WRONGFUL OR ERRONEOUS ATTACHMENT.

§ 142. In general.

Curative amendments after action brought for wrongful attachment, see ante §§ 103, 104.

Replevin by chattel mortgagee superior to attachment, see ante ¶ 378.

Liability on the bond, see post XIV.

Liability to third persons claiming by superior right or title and not in privity to the attachment proceeding, see ante XI.

Wrongful attachment as Conversion, Trespass, Malicious Prosecution, see those topics.

Liability of sheriffs and other levying officers, and of the plaintiff to the writ for the acts of the sheriff, see Sheriffs, IV.

Liability for attachment begun by attorney, see Attorneys, ¶ 62.

Measure and proof of damages in general, see Damages.

Impropriety of replevin for attached goods, see Replevin, I.

Right of partner to sue, see also Partnership, VI, A.

Release of one as releasing all persons liable, see Releases, III.

§ 143. Actions and procedure.

Most questions of practice are ruled by the general law without distinctive or peculiar application. See generally topics treating of the specific actions or of general topics like Pleading; Trial: Verdicts; Instructions.

Actions in tort for wrongful attachment, see generally Conversion; Trespass; Ejectment; Malicious Prosecution.

Waiver of tort and suit in assumpsit, see Assumpsit, I.

Damages generally, see Damages.

Instructions concerning damages for improper levy, see Damages XII.

Actions by or against sheriffs and constables, see Sheriffs, VI.

Question of fact on justification by plea of fraudulent conveyance, see Fraudulent Conveyances, V.

Time of action as limiting issues in action for tortious sale or levy, see Conversion. II.

Damage questions, see Damages.

¶ 399. In an action to recover the value of property wrongfully attached by defendants the question whether the property was exempt becomes immaterial where the attachment proceedings prove to be void.—Mears v. Cornwall, 73 Mich. 78.

¶ 400. Where an attachment has been dissolved before a hearing of the motion to dissolve it, and the right of defendant to make counterclaim for damages resulting from the levying of the writ has been agreed upon by the parties, the only question is as to the amount of defendant's damages, and it is wholly immaterial whether the attachment was properly sued out or whether the plaintiff had cause for suing out the writ.—Brown v. Speigel, 167 Mich. 645.

§ 144. Presumptions and evidence.

Conclusiveness of return, see ante § 75.

Presumptions and evidence as to existence of grounds on motion to dissolve, see ante §§ 122-124.

In action against sheriff, see also Sheriffs, VI.

Time when judgment becomes admissible as evidence of facts adjudged, see Evidence, VIII, C; Former Adjudication, II, A.

¶ 401. In an action for damages from a wrongful attachment, where malice is neither alleged nor shown, it is assumed that there was no wrong in issuing the writ. —Blanchard v. Brown, 42 Mich. 46.

¶ 402. A vendee suing as owner of goods attached by the vendor's creditors, who attack the sale as fraudulent, has the burden of showing that at the time of the attachment the sale or transfer of the goods had been completed and the title had passed.—Buckingham v. Tyler, 74 Mich. 101.

¶ 403. In a suit for damages from a wrongful attachment, the affidavit for attachment and the other proceedings are properly put in evidence by the defendant.—Blanchard v. Brown, 42 Mich. 46.

¶ 404. The fact that an attachment is issued before the debt on which it is founded is conclusively established is not a sufficient reason for holding that the attaching creditor cannot show that the attached property is in fact the debtor's, when sued for it by a third person, who claims it by a title which is fraudulent as against the attaching creditor.—Trowbridge v. Bullard, 81 Mich. 451.

¶ 405. In an action by a vendee against a sheriff for the value of goods attached at the suit of the vendor's creditors upon valid writs, proof of the tender of the goods to the plaintiff by the sheriff, and affidavits for continuance of the suit made by him and his attorneys, are inadmissible in support of the plaintiff's theory that the attaching creditors and the sheriff knew that the sale was an honest one, and that the attachments were levied for vexatious purposes, there being no evidence in the case tending to show that the sheriff was actuated by any malice in the transaction, but, on the contrary, it appearing that he was undertaking simply to perform his duty as he understood it.—Buckingham v. Tyler, 74 Mich. 101.

XIV. LIABILITY ON BOND OR SECURITY.

§ 145. On attachment bond.

On release bond, see post §§ 146-148.
Common law liability not on bond, see ante XIII.
General law of bonds, see Bonds.

¶ 406. If the plaintiff recovers judgment, even though the attachment is dissolved, the bond is satisfied.—Hahn v. Seifert, 64 Mich. 647.

¶ 407. The bond covers a reasonable counsel fee for defendant on obtaining a dissolution of the attachment; and in a suit on the bond it is proper to leave the jury, in view of all the evidence, to estimate the injury and loss to the attachment defendant during the time that plaintiff was in possession of his place of business.—Swift v. Plessner, 39 Mich. 178.

¶ 408. The express obligation of sureties on an attachment bond is not enlarged by showing that the defendant in the attachment suit was an individual doing business in a firm name, and that he suffered the damages caused by the attachment.—Ermeling v. Bargh, 121 Mich. 167.

§ 146. On release bond.

On attachment bond, see ante § 145.
On release bond, see Jud. Act, Chap. XXVI, § 18; Comp. L. 1915, § 13045.

¶ 409. Where the bond, for release of attachment, is conditioned to pay the judgment, or where it is to produce the property, or in default thereof to pay the judgment, plaintiff, upon its breach, may recover the full amount of the judgment irrespective of the value of the property attached.—Phansteihl v. Vanderhoof, 22 Mich. 296; Dorr v. Clark, 7 Mich. 310; Goebel v. Stevenson, 35 Mich. 172.

§ 147. ——Defenses.

¶ 410. It is no defence to a suit on a release bond in attachment on which property has been delivered by the sheriff to the obligors that the property did not belong to the defendant in the attachment, or that it was encumbered. Parties bonding property under the statute must take it on the statutory conditions.—Dorr v. Clark, 7 Mich. 310.

¶ 411. Sureties on the defendant's bond in attachment cannot, when sued on it, object to the sufficiency of the affidavit for the writ, when they have already expressly stipulated that the attachment suit was begun in due form of law, and where the defendant in attachment himself, though personally served, did not question its sufficiency and let judgment go against him.—Goebel v. Stevenson, 35 Mich. 172.

¶ 412. Whether the sureties, having recognized the sheriff's levy and possession by a recital of such in the forthcoming bond, can dispute such recitals, quære.—Patch v. Wessels, 46 Mich. 249.

¶ 413. That cosurety was not a freeholder, held no defense to suit on bond.—Gibbs v. Johnson, 63 Mich. 671.

§ 148. ——Discharge of sureties.

¶ 414. The bond given by the sureties must be considered as referring to the suit as then constituted. A subsequent discontinuance by the plaintiff as to a part of the defendants may so vary or affect the sureties' obligation as to release them.—Andre v. Fitzhugh, 18 Mich. 93.

¶ 415. Attachment suit against three. The usual bond was given under the statute to procure the release of the property attached. Afterwards the plaintiff discontinued as against two defendants. Held, that the sureties in the bond were thereby released.—Andre v. Fitzhugh, 18 Mich. 93.

¶ 416. The requirement of two freeholders as sureties on a bond for release is for the sheriff's protection only, and does not affect the liability of either surety or of the principal.—Gibbs v. Johnson, 63 Mich. 671.

§ 149. Actions on bonds.

Defenses to liability, see ante §§ 145, 147, 148.

Right to sue on release bond, see also ante ¶ 163.

Transfer of release bond to plaintiff for suit, see ante § 67.

Evidence of title to the goods, see also ante ¶ 381.

General law of practice in actions on bonds, see Bonds; and see specific topics, e. g., Pleading; Evidence; Instructions; Trials; etc.

When execution is prerequisite to suit on bond, see Jud. Act, Chap. XXVI, § 28; Comp. L. 1915, § 13055.

¶ 417. Comp. L. 1857, § 4159, as amended by L. 1863, p. 102 (How. St., § 7344), permitting the assignee of a bond, note or other chose in action to sue in his own name, was not meant to affect the special provisions on bonds for the release of property under attachment.—Forrest v. O'Donnell, 42 Mich. 556.

¶ 418. A plaintiff in an action on an attachment bond is not estopped from showing that he was doing business under a certain name to which the bond ran, that he was the party named in the attachment suit, and that he was damaged individually by such suit, by the fact that the plaintiff in the attachment suit styled the attachment defendant as a foreign corporation in the affidavit and other proceedings in that suit.—Ermeling v. Bargh, 121 Mich. 167.

¶ 419. In assumpsit on a bond given by the claimant of attached property and his surety, where the evidence was clear and undisputed that the transaction by which claimant got possession of the debtor's property was bona fide, and that there was no scheme to defraud creditors of the debtor, the court erred in submitting the question of fraud to the jury.—Rogan v. Gustafson, 151 Mich. 508.

ATTEMPTS to ATTESTATION.

Cross-References.

Attempts at Crime—
See Crimes; Indictment.
Attendance at Court—
Of witnesses, see Witnesses, I.
Attendants on Passengers—
Liability of carriers for injuries to, see Carriers, IV.
Attestation—
Of instruments, see Acknowledgments; Execution of Instruments; Wills, IV, B.
Of documents to make them admissible, see Evidence, VIII; Indictment, VIII.

ATTORNEYS AND COUNSELORS.

TREATS of the nature and tenure of the office of attorney or counselor at law; the admission to and disbarment from such office; its duties, privileges, rights, and liabilities towards the public and the client; and the offices of prosecuting and other public attorneys and of the attorney general.

Analysis.

I. The Vocation and Office.

§ 1. In general, nature of office.
§ 2. Delegation of office; lending name.
§ 3. Admission and license.

§ 4. Suspension and disbarment.
§ 5. Proceedings to disbar or suspend.
§ 6. ——Pleading and evidence.
§ 7. ——Hearing, decision and judgment.
§ 8. Effect of disbarment or suspension.

II. The Relation and its Rights and Duties.

A. NATURE, CREATION, AND TERMINATION OR SUBSTITUTION.

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§ 10. Parties to relationship.
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C. AUTHORITY FOR AND REPRESENTATION OF CLIENT.

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§ 31. In general; good faith.
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E. COMPENSATION, LIEN AND ACCOUNTING.

§ 34. Construction, validity and effect of contracts.
§ 35. ——Assumption of costs and expenses.
§ 36. ——Contingent fee contracts.
§ 37. Compensation for reasonable value.
§ 38. ——Unsuccessful or nonbeneficial service.
§ 39. ——Implication of promise.
§ 40. Right to indemnification and reimbursement.
§ 41. Actions for compensation or reimbursement.
§ 42. Burden of proof and evidence.
§ 43. ——As to value of services.

§ 44. ——Questions of law and fact.
§ 45. ——Instructions.
§ 46. Lien of attorney or counsel.
§ 47. ——On judgment or proceeds thereof.
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§ 49. Protection of lien by court.
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§ 51. Waiver or loss of lien.
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III. Attorney General and Other Public Attorneys.

§ 61. Attorney general and his functions.
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I. THE VOCATION AND OFFICE.

§ 1. In general, nature of office.

Creation and termination of relation with client, see post II, A.
Authority to bind client, see post II, C.
Power of attorney to bind associate, see also post ¶ 51.
Law partnerships and mutual rights of partners, see Partnership.
As friends of the court, see Amicus Curiae.
Attorneys in fact, see Agency.
Disability of judge or justice to be attorney, see Judges, II; Justices of the Peace, II.
Relation of attorney to judge as ground for rehearing, see Appeal and Error, § 543.
Judicial notice of identity of person with attorney of same name, see Appeal and Error, ¶ 1442.
Competency as notary public to take affidavits, see Affidavits, § 2; Notaries Public.
Use of assumed or fictitious business name, necessity of filing same, and right to sue or defend in such name, see Trade Marks and Trade Names.
Termination of membership in law library association, see Associations, ¶ 19.

¶ 1. Attorneys are officers of the court and are subject to its summary jurisdiction.—Potter v. Hutchison Mfg. Co., 87 Mich. 59.

§ 2. Delegation of office; lending name.

Estoppel to question agency of clerk, see Agency, ¶ 101.

¶ 2. An attorney cannot allow his name to be used by an unlicensed person for the purpose of giving notices which an attorney only may give.—McClintock v. Laing, 22 Mich. 212.

§ 3. Admission and license.

Effect of disbarment, see post § 8.
Manner of authorizing layman to represent another in court, see also post ¶ 60.
As qualification for prosecuting attorney, see post § 62.
Lending name to unlicensed person, see ante § 2.
General provisions as to admission or right to practice, see Jud. Act, Chap. I, §§ 48-57; Comp. L. 1915, §§ 12053-12062.

¶ 3. A party cannot appear in a court of record by an agent who is not an attorney duly licensed to practice.—Cobb v. Grand Rapids Superior Court Judge, 43 Mich. 289.

¶ 4. Section 1122, 1 Comp. L. 1897, authorizes the State Board of Law Examiners to "make such rules and regulations relative to such examination as to them may seem proper." This law has necessarily left a large discretion in the board as to the rules and regulations it would make to govern it in these examinations and the details pertaining thereto, and the exercise of this discretion will in no case be reviewed by this court unless it should clearly appear that an abuse has occurred.—Mitchell v. State Board Law Examiners, 155 Mich. 452.

¶ 5. Under Comp. L. 1807, §§ 1119-1125, giving the board of examiners the power to prescribe the general educational qualifications necessary for admission to the bar, rules prescribing that graduates from colleges or universities, normal or high schools, or other reputable institutions, or those holding teachers' certificates recently issued by school examiners, shall be deemed qualified, and providing in the absence of such evidence of fitness for an examination on the subjects usually covered in said institutions, are reasonable and valid.—In re Alexander, 167 Mich. 495.

¶ 6. Section 1123, 1 Comp. L. 1897, providing that a candidate for admission to the bar shall be required to submit to an examination, and shall be required to answer a minimum of seventy per cent. of the questions given, to entitle him to recommendation by the State Board of Law Examiners, is not violated by Rule 4 of the Board, which requires that the candidate answer correctly at least seventy per cent. of all questions upon each subject.—Mitchell v. State Board of Law Examiners, 155 Mich. 452.

¶ 7. Upon an application to strike respondent's name from the roll of attorneys, it appeared that respondent did not furnish the required evidence of educational qualifications; that he was permitted to take the bar examination upon his assurance that such proof would be later furnished to the board of examiners; that he successfully passed said examination and was permitted by the Supreme Court to take the oath and sign the roll of attorneys; that his certificate of admission was withheld until he should comply with said educational requirements; and that respondent failed thereafter to furnish the certificate of said requirements required by the rules of the board of examiners. Held, he was never legally admitted to practice and his name should be stricken from the roll.—In re Alexander, 167 Mich. 495.

§ 4. Suspension and disbarment.

Striking name from roll when improperly admitted, see ante § 3.
Evidence of grounds, see also post § 6.
General provisions as to suspension or disbarment, see Jud. Act, Chap. I, §§ 58-62; Comp. L. 1915, §§ 12063-12067.

¶ 8. The court may remove or suspend an attorney for other causes than those mentioned in the statute, which is not to be construed as restrictive of the general powers of the court over its officers.—In re Mills, 1 Mich. 392.

¶ 9. Conviction of such crimes as the law regards as infamous is sufficient ground for disbarring an attorney.—In re McCarthy, 42 Mich. 71.

¶ 10. An attorney may be disbarred for fraud and dishonesty in acting as executor of an estate, and it is not essential that he be convicted of some criminal conduct or of some professional misconduct.—In re Radford, 168 Mich. 474.

¶ 11. A brief and affidavit, filed by an attorney in support of a motion that another judge try a perjury case against him, which charges unjust prejudice, unfair rulings, that one of the witnesses was bribed, and that the judge was corrupt and a party to a conspiracy against the attorney, which charges are entirely unsupported by evidence, justifies disbarment of the attorney. While an attorney ought not to be disbarred unless the duty of the court is clear, the privilege of attorneys does not authorize such charges without adequate basis, and the conduct of the attorney if overlooked would tend to destroy confidence in the impartial administration of justice. In addition the charges show the guilty attorney to be without the moral sense to appreciate his duties to the court and the public.—In re Mains, 121 Mich. 603.

¶ 12. Disbarment because of improper and inexcusable conduct of an attorney in charging a judge with corruption and conspiracy, cannot be avoided by a plea for mercy because of the plight of the wife and children of the attorney, as such wife and children should be an incentive to an honorable career, and not a shield to protect the attorney from the natural consequences of his own acts.—In re Mains, 121 Mich. 603.

§ 5. Proceedings to disbar or suspend.

Nunc pro tunc entry of judgment of disbarment, see Judgments, III.
Right or propriety of jury trial, see Jury, I.

¶ 13. A disbarment proceeding is not simply for the purpose of punishing the offend-

ing attorney, but to aid in securing a proper administration of the law.—In re Mains, 121 Mich. 608.

¶ 14. Like contempt proceedings, proceedings for disbarment are the exercise on the part of a court of its inherent right and power to preserve the orderly administration of justice.—In re Radford, 159 Mich. 91.

¶ 15. Proceedings to disbar an attorney, though not strictly a criminal prosecution, have that nature, and the charges preferred should be clearly supported by the evidence to warrant a conviction.—In re Baluss, 28 Mich. 507.

¶ 16. In disbarment proceedings the Supreme Court will not assume original jurisdiction or under its general supervisory power over the lower courts exercise exclusive jurisdiction of a proceeding begun below, but will only review the case after its final disposition in the lower court.—In re Radford, 159 Mich. 91.

§ 6. ——Pleading and evidence.

Degree of proof, see also ante ¶ 15.

¶ 17. When an attorney is tried for any other misconduct than contempt there must be specific charges and an opportunity for full defence, so that, if necessary, a resort to an appellate court may be had to determine the legal sufficiency of the accusation. —Dickinson v. Dustin, 21 Mich. 561.

¶ 18. A charge made against an attorney for the purpose of removing him, that he is of notoriously bad character, not to be believed under oath, and unworthy to practice as an attorney, is too general. Specific acts should be charged, so as to give to the respondent an opportunity of answering them. —In re Mills, 1 Mich. 392.

¶ 19. The charge that the reputation of an attorney for truth and veracity is so notoriously bad that he is not to be believed under oath contains good cause for removal, and is not too general.—In re Mills, 1 Mich. 392.

¶ 20. Charges that an attorney at law, under circumstances showing that he was acting as attorney for one who was suspected of being instrumental in causing an abortion, was present during the last hours of the girl suffering from the effects thereof, for the purpose of preventing her from making an ante mortem statement concerning the affair, that he directed who should care for her, and forbade that any person should be with her alone, and directed her attendant not to permit her to make any statement concerning herself, her condition, or the cause thereof, and which state, as a conclusion from the facts alleged that respondent "was guilty of unlawful and unprofessional conduct in that he attempted to stifle evidence of the commission of a crime, by preventing an ante mortem statement of said girl," are sufficiently specific, and, if sustained, constitute a legal ground for disbarment.—In re Shepard, 109 Mich. 631.

¶ 21. A petition for disbarment alleged that respondent attorney in his capacity as executor wilfully and knowingly failed to file his inventory for accounts though ordered to do so by the court; failed to render accounts although receiving large amounts of real and personal property, and continued in this neglect for eight years; violated and disobeyed the specific order of the court requiring him to file an inventory for accounts of his receipts and disbursements, after failing to do so for a period of eight years; failed to pay over money admitted to be due to the devisees and legatees when specifically ordered so to do; sought to deceive and mislead the court and cheat the persons interested in the estate by crediting himself as executor with worthless investments which he falsely claimed to be made out of the funds of the estate; misappropriated and converted to his own use large sums of money belonging to the estate; received large sums of money belonging to the estate, which he wilfully refused to account for; charged the estate with large sums of money as disbursements which he knew he did not lawfully disburse; and continued to appropriate to himself the assets of the estate and wilfully continued to disobey an order to turn over same. Held, said petition was sufficiently definite and sufficiently alleged a cause for disbarment to require the overruling of a demurrer thereto. under sections 1128 to 1130 of the disbarment statute.—In re Radford, 168 Mich. 474.

¶ 22. The court may, in its discretion, entertain proceedings to disbar an attorney upon charges verified on information and belief only.—In re Shepard, 109 Mich. 631.

¶ 23. To sustain disbarment, the charges must be proved clearly.—In re Clink, 117 Mich. 619.

¶ 24. Where a lawyer who was a defendant in an equity suit was found to have committed a fraud and a gross abuse of confidence in the premises, and was cited to show cause why he should not be disbarred therefor, a showing of the bad character of the complainant in equity was not very material; nor was proof of the good character of a witness who, in testifying for the defence had contradicted complainant as to the manner of the fraud, but whose testimony was not conclusive as to the main

fact. Complainant's character could only affect the strength of his proof.—In re Wool, 36 Mich. 299.

¶ 25. Where disbarment proceedings are heard by a certain judge, who invites two other circuit judges to sit with him and hear and decide the case, it is not necessary that testimony taken in open court before one of said judges should be examined and signed by the witness giving same.—In re Radford, 168 Mich. 474.

¶ 26. In a disbarment proceeding the evidence indicated that defendant lawyer acting as executor received some $30,000 from the estate in 1900 and made payments to the widow and daughter from 1900 to 1908; that during this time no inventory or account was filed in probate court; that respondent failed to file said inventory or account, though being expressly ordered to do so by the court and though an order for his arrest was issued on such ground; that in 1908 when his accounts were under investigation he failed to comply with the order of the court requiring him to give bond; that he admitted an indebtedness of $5,000 to the estate; that he made investments in his own name in personal and real estate with nothing to indicate the trust; that he kept money of the estate in his own bank account and drew therefrom for his own personal uses; and that he kept no accounts showing his investments. Held, the decree disbarring respondent was sustained by the evidence.—In re Radford, 168 Mich. 474.

§ 7. ——Hearing, decision and judgment.

Review by certiorari, see Certiorari.

¶ 27. A bar association is not a recognized body, as such, in proceedings to disbar an attorney, and cannot control the prosecution; the proceeding is in the interest of public justice, and the Supreme Court will examine into and act on it as in other cases involving the position of its attorneys.—In re McCarthy, 42 Mich. 71.

¶ 28. In disbarment proceedings the Supreme Court will examine the testimony taken, even though counsel for petitioners gives his opinion that the charges have not been sustained, respondent being entitled to an authoritative determination of the question.—In re Chandler, 105 Mich. 235.

¶ 29. A finding that "respondent has been, and is, guilty of the several acts of misconduct in stifling evidence, with which he is charged," is sufficiently conformable to charges that he "attempted" to stifle evidence by preventing the making of an ante mortem statement.—In re Shepard, 109 Mich. 631.

¶ 30. Where a suit in equity against an attorney and solicitor, charging him with fraud under circumstances implicating him in a gross abuse of confidence, has been before the court on the facts, and the court has decreed against him, an order to show cause why he should not be struck from the rolls may properly be based on the decree, or be incorporated in the decree itself. And while respondent has been allowed to make a showing by affidavit, there is no occasion for a reference to take further evidence, unless on such a showing as would justify a rehearing.—In re Wool, 36 Mich. 299.

§ 8. Effect of disbarment or suspension.

¶ 31. Disbarred attorneys cannot appear as attorneys in any court of record nor represent any person in court as attorney, agent or otherwise.—Cobb v. Grand Rapids Superior Court Judge, 43 Mich. 289.

II. THE RELATION AND ITS RIGHTS AND DUTIES.

A. NATURE, CREATION, AND TERMINATION OR SUBSTITUTION.

§ 9. Nature and creation of relationship.

Necessity of admission and license, and effect of disbarment, see ante I.

Representation of conflicting interests, see post § 14.

Presumptions and proof of retainer and authority, see post § 19.

Creation of agency in general, see Agency, I, A.

Contract right to compensation and liability on contract, see post II, E, F.

Lien of attorney described as "counsel," see post ¶¶ 176, 177.

Disqualification of judge, see Judges, II.

Award by attorney as arbitrator, see Arbitration, ¶ 44.

¶ 32. Employment of counsel does not differ in its incidents or in the rules which govern it from the employment of an agent in any other capacity or business.—City of Detroit v. Whittemore, 27 Mich. 281.

§ 10. Parties to relationship.

Retainer of one as retainer of all members of firm, see also post ¶ 52.

Authority of associate attorneys, see post § 18.

Parties to contract in general, attorney or client or individual or firm as party, see Contracts, II.

Right of city officer to take employment as its attorney, see Municipal Corporations, XV.

¶ 33. A contract made with an attorney by partners and trustees doing business un-

der a certain company name, by which contract the attorney is to prosecute and defend all suits for and against the company, does not cover a suit between the beneficiaries of the trust held by said company to settle their respective rights and make him their attorney.—McCutcheon v. Loud, 71 Mich. 433.

¶ 34. A married woman may make herself chargeable for the services of an attorney employed by her in a divorce suit.—McCurdy v. Dillon, 135 Mich. 678.

§ 11. Termination; effect of death.

Authority of attorney after judgment, see post § 23.
Of agencies generally, see Agency, II, B.

¶ 35. An attorney's authority is revoked by his client's death.—Doty v. Dexter, 61 Mich. 348.

¶ 36. The death of a client revokes the agency of his attorney.—Courser v. Jackson, 159 Mich. 119.

¶ 37. The relation of attorney and client does not terminate in case of the client's death until the attorney has accounted to proper persons and has turned over property and effects received from client.—Beedle v. Crane, 91 Mich. 429.

§ 12. Withdrawal or substitution.

Repudiation of change made by attorneys without authority, see post ¶ 85.
Right to compensation on justifiable abandonment of case, see post § 34, ¶¶ 114, 115.
Protection of lien of withdrawing attorney, see post § 49.
Notice to appoint substitute, see Jud. Act. Chap. I, § 63; Comp. L. 1915, § 12068.

¶ 38. Any conduct on the part of a client during the progress of litigation which tends to degrade or humiliate the attorney, furnishes sufficient cause to him for abandoning the case.—Genrow v. Flynn, 166 Mich. 564.

¶ 39. An attorney can be disconnected from a case only by consent of the parties or the court, or by regular proceedings for substituting another.—People ex rel. Coon v. Plymouth Plank Road Co., 32 Mich. 248.

¶ 40. Notice of the substitution of an attorney must be duly served upon the opposite attorney before any other proceedings can be taken by the attorney who has been substituted.—Comfort v. Stockbridge, 38 Mich. 342.

¶ 41. Attorneys cannot interfere in the conduct of a cause upon a claim of substitution before notice thereof has been properly served upon the attorneys for the opposite party.—Kelley v. Alcona Circuit Judge, 79 Mich. 392.

¶ 42. An attorney of record cannot complain of an order of substitution that expressly reserves to him any lien he may have for services rendered.—Jones v. Muskegon Circuit Judge, 95 Mich. 289.

¶ 43. A solicitor may not complain of a substitution of solicitors if the order of substitution preserves his lien.—Wipfler v. Warren, 163 Mich. 189.

¶ 44. Comp. L. 1871, § 5630, How. St., § 7181, which provides that, when an attorney shall cease to act as such, his client shall be notified to appoint another at least thirty days before any farther proceedings against him, does not apply where a lawyer continuing in practice refuses to go on with the particular case. It is meant to meet the emergency of the lawyer's ceasing wholly to practice in the court.—People ex rel. Coon v. Plymouth Plank Road Co., 32 Mich. 248.

B. FUNCTIONS, DUTIES AND RIGHTS IN GENERAL.

§ 13. Conduct of client's suit or affairs; appearances.

Withdrawal and substitution of attorneys, see ante § 12.
Scope of authority to represent client, see post §§ 20-26.
Scope of authority to conduct litigation, see post § 22.
Control of case to prevent dismissal in violation of lien, see post § 52.
Duty and skill required, see also post II, F.
The form and sufficiency of pleadings and practice by attorneys in the conduct of litigation are incidental to the rules and modes of practice, and will be treated therewith. See Appearance; Argument of Counsel; Indictment and Prosecution, IX et seq.; Pleading; Trial.
Presumption in favor of judgment that appearance was authorized and regular, see Appeal and Error, XII, C; Judgments, VII.
Entry of appearance on appeal or error, see Appeal and Error, § 130.
Solicitor as person to notice appeal cause for hearing, see Appeal and Error, § 133, ¶ 592.
Service of notice of appeal on party when personally assisting solicitor in the cause, see Appeal and Error, ¶ 651.
Service of appellate motions on counsel rather than on party, see Appeal and Error, § 167.

Unprofessional language in appellate briefs, see Appeal and Error, § 237.
Making opening address and arguing cause to jury, see generally Argument of Counsel.
Appearance by attorney, see Appearance, §§ 3, 4.
Indorsement of name on attachment, see Attachment § 43.
Delivery of writ and return to attorney to be filed with clerk, see Attachment, § 76, ¶ 188.

¶ 45. The duty of a lawyer to his client does not require him to maintain positions which did not accord with his own notions of law and justice, simply because they tended to the client's advantage.—Sprague v. Moore, 136 Mich. 426.

§ 14. Representation of diverse parties or interests.

Authority as affected by attorney's personal interest, see post § 15.
Dealings with client or with subject of attorneyship, see post II, D.
Making contract with other party to pay commission to attorney selling property for client, see post ¶ 97.
Liability to client for favoring other side in settlement, see post § 59.
Disqualification of prosecuting attorney or assistants by other retainers or interests, see post §§ 63, 65.

¶ 46. The same attorney can act in proceedings to levy and to dissolve attachments in distinct suits by different creditors against the same debtor.—Schall v. Bly, 43 Mich. 401.

§ 15. Status, rights and disabilities.

Rights of third persons depending on scope of attorney's authority and effect of acts to bind client, see post II, C.
Lien of attorney on cause of action, moneys or judgment, see post §§ 46-56.
Liability of principals to third persons for unauthorized acts, see Agency, II, B.
Attorney as party to tort, see generally topics treating of wrongs, e. g., Conversion; Trespass; Assault and Battery; Executions, XII.
Liability of attorney considered as agent, see also Agency.
Advice of counsel as justification or mitigation of tort or crime, see Assault and Battery; Conversion; False Imprisonment; Homicide; Malicious Prosecution; Larceny.
Advice of counsel as justification for assault, see Assault and Battery, ¶ 49.
Implied license to enter office on client's business, assault on attorney, see Assault and Battery, ¶ 61.
Whether contract was that of attorney or client as question of fact concluded on error, see Appeal and Error, XII, E.
Advice of counsel as excuse for contempt of order of court, see Contempt, II.
Advice of counsel as excusing refusal to discharge mortgage in action for penalty, see Mortgages, VIII.
Right to claim good faith and want of notice in buying title on advice of counsel, see Notice and Record of Title, I, C.
Disability to go bail or security in criminal cases, or to be attorney in case previously tried before himself as judge, or to administer oath in client's cause, see Jud. Act, Chap. I, §§ 75-77; Comp. L. 1915, §§ 12080-12082.
Law partnerships, see Partnership.

¶ 47. An attorney-at-law stands on the same footing with other persons in dealing with those who are not his clients and have not been within such a period as might raise a presumption that he is dealt with as a professional adviser.—Taylor v. Boardman, 24 Mich. 287.

§ 16. Privilege from arrest, service or testifying.

Privilege of communications made to attorney, see Witnesses, V, A.

¶ 47a. The attorney for an attachment creditor, both of whom are non-residents of the county in which the action is pending, is not privileged from service of citation in interlocutory proceedings to dissolve the writ, while in the county for the purpose of trying the principal suit.—Cleland v. Clark, 111 Mich. 336.

C. AUTHORITY FOR AND REPRESENTATION OF CLIENT.

§ 17. Authorization and connection with case.

See also post ¶ 60.
Creation of attorneyship, termination and withdrawal, see ante II, A.
Ratification and adoption, see post § 27.
Mode of objecting for want of authority, see post § 30.

¶ 48. As a general rule the authority of a complainant's solicitor to represent his alleged client cannot be questioned at the trial, but where the facts raising the question were not learned sooner it was then properly allowed.—Dehn v. Dehn, 170 Mich. 407.

¶ 49. The court in which a suit is begun is the proper tribunal to pass upon the question of the authority of the counsel to represent an alleged client.—Dehn v. Dehn, 170 Mich. 407.

¶ 50. A notice may be disregarded in chancery when it is not signed by the so-

licitor for the opposite party and does not come from his office and by virtue thereof. —McClintock v. Laing, 22 Mich. 212.

§ 18. ——Associate counsel or joint attorneys.

Assistants and associates on prosecution of crime, see post §§ 64-66.

¶ 51. Where there are two or more attorneys in a cause the agreement of one binds both.—Pantlind v. Osceola Circuit Judge, not reported; cited in People v. Bussey, 80 Mich. 504.

¶ 52. A client is entitled to the personal services of his attorney upon the argument. But the retainer of one member of a firm is a retainer of all, and unless otherwise stipulated the cause may be argued and conducted by any one of them. And if a client knowingly permits his case to be argued by a person in the service of his attorneys, and under their direction, he is presumed to have consented thereto.—Eggleston v. Boardman, 37 Mich. 14.

§ 19. ——Presumption and proof.

See also ante ¶ 52.

Of assistant to prosecutor, see post § 65, ¶ 285.

Evidence of ratification, see post § 27.

Presumptions that appearance was authorized, see Appeal and Error, XII, C, § 363; Appearance, § 4; Judgments, VII (on collateral attack).

Proof of authority before justice of the peace, see Justices of the Peace IV, B.

¶ 53. The court will not require attorneys to produce their authority to prosecute a writ of error on behalf of one of the plaintiffs, where there is no showing that they are not duly authorized and on the contrary it appears that the attorneys were employed by the other plaintiff to take charge of the case generally, and that the one so employing them was, in fact, the party responsible in the case and bound to protect the other from liability.—O'Flynn v. Eagle, 7 Mich. 306.

¶ 54. The practice of giving or filing warrants of attorney, authorizing the prosecution of a suit, has never prevailed in this state, and a judgment will not be reversed for the want of one, even where the plaintiff below was a corporation.—Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457.

¶¶ 55, 56. A client is presumed to authorize and sanction such action as his attorney, in his superior knowledge of the law, may decide to be legal, proper and necessary in prosecuting the former's demand, and whatever adverse proceedings the attorney may take are to be considered, so far as they affect the defendant, as approved in advance by the client, and therefore as the client's act, even though they prove unwarranted by law. But a plaintiff can never be held to intend a trespass to third persons.—Foster v. Wiley, 27 Mich. 244.

¶ 57. Where the testimony of complainant's solicitor in a suit to settle property rights indicates that he was consulted by complainant and the latter wished a suit commenced to preserve his rights, the discretion of the trial court is not abused in ruling that the solicitor was authorized to prosecute in behalf of complainant a bill in equity to quiet title.—Dehn v. Dehn, 170 Mich. 407.

¶¶ 58, 59. A circuit judge is not justified in refusing to sign a finding of facts and to settle and sign a case at the instance of a garnishee bank, by the fact that the attorney who appeared and objected to the rendition of any judgment against the garnishee and who requested the findings of facts and the settling and signing of a case, was the attorney who had appeared for the defendant in the primary case, and was not the regular attorney of the garnishee bank.—Cadillac State Bank v. Wexford Circuit Judge, 139 Mich. 126.

§ 20. Scope of authority in general.

In conduct of litigation, see post §§ 22, 23.

In making collections and settlements, see post § 24.

Making indorsement on check received in payment to order of client, see post ¶ 73.

Notice outside of employment and scope, see post § 25.

¶ 60. An attorney under mere general retainer cannot bind his client to any particular action by giving an unauthorized consent thereto; and a layman, acting as attorney, cannot give consent at all to any action binding his principal unless he is specifically and formally empowered for the very purpose, and his authority is produced and proved in court.—Durfee v. Abbott, 50 Mich. 278.

¶ 61. Retainer of a solicitor is not presumed to cover proceedings taken subsequent to the decree and for its enforcement.—Ransom v. Sutherland, 46 Mich. 489.

¶ 62. A general authority to commence suits will warrant an attorney in attaching property, and will render the client responsible for damages.—Brown v. Spiegel, 156 Mich. 138.

¶ 63. The service of notice containing names of laborers and sub-contractors, required by Comp. L. 1897, § 10713, made by

an agent who received his authority, not from the contractor but from his attorney, who drafted the notice, was sufficient as the action of the attorney in directing the service was within the scope of his authority. —Cady v. Fair Plain Literary Ass'n, 135 Mich. 295.

§ 21. ——Effect of personal interest.

¶ 63a. A general retainer does not cover matters in which the attorney has a personal interest opposed to his client's.—Gott v. Brigham, 41 Mich. 227.

§ 22. Conduct of litigation.

General function to conduct client's affairs, see ante § 13.
Scope and extent of authority before justice of the peace, see Justices of the Peace, IV, B.
Extension of time for appeal lost through neglect of counsel, see Appeal and Error, § 75.
Signature of appeal bond by attorney, see Appeal and Error, § 82, ¶ 372.
Neglect of attorney as excuse for delay in filing return to error, see Appeal and Error, § 129, ¶ 576.

¶ 64. An attorney for a mortgage in foreclosure proceedings who bids in the land involved at a tax sale, is presumed to act in the interest of his client.—Boardman v. Boozewinkel, 121 Mich. 320.

§ 23. ——Matters subsequent to judgment.

See also ante ¶ 61.

¶ 65. An attorney's authority does not for all purposes, cease with judgment.—Foster v. Wiley, 27 Mich. 244.

¶ 66. The acts which are within the authority of an attorney after the recovery of judgment are enumerated and authorities are cited in Foster v. Wiley, 27 Mich. 244.

¶ 67. A client is responsible for his attorney's conduct in procuring the issue of an execution unauthorized by law.—Foster v. Wiley, 27 Mich. 244.

§ 24. Collections and settlements.

Ratification of settlements, see post § 27.
Collections by attorneys acting as agents, see also Agency, § 36.
Authority of adjusters in general, see Agency, § 37.

¶ 68. An attorney's possession of a note and mortgage is presumptive evidence of his authority to receive payment thereon.—Donaldson v. Wilson, 79 Mich. 181.

¶ 69. An attorney has no implied authority to receive wood as pay for a promissory note.—Pitkin v. Harris, 69 Mich. 133.

¶ 70. Authority in a general attorney to settle an action for damages brought by an employee against a railroad company does not imply authority to make a contract for the railroad company to employ the injured employee for life.—Nephew v. Michigan Cent. R. Co., 128 Mich. 599.

¶ 71. An acceptance by the attorney of record of an amount smaller than a judgment in satisfaction thereof, is not a discharge, if the attorney had no authority to settle for such sum.—Fetz v. Leyendecker, 157 Mich. 355.

¶ 72. In an action for the amount of two judgments, defendant pleaded that plaintiff's attorney of record in both cases had compromised the claims. Held, that whether the attorney had authority to effect a compromise and whether there was sufficient consideration for his agreement to accept a smaller sum in settlement of the judgments, were questions of fact.—Fetz v. Leyendecker, 157 Mich. 355.

¶ 73. The power to indorse checks or bills must be expressly conferred; and the employment of an attorney to collect a claim against an estate confers no authority upon him to indorse a check or draft received in payment of the claim and made out to the client as payee—Brown v. People's Nat. Bank, 170 Mich. 416.

§ 25. Notice through attorney.

General doctrine of notice to agent as notice to principal, see Agency, II, E.
Notice to attorney acting as agent as binding client, see also Agency, § 433.
Notice to attorney by reason of knowledge of client, see also Notice and Record of Title, I, A.
Efficacy of notice by clerk or other attorney to take proofs in chancery, see Depositions, II.

¶ 74. A notice to an attorney is binding upon his client.—Dickinson v. Dustin, 21 Mich. 561.

¶ 75. An attorney's unprivileged knowledge of a chattel mortgage is notice to his client.—Littauer v. Houck, 92 Mich. 162.

¶ 76. An attorney's knowledge is not that of his principal in matters in which he is not acting as his attorney.—Larzelere v. Starkweather, 38 Mich. 96.

¶ 77. A client is not chargeable with notice of facts known to his lawyer if the lat-

ter did not obtain this knowledge while doing business for him.—Warner v. Hall, 53 Mich. 371.

¶ 78. A mortgagee of land against which attachment proceedings have been started is not without notice where his counsel, before advancing the money secured by the mortgage, recognized the attachment as a lien to be got rid of in order to clear the title, and caused money to be tendered for that purpose.—Chase v. Welsh, 45 Mich. 345

¶ 79. The solicitor for defendants in partition is chargeable with notice of any lien for costs which had attached under the law, by reason of the institution of the partition proceedings, since he had personal knowledge of the nature of the proceedings.—Barbour v. Patterson, 145 Mich. 459.

§ 26. Stipulations and admissions.

Declarations or admissions as evidence against client, see Evidence, VII, C.
Making admissions in open court, see Equity, VIII; Trial, V.
Admission by attorney of coparties as effecting waiver of error for both, see Appeal and Error, § 229, ¶ 1020.
Form of stipulations, and their effect, see Stipulations.

¶ 80. A stipulation by plaintiff's attorney that a claim of defendant to damages suffered by the levy of an attachment may be prosecuted and defended against as a setoff in the case in which the attachment was issued, is within the implied authority of the attorney to bind his client by all acts necessary or incident to the prosecution or management of the suit, affecting the remedy only, and not the cause of action.—Brown v. Spiegel, 156 Mich. 138.

§ 27. Ratification by client.

Disaffirmance and repudiation, see post § 28.
Estoppel by ratification, see post § 29.
Of acts of agents in general, see Agency, II, C.

¶ 81. Filing the bond is an essential preliminary to an attachment in a justice's court, and if the plaintiff named has recognized the agency of the attorney who has started such a proceeding, and there is evidence to show that he ratified the same, the bond should be admitted in evidence for consideration by the jury in finding whether the relation of attorney and client existed.—Hutchinson v. Smith, 86 Mich. 145.

¶ 82. A debtor who had previously agreed to secure a creditor, the form of the security not having been agreed upon, executed a chattel mortgage and delivered it to the creditor's attorney, who filed it. The next day the debtor made a general assignment, subject to such mortgage. Held, that the mortgagee's subsequent ratification of the transaction related to the date of filing, and that his lien was prior to that of the other creditors under the assignment.—Field v. Fisher, 65 Mich. 606.

¶ 83. A solicitor's action in compromising or settling a mortgage which he had been employed to foreclose, held to have been ratified, even if not previously authorized, where a receipt for balance due was signed by the mortgagee, who testified that he supposed the mortgage papers were surrendered at the time, and where the attorney for the mortgagee testified that when he reported the settlement it was approved by the mortgagee.—Gemberling v. Spaulding, 104 Mich. 217.

§ 28. Disaffirmance or repudiation.

Estoppel to question authority, see post § 29.

¶ 84. A defendant on trial for violation of a village ordinance has a right to disclaim the authority of an absent attorney assuming to act for him in the matter of an adjournment which such defendant opposes.—Village of Vicksburg v. Briggs, 85 Mich. 502.

¶ 85. A client is always entitled to be heard as to his representation before the court; and a change therein, made ex parte by one or all of the counsel, is a nullity if made without the client's concurrence or consent.—Hackley v. Muskegon Circuit Judge, 58 Mich. 454.

§ 29. Estoppel to question authority.

¶ 86. The receipt by a plaintiff of the money due upon a judgment rendered in his favor, and its discharge by indorsing a satisfaction thereof upon an execution issued for its collection, estop him from denying the authority of the attorneys to act for him in its procurement, and, if their original employment is not shown, such acts are a full and complete ratification of their acts and services in obtaining the judgment.—Lindner v. Hine, 84 Mich. 511.

¶ 87. By receiving moneys due upon judgment in his favor, and by indorsing satisfaction upon execution issued thereunder, one estops himself from denying his attorneys' authority to act for him in procuring it.—Lindner v. Hine, 84 Mich. 511.

¶ 88. That an attorney has been employed by it cannot be questioned by an insurance company which forwarded from its home office a check payable to the attorney's order as a retainer, and which was kept advised of what he did in its behalf.—McCurdy v. New York Life Ins. Co., 115 Mich. 20.

§ 30. Objections for want of authority or disqualification.

Presumptions and proof of authority, see ante § 19.
Questioning authority at trial, see also ante ¶ 48.
Court in which question may be raised, see also ante ¶ 49.

¶ 89. An attorney employed by the plaintiff in an action of trespass had also been employed by the board of supervisors to assist the prosecuting attorney in a criminal proceeding against the defendants on the same state of facts. Held, that any objection based upon the statute—How. St., § 557, as amended in 1883—to the attorney's participating in the civil case was waived unless made seasonably; after pleading to the attorney's declaration, and permitting him to act in selecting the jury, it was too late to object to swearing the jury and to ask a discontinuance.—Webber v. Barry, 66 Mich. 127.

D. CONTRACTS AND DEALINGS WITH SUBJECT OF EMPLOYMENT.

§ 31. In general; good faith.

Personal interest as affecting authority to bind client to third person, see ante § 21.
Liability for fraud or bad faith, see post § 59.
Duty of attorney lending money for client to advise as to measures to be taken on maturity, see post ¶ 230.
Rights of attorney holding mortgage second to client's, see post ¶ 236.
General doctrine of implied fraud in dealing with person in confidential or fiduciary relation, see Fraud, II.
Rights of attorney as joint adventurer in enterprise with client, see Joint Adventures.
Right of attorney to urge against client that contract was illegal, see Contracts, IV.
Buying claims for litigation, see Champerty and Maintenance.
Availability of defense on motion to quash capias, see Civil Arrest and Bail.
Right to make defense that plaintiff assignee has taken as attorney to bring suit, see Assignments, ¶ 103; and see also Contracts, IV.
Defense that thing in action was bought by attorney to put in action, see Jud. Act, Chap. I, §§ 67-73; Comp. L. 1915, §§ 12072-12078.

¶ 90. It is the policy of the law to scrutinize gifts, conveyances and securities by a client to his attorney pending the relation, especially when connected with the subject-matter of litigation; and it will not permit the relation and the confidence the relation implies to be turned to the profit of the attorney at the expense of the client.—Gray v. Emmons, 7 Mich. 533.

¶ 91. Contracts between attorney and client will be scrutinized with care by the courts.—Gates v. McLaulin, 199 Mich. 438.

¶ 92. A contract between attorney and client made while the relation exists must be characterized by fairness and reasonableness if it is to be sustained.—Coveney v. Pattullo, 130 Mich. 275.

¶ 93. An attorney-at-law who assumes the double position of purchaser and confidential legal adviser is bound to observe the utmost good faith towards the party with whom he is dealing, and to draft all papers with sufficient care and professional skill, so as to make them express the real understanding and agreement of the parties.—Payne v. Avery, 21 Mich. 524.

¶ 94. An attorney employed for a particular service cannot acquire a personal interest in the subject-matter of the employment, opposed to that of his client, without the client's consent or ratification.—Gott v. Brigham, 41 Mich. 227.

¶ 95. Where an attorney obtains from the heir of a deceased client a release of property received by the attorney as such, the burden of proof is upon the attorney to show that the heir acted freely and understandingly.—Beedle v. Crane, 91 Mich. 429.

¶ 96. Where a client seeking to acquire title to land refused to take up a claim on it of which his attorney had notified him, and expressed the opinion that the claim referred to was of no consequence, the attorney violated no confidence in buying up the claim in the interest of another party.—Humphrey v. Hurd, 31 Mich. 436.

¶ 97. Where an attorney who had been employed to bring about a judicial sale of his client's property, the title to which was in dispute, with their knowledge and consent executed a contract with a prospective purchaser whereby he was to receive from the latter, in case he should be the successful bidder at a stated amount, a commission upon the purchase price, such commission being in lieu of direct compensation from the clients, the agreement was not invalid as violating the client's interests.—Culver v. Nester, 116 Mich. 191.

¶ 98. An attorney who advises the devise of property to himself on the pretence that he will only make use of it for another, but intending, nevertheless, to appropriate it to his own use, is guilty of a gross fraud and breach of confidence; and it would be equally a fraud if, having given the advice honest-

ly, he should afterwards conclude dishonestly to keep the property.—Hooker v. Axford, 33 Mich. 453.

¶ 99. An attorney acts in fraud of his client's rights in selling an attorney's lien to one whose interests are adverse to those of the client, without giving the client an opportunity to get rid of it.—Taylor v. Young, 56 Mich. 285.

¶ 100. It is contrary to the spirit of the code of ethics for a lawyer to draft a will making dispositions of property in his favor, and such dispositions will be looked upon by this court with suspicion.—Abrey v. Duffield, 149 Mich. 248.

§ 32. Trusteeship for client.

Trust in third person, see post ¶ 106.

¶ 101. Where the attorney of a judgment creditor bids off in his own name an undivided interest in lands upon which he has levied execution, and which the client desires to obtain, he holds such interest for his client's benefit and must release it on demands; and if he refuses, the client can hold him as a trustee and require him to account or compel him to convey.—Taylor v. Young, 56 Mich. 285.

¶ 102. An attorney can in no case, without his client's consent, buy and hold otherwise than in trust any adverse title or interest touching the thing to which his employment relates.—Baker v. Humphrey, 101 U. S. 494, 25 L. ed. 1065.

¶ 103. Where an attorney-at-law proposed to one who was not his client to redeem for a reasonable compensation certain of the latter's property which had been sold on execution, and the latter refused, it was held that a subsequent purchase by the attorney of an outstanding judgment, and a redemption under it, gave the other no rights in the redeemed property.—Taylor v. Boardman, 24 Mich. 287.

§ 33. Rights of other person dealing with attorney.

General status towards third persons, and rights of client towards third persons, see ante § 15.

Authority of attorney and acts binding on client, see ante II, C.

Right to be reimbursed for attorney's fees paid for another, see Implied Contracts, II; and see also Estates of Decedents, VI, A.

Implied contract to repay money collected on judgment subsequently reversed, see Implied Contracts, II.

¶ 104. Where, by improper agencies, counsel obtained securities for $5,000 for injuries to his client which he is shown to have regarded as not likely to authorize a verdict for more than $2,000, the remainder being reckoned as the share of the negotiator for his services, the court, on a bill to foreclose the securities, directed the excess beyond $2,000 to be released.—Briggs v. Withey, 24 Mich. 136.

¶ 105. In an action against an attorney and his client to recover money alleged to have been paid under duress to the attorney, who represented that it was due his client on a debt owing to him from the plaintiff, where it was shown that the attorney was to share equally in the proceeds of the money collected, held that if the case was proper to be submitted to the jury at all it should be submitted against both defendants.—Welch v. Beeching, 193 Mich. 338.

¶ 106. Where an attorney is employed to purchase tax titles and other outstanding claims against his client's lands to strengthen the title, which is defective of record, the client furnishing the means, and the purchases being made, at the attorney's suggestion, in his own name, a conveyance to a third person by the attorney in violation of the professional confidence reposed in him, will not be protected by Comp. L. 1857, § 2637, How. St., § 5569, relating to resulting trusts. The consent obtained by the attorney to taking the conveyances in his own name, having been procured for the fraudulent purpose of appropriation and on the strength of the confidence reposed in him as an attorney, is void, and comes within Comp. L. 1857, § 2639, How. St., § 5571.—Linsley v. Sinclair, 24 Mich. 380.

E. COMPENSATION, LIEN AND ACCOUNTING.

Right to costs and fees, and liability for same, see Costs, II.

§ 34. Construction, validity and effect of contracts.

Express agreement as excluding implied promise, see post § 39; and see also Implied Contracts.

Liability of attorney for breach of contract, see post § 60.

Lien for compensation, see post §§ 46-56.

Construction of agreement as affecting right to settle, see also post ¶ 201.

Actions and practice on the contract, see post §§ 41-45.

Champertous contracts and dealings, see Champerty and Maintenance.

Mutuality of agreement for indeterminate sum, see Contracts, I.

Consideration for contract, see Contracts, V.

Fee contracts void as against public policy, see Contracts, IV, B.

Agreement to be compensated by share in prospective alimony as offending public policy, see Contracts, IV, B.
Effect of invalidity of contract on rights, see Contracts, IV, D.
Effect on valid contract of attempt to substitute invalid one, see Contracts, IV, D, VIII.
Addition of clause for attorney's fees in bond as alteration, see Alteration of Instruments, ¶ 13.
Contract with stockholder as affecting corporation, see Corporations, XXIV, D.
Statute regulating agreements for compensation, see Jud. Act, Chap. I, § 74; Comp. L. 1915, § 12079.

¶ 107. Before entering upon the business of a client, an attorney may stipulate the measure of his compensation, and, if the client assents, the contract is valid and free from objection.—Gates v. McLaulin, 199 Mich. 438.

¶ 108. Attorneys are now at liberty under How. St., § 9004, to make their own arrangements with their clients for compensation, and an assignment of liens to an attorney cannot be objected to as champertous.—Smedley v. Dregge, 101 Mich. 200.

¶ 109. An agreement that an attorney shall advance the necessary costs of an action for his client and shall receive one-half of the amount recovered, is not, since the enactment of Section 11254, Comp. Laws 1897, How. Ann. St., 2nd Ed., § 14432, champertous.—Lehman v. Detroit, G. H. & M. Ry Co., 180 Mich. 362.

¶ 110. An attorney employed to carry a suit through for an agreed sum has a vested right to the compensation when he accepts and begins the service, and his subsequent appointment to a position in which it would become his official duty to conduct the suit would not prevent him from recovering the sum agreed on under the private contract; if the original agreement was for such compensation as the services should be reasonably worth, he could recover under it only the value of services rendered before the appointment was made.—City of Detroit v. Whittemore, 27 Mich. 281.

¶ 111. Where a solicitor's contract with his client seeking divorce entitles him to a percentage of the amount awarded to her above a certain sum, a special allowance to pay her debts should be included in the computation in his favor.—Chadwick v. Walsh, 70 Mich. 627.

¶ 112. A widow's agreement to pay her attorney for his services all he recovers, beyond $25,000, on her claims against her husband's estate does not include an allowance for her support pending the estate's settlement; the right to such allowance may be waived and is not assignable.—Hackley v. Muskegon Circuit Judge, 58 Mich. 454.

¶ 113. A client's obligation to pay an attorney for services rendered in "securing" an estate for her, in accordance with an agreement, cannot be avoided by claiming that the estate vested in her claim by operation of law and accordingly was not "secured" by the attorney.—Morna v. L'Etourneau, 118 Mich. 159.

¶ 114. Where an attorney has a justifiable cause for his abandonment of a case and has made a special contract with his client to perform the services for a certain fee, he may recover the whole amount of the fee in like manner as if his services had been completely performed; the cause of abandonment being considered as a prevention by the client of full performance.—Genrow v. Flynn, 166 Mich. 564.

¶ 115. In a suit by a client to recover a fee advanced to an attorney under an agreement that the latter should prosecute to completion a certain suit, the evidence showed that the defendant attended faithfully to the suit and expended several weeks of labor thereon, and that thereafter plaintiff sent him a telegram accusing him of deceiving, neglecting and abusing plaintiff. Thereupon defendant informed plaintiff of his withdrawal from the case. There was no evidence offered by plaintiff as to the value of the services rendered by defendant. Held, defendant was entitled to retain the entire fee paid him.—Genrow v. Flynn, 166 Mich. 564.

§ 35. ——Assumption of costs and expenses.

See also ante ¶ 109.

¶ 116. In an action against an attorney for the costs incurred by plaintiff in a suit prosecuted for him by the attorney under an agreement to pay the costs and to receive, if successful, half the recovery, held, that if the attorney, pending the litigation, refused to carry out his agreement, and so notified his client, and if the latter was unable to discontinue without costs, then the latter could only recover such costs as had been made up to that time.—Wildey v. Crane, 69 Mich. 17.

¶ 117. Under an attorney's agreement to pay costs and prosecute the suit for half the recovery if, pending the litigation, the attorney denied to his client that he had agreed to pay the costs if the suit failed, and stated that he would not pay them, and if at that time plaintiff could have discontinued without

costs, the attorney would not be liable for the costs incurred.—Wildey v. Crane, 69 Mich. 17.

§ 36. ——Contingent fee contracts.

Assumption of costs and advances of money, see ante § 35.

¶ 118. Contracts with attorneys for contingent fees with a lien on the amount recovered, either by settlement or judgment, are valid, and after proper notice thereof the opposing party is obligated to recognize the same at his peril.—Nichols v. Waters, 201 Mich. 27.

¶ 119. A contract between attorneys and clients for suing a death claim in the federal court on a contingent basis that in case the attorneys did not recover more than the client would have received under the Workmen's Compensation Act then the client should receive the amount which she should receive under such law must be construed as providing an allowance to the client of the full amount allowed by the act, and not merely a lesser sum which the employer had offered the client before the making of the contract, and which was not referred to in the contract.—Nichols v. Waters, 201 Mich. 27.

¶ 120. Evidence held insufficient to show failure of attorneys to comply with a contract for the prosecution of an action for the death of a son of the client on a contingent basis by not caring for funeral expenses of deceased.—Nichols v. Waters, 201 Mich. 27.

¶ 121. Under a contract on a twenty-five per cent contingent fee basis, which in fact though not in words contemplates only a nisi prius trial, the fact that the attorney appeals the case and obtains judgment, after his client has abandoned it on an adverse decision below, will not entitle the attorney to a larger per cent. of the amount recovered.—Cavanaugh v. Robinson, 138 Mich. 554.

¶ 122. A request to an attorney for terms on a contingent basis for getting the assets paid over to the heirs and an answer fixing the terms at twenty-five per cent. must be taken to include services made necessary in appealing an erroneous decision.—Cavanaugh v. Robinson, 138 Mich. 554.

§ 37. Compensation for reasonable value.

For services which did not prove to be of benefit, see post § 38.

Reasonable value where during litigation it became duty to continue without charge, see also ante ¶ 110.

Actions, evidence and instructions, see post §§ 41-45.

Evidence as to value, see post § 43.

Fees allowable in particular cases as attorney fees or by virtue of contract provisions, see specific topics, e. g., Foreclosure of Mortgages; Negotiable Instruments; Taxes; Estates of Decedents.

Reasonable counsel fee as part of proper recovery on attachment bond, see Attachment, § 145.

Fees under the Workmen's Compensation Law, and adjustment of them, see Workmen's Compensation Law, X.

¶ 123. The value of an attorney's services is their reasonable worth as determined from the prices usually charged for similar services; his professional skill, standing and experience, the questions involved and the result of the case, must all be considered. A retainer is recoverable without special contract.—Eggleston v. Boardman, 37 Mich. 14.

¶ 124. Where several suits were made to depend on the argument of one, the charges should not be multiplied at the full rate as if there had been separate hearings in each, but should be confined to the services actually rendered.—Brackett v. Sears, 15 Mich. 244.

¶ 125. An attorney who made no contract with a married woman in relation to divorce proceedings and to a case to be commenced by capias against her husband, as to how he should be paid other than one opposed to public policy, was entitled to recover what his services were reasonably worth.—McCurdy v. Dillon, 135 Mich. 678.

¶ 126. Claimant attended court as attorney for the deceased in a case in which the deceased was collaterally but greatly interested. He took no part in the hearing, and the deceased made no substantial defense. The probate commissioners allowed a claim of fifty dollars a day for this service. Held, the charges were not so excessive as to call for reversal on appeal.—Warren v. Sheehan, 156 Mich. 432.

¶ 127. $1,000 held to be a sufficient attorney's fee for the collection of a judgment amounting to nearly $15,000, where it appeared that the attorney relied almost exclusively upon the services of an attorney in another state for the investigation of the legal principles and for the real work of preparing and directing the litigation, both upon the law and facts.—Myers v. Radford, 167 Mich. 135; affirmed in 231 U. S. 725, 58 L. ed. 454, 34 Sup. Ct. Rep. 249.

¶ 128. A resident of Michigan went to Dawson, Yukon Terr., and met a man against whom he claimed to have a valid cause of action which was settled by payment to him of $7,000. Shortly thereafter the party caused

his arrest for robbery, the charge later being changed to obtaining money by menaces. He employed defendant as counsel, paying him $200, was committed to prison and when arraigned defendant failed to appear and another attorney was employed as associate counsel. Meanwhile plaintiff remained in prison and while there paid defendant an additional $500, and gave him a mortgage on Michigan land for $800. Upon advice of his counsel he pleaded guilty and after returning the $7,000 was permitted to leave the country. Action was brought to set aside the mortgage for fraud, conspiracy and duress. Held, that though no conspiracy was shown the mortgage should be canceled because unconscionable and because the $700 paid was reasonable compensation for the services rendered.—Coveney v. Pattullo, 130 Mich. 275.

¶ 129. An attorney who took to the Supreme Court on certiorari the files in a certain suit other than the one at bar, and made the former suit the basis of argument on the certiorari, will not be entitled to be compensated by the client as for services in the Supreme Court rendered in the suit so included; for it was never in that court as a suit but only as an incident in the certiorari and the fees for the certiorari case cover both in the Supreme Court.—Smedley v. City of Grand Haven, 125 Mich. 431.

§ 38. ——Unsuccessful or nonbeneficial service.

¶ 130. Professional charges are not to be rejected merely for want of success in the litigation, where there is no clear proof of mismanagement.—Brackett v. Sears, 15 Mich. 244.

¶ 131. An attorney is entitled to compensation, for services faithfully and intelligently performed, whether such services are beneficial to the client or not.—In re Freshour's Estate, 174 Mich. 114; Lyon v. Minor, Id.

¶ 132. In an attorney's action for compensation for services in a certain suit it appeared that after the attorney had procured a settlement in that suit a second suit was brought against defendant through no fault of the attorney. Held, that it was proper to exclude defendant's answer to a question as to the damage sustained by reason of bringing the second suit, since the attorney is not an insurer of results.—Babbitt v. Bumpus, 73 Mich. 331.

§ 39. ——Implication of promise.

As to implication of additional compensation for taking appeal or error, see ante § 36, ¶¶ 121, 122.

¶ 133. Where an attorney makes two trips to a distant town in connection with a case and where no price has been agreed upon therefor, he is entitled to recover what the trips were reasonably worth, even though he made no charges for such trips at the time.—Crowell v. Truax, 94 Mich. 585.

¶ 134. An attorney could not have an express contract with the promoters of a corporation that they, in consideration of his services in assisting to successfully accomplish the scheme in question, would make him the permanent attorney of the corporation to be formed, and at the same time have an implied contract with the company to pay him for the same services what they were reasonably worth.—Sullivan v. Detroit, Y. & A. A. R. Co., 135 Mich. 661, per Grant, J., others concurring on another point.

§ 40. Right to indemnification and reimbursement.

Lien for protection, see post §§ 46-56.
General law of indemnification between parties, see Indemnity and Contribution.
Consideration for contract indemnifying attorney, see Contracts, V.

¶ 135. Where the attorneys of complainants, assignees of a portion of a chattel mortgage on a stock of goods with priority of payment, took possession of the mortgaged property, and, without authority from complainants, sold more than was sufficient to satisfy their portion of the mortgage, and were sued by the owner of the balance and recovery had against them, held, that the attorneys had no equity against complainants to require to be indemnified for their act in selling the excess.—Gray v. Emmons, 7 Mich. 533.

¶ 136. An attorney held liable for an excessive sale under a chattel mortgage, made without authority from the client, who was an assignee of a part ownership in the mortgage, cannot claim indemnity from the client, though it was done under a supposed authority from the owner of the balance of the mortgage; since the failure of the latter authority was not attributable to his client.—Gray v. Emmons, 7 Mich. 53.

§ 41. Actions for compensation or reimbursement.

Sufficiency of allegations to admit proof, see also post ¶ 150.
Burden of proof and evidence, see post §§ 42, 43.
Questions of fact and instructions, see post §§ 44, 45.
Remedies to enforce rights under lien, see post §§ 54-56.
Actions on contracts in general, see Contracts, X.

Actions by agents generally for compensation, see Agency, IV, C.
General law of procedure, see specific topics treating thereof.
Right to enforce payment of counsel fee in divorce by contempt, see Contempt, I.
Accord and satisfaction with client, see Accord and Satisfaction.
Former judgment as bar or estoppel of claim of attorney for compensation, see Former Adjudication.
Liability of married woman for attorneys' services, see Divorce, X; Husband and Wife, IV, C.

§ 42. Burden of proof and evidence.

¶ 137. Where, in a suit for an attorney's stipulated compensation, defendants plead his neglect or refusal to perform the services stipulated, and introduce evidence tending to support such defense, plaintiff has the burden of showing performance by the attorney or his continued readiness to perform. —Hitchcock v. Davis, 87 Mich. 629.

¶ 138. Evidence of an attempt by attorneys to settle with a client and adjust their differences without litigation is immaterial, in an action for compensation, as the sole question when the attempt to settle failed was the agreement and the value of the services.—Walbridge v. Barrett, 118 Mich. 433.

¶ 139. In an action for compensation for services rendered by an attorney, evidence of negotiations with another associated attorney, which fell through, and letters written at such time, were irrelevant.—Walbridge v. Barrett, 118 Mich. 433.

¶ 140. Evidence that the service performed by plaintiff in obtaining the appointment of a guardian for an incompetent person was light in comparison with the amount which he alleges defendant agreed to pay for his services, cannot be adduced by defendant to show an improbability that plaintiff's version of the agreement is correct, but the inquiry, if permissible at all, must be as to the value of the services contemplated, taking consideration of the contingencies.—Shakespeare v. Baughman, 113 Mich. 551.

¶ 141. Evidence that plaintiff in action for agreed fees for services is a lawyer of limited practice and experience, is inadmissible on the question of probability that there was such a contract made as alleged, where defendant does not profess to have known anything about plaintiff's qualifications at the time the alleged contract was made.—Shakespeare v. Baughman, 113 Mich. 551.

¶ 142. In an action for the value of attorney's services, evidence of the outcome of another suit and of expenses therein incurred is inadmissible where offered on a claim of setoff, which pleaded that the other suit was begun on a guaranty of success but failed, and that there was an agreement that the respective attorneys should exchange services in the two suits, neither of which contracts had been proved as a basis for the offered testimony.—Lungerhausen v. Crittenden, 103 Mich. 173.

¶ 143. Where an attorney claiming setoff for services rendered shows that after a note had been placed in his hands by his client for collection, and after he had ascertained, through correspondence, the maker's residence, the client took back the note and accepted a new one from the maker, it was incompetent for the client to show in rebuttal that such new note had not been paid. —Wildey v. Crane, 69 Mich. 17.

¶ 144. That an attorney, pursuant to the request of his client, immediately instituted an action, in connection with the former's testimony that the client agreed that he should have fifty per cent. of the amount recovered, is sufficient to justify a finding that such proposal was accepted.—Lehman v. Detroit, G. H. & M. Ry. Co., 180 Mich. 362.

§ 43. ——As to value of services.

Expert testimony as to value of services, including competency of attorney himself as expert, see Evidence, VI, B.
Evidence of values generally, including comparisons with other like objects of value or prices, see Values.

¶ 145. The amount charged by an attorney in a given case is not admissible in evidence to fix the value of the services rendered in the same case by the attorney for the other parties; nor does the amount paid in a particular case necessarily fix the amount in all like cases.—Eggleston v. Boardman, 37 Mich. 14.

¶ 146. It is competent to show the amount involved in suits for the management and trial of which an attorney brings suit, such fact having much to do with the value of the services so rendered.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 147. Where an attorney sues for services rendered in a suit in which, after he had procured a settlement, a second suit was brought, through no fault of his, against his client (the present defendant), the damage sustained by the latter by reason of such second suit cannot be shown.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 148. In an attorney's action for compensation for services in certain suits he may be asked the total amount charged for his

services in either or all of the suits, the reasonableness of the amount being one of the questions before the jury.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 149. In assumpsit by an attorney for services, testimony offered by defendant to show that the charges of the opposing attorneys in the case in which the plaintiff rendered the services sued for were less than plaintiff's, and that said services were as important as, and of as much or even greater value than, plaintiff's, is properly excluded.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 150. In an attorney's action for compensation for services in prosecuting a suit, it is competent for him in describing the character of the services for which he charged to testify that he had consultations with a great many witnesses, although such service was not specifically stated in the declaration or bill of particulars, since such testimony is admissible under the pleadings.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 151. In an action by an attorney for services rendered in the trial of a cause, evidence that two years before he was retained plaintiff had offered by letter to take $10 per day for work is immaterial.—Crowell v. Truax, 94 Mich. 585.

¶ 152. In an action by an attorney to recover his fees, the plaintiff is competent to testify in his own behalf as to the nature of the services rendered and their reasonable worth.—Chamberlain v. Rodgers, 79 Mich. 219.

¶ 153. A bill rendered for an attorney's services is not for his client proof of their value.—Gartner v. Beller, 54 Mich. 333.

¶ 154. Where a client denies the correctness of an account rendered by his counsel, and refuses to pay it, the counsel in a suit to recover the value of his services is not bound by the bill rendered, but may recover the full value.—Romeyn v. Campau, 17 Mich. 327.

¶ 155. In an action for compensation for services rendered by an attorney, evidence as to time spent by another attorney in assisting in a trial, and his opinion of the value of the plaintiff's services, was competent.—Walbridge v. Barrett, 118 Mich. 433.

¶ 156. Evidence as to the value of an attorney's services rendered on agreement to pay what they were worth, but with the understanding that nothing was to be paid unless a judgment was recovered, was held incompetent, in an action for such services, as the value of the attorney's services were to be determined by what they were worth, and they were worth no more or no less because of the agreement to charge nothing if they were unsuccessful.—Walbridge v. Barrett, 118 Mich. 433.

¶ 157. Where, in a suit by an attorney for services rendered in a particular suit, he is the only witness, and testifies to their nature and reasonable value, and that he has been engaged in the general practice of the law for twenty years, and had experience in all of its departments, and goes into the nature of the controversy in the suit in which the services were rendered, and the questions and amount involved, such testimony makes a prima facie case as to the value of the services sued for.—Chamberlain v. Rodgers, 79 Mich. 219.

§ 44. ——Questions of law and fact.

See also ante ¶ 148.
In general, see Trial, VI.

¶ 158. In an action to recover for legal services, where the testimony of a certain witness that a certain sum was a reasonable amount as attorney's fee for the services performed was modified on cross-examination, held that the whole question became one for the jury.—McKnight v. Lowitz, 196 Mich. 368.

¶ 159. In an action to recover upon certain notes given as for certain legal services rendered by plaintiff for defendant, wherein defendant claimed plaintiff had fraudulently induced her to sign the notes by false representations that she was free and clear of a certain claim as to which a portion of such services was rendered, held that a question of fact for the jury was presented.—Radford v. Gaukler, 196 Mich. 94.

¶ 160. In an action by an attorney to recover for professional services rendered in giving advice to an alleged client with reference to cumulative voting at a stockholders' meeting of a corporation in which defendant was interested, and in which plaintiff testified that he talked the matter over with defendant three times, and that on one occasion they spent two hours discussing the matter and in figuring out various combinations that defendant could make under the cumulative voting law, and in which defendant denied that he received such advice, and stated that he was only in plaintiff's office for five minutes, an instruction that if defendant did consult plaintiff in relation to his interest in the corporation as stated and the jury found for the plaintiff the verdict should be for the amount claimed and interest, held sufficient in connection with the rest of the charge to present to the jury the question whether defendant consulted plaintiffs, and as a result of such consultation received the advice for which the bill was rendered.—Sloman v. Cady, 191 Mich. 471.

¶ 161. In an action by attorneys to recover compensation for services payable when a judgment was obtained or a settlement effected, where the evidence showed such settlement and the making of a check placed in the hands of the judgment defendant's attorneys to be paid over to the judgment plaintiff, present defendant, a request of the defendant for a directed verdict on the ground that the action was prematurely brought, was properly refused.—Walbridge v. Barrett, 118 Mich. 433.

¶ 162. It is error to direct a verdict for defendant in an action by an attorney for fees for services rendered to defendant railway company, because plaintiff refuses to produce papers in his possession and owned by the defendant, but not relevant to the case on trial, even though his refusal to turn them over to the owner was wholly without justification.—Randall v. Detroit & N. W. Ry., 139 Mich. 477.

¶ 163. In an attorney's action for compensation it was error for the court to refuse to submit to the jury special questions as to the value of plaintiff's services, whether he had not been paid enough to compensate him in full, and whether he had not been paid certain specified amounts, all such being disputed questions.—Babbitt v. Bumpus, 73 Mich. 331.

§ 45. ——Instructions.

General law of instructions, see Instructions.

¶ 164. In an action by an attorney for services rendered in the trial of a cause, it is not error to instruct the jury that plaintiff is entitled to recover for the time necessarily spent in attendance upon court, while awaiting trial, before the cause was reached, even though such time cannot be brought under the two dates mentioned in the bill of particulars; where it is clear from the bill that all the services then rendered are not mentioned, which however did not mislead defendant, and an amendment of the bill being allowable if necessary.—Crowell v. Truax, 94 Mich. 585.

¶ 165. An instruction that the opinions of attorneys as to the value of services rendered by plaintiffs are not conclusive, is improperly refused in an action by attorneys for compensation where there is other evidence as to the value of the services.—Walbridge v. Barrett, 118 Mich. 433.

¶ 166. In an action by an attorney to recover salary for a year, where he had been discharged after performing the services for two months, a charge that if he had been employed for annual periods at an annual salary and entered upon the performance of his duties at the beginning of an annual term and continued to act for two months and was then discharged, and defendant continued to use his name on its letterheads, he might recover, is not reversible error, the reference to the letterheads which were continued in use, no new ones being made, though error, being of no consequence.—Ostrander v. Capitol Investment. Building & Loan Ass'n, 130 Mich. 312.

¶ 167. Held, in an action for attorney's services that the charge was comprehensive, fair and not argumentative.—In re Freshour's Estate, 174 Mich. 114; Lyon v. Minor, Id.

¶ 168. Where the court in its charge describes plaintiff as a "reputable" attorney in an action by him for services the word means only that such attorney is a regular lawyer in good standing.—In re Freshour's Estate, 174 Mich. 114; Lyon v. Minor, Id.

¶ 169. In an action by an attorney for services it is not improper to charge the jury that plaintiff is a "reputable lawyer" where it seems that the jury were not, and could not be misled thereby.—In re Freshour's Estate, 174 Mich. 114; Lyon v. Minor, Id.

¶ 170. In an action by an attorney for services rendered in an endeavor to secure the release of an alleged incompetent person from an asylum, it is not error to submit the case to the jury on the theory that plaintiff should recover if he acted in good faith and gave his client the benefit of his best intelligence.—In re Freshour's Estate, 174 Mich. 114; Lyon v. Minor, Id.

§ 46. Lien of attorney or counsel.

Protection of lien and remedies of parties, see post §§ 49-56.

Notice and sufficiency thereof, see post § 53.

Liability for withholding money to coerce settlement, see post ¶ 233.

Selling lien to another as fraud on client, see ante § 31, ¶ 99.

Vendor's lien to work out right to compensation by share in land, see Vendors, IX.

¶ 171. The law creates the lien of a solicitor upon the judgment or fund resulting from his services.—Wipfler v. Warren, 163 Mich. 189.

¶ 172. The theory upon which a lien follows a lawful agreement entered into between attorney and client with respect to compensation is that the agreement amounts to an assignment of a portion of the judgment sought to be recovered or expected as the fruit of the litigation.—Dreiband v. Candler, 166 Mich. 49.

¶ 173. There is no lien before judgment for attorney's fees, except by special agree-

ment.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 174. An attorney's retention in good faith of moneys held by him for his client, pending the settlement of an honest disagreement between them as to the amount justly due for the attorney's services, is not professional misconduct or a violation of professional duty, and does not make him liable in trover to his client.—Robinson v. Hawes, 56 Mich. 135.

¶ 175. An attorney's lien will not attach to land which the judgment creditor's attorney bids off at execution sale in his own name and against his client's interest and protest, and without making any payment in his own behalf.—Taylor v. Young, 56 Mich. 285.

¶ 176. It is immaterial that an attorney, who claims a lien upon a judgment for his services, was styled upon the record as "of counsel" merely, where it appears that he actively assisted in the preparation for and conduct of the trial.—People v. Pack, 115 Mich. 669.

¶ 177. It is immaterial that an attorney who claims a lien upon a judgment for his services was styled upon the record as "of counsel" merely, where it appears that he instituted the suits, had control of them at all times, and was recognized as attorney of record by counsel for the adverse parties.—Heavenrich v. Alpena Circuit Judge, 111 Mich. 163.

¶ 178. Where an attorney does not perform services in the creation of a fund arising from a partition sale of land, and his clients have no lien thereon under § 11080, Comp. Laws 1897, § 13277, How. St., 2nd Ed., he is not entitled to a lien for his services on the fund, or to an order determining the amount of his compensation, which was disputed by his clients.—Conlon v. Wayne Circuit Judge, 186 Mich. 354.

¶ 179. The court will not fix the amount of an attorney's fee in a partition proceeding and give him a lien on the proceeds of a sale of land, where the amount of his compensation is in dispute.—Conlon v. Wayne Circuit Judge, 186 Mich. 354.

¶ 180. One Cook employed petitioners as his attorneys to bring a bill to have lands conveyed to him, and agreed to pay them 20 per cent. of the proceeds recovered. Defendant Sheehan was acting with Cook, and the title to the land recovered was put in him as trustee for Cook. Held, the petitioners were entitled to enforce a lien for their fees against defendant upon the proceeds of the land in his hands.—Bigelow v. Sheehan, 161 Mich. 667.

¶ 181. A decree in an action for divorce permitted the wife to acquire land owned by her and her husband upon payment to him of $800, which included her interest therein and alimony. Held, that the husband's solicitor had no lien on the $800 for his services in the divorce action.—Canney v. Canney, 131 Mich. 363.

§ 47. ——On judgment or proceeds thereof.

Lien as creature of the law, see also ante ¶ 171.

On proceeds of judicial sale, see also ante ¶ 178.

On proceeds of trust lands adjudged to client, see ante ¶ 179.

¶ 182. An attorney has a lien for his compensation upon the judgment recovered for his client, and is to be regarded as equitable assignee of so much of the judgment as is necessary to pay him.—Wells v. Elsam, 40 Mich. 218; and see Kinney v. Tabor, 62 Mich. 517.

¶ 183. An attorney has a lien for his services upon money collected, and in settling and paying over the proceeds he can demand a final settlement and a receipt; and if there is no fraud, duress, undue advantage or mistake, the settlement binds.—Dowling v. Eggemann, 47 Mich. 171.

¶ 184. An agreement between attorneys and their clients that they are to be paid for their services rendered in the prosecution of a suit, and reimbursed for moneys advanced from the proceeds of the judgment which should be obtained, operates as an assignment of the judgment to the attorneys to the extent of such claims, and until the same are paid the plaintiff can give no valid discharge of the judgment.—Weeks v. Wayne Circuit Judges, 73 Mich. 256.

¶ 185. The lien of an attorney-at-law attaches to the money payable to his client upon a judgment if it is the proceeds of the attorney's labor and skill, and to moneys received by the client by way of a compromise of such judgment, who, if he settles the case after judgment, so as to deprive the attorney of his costs and fees, is liable to him in the proper action.—Lindner v. Hine, 84 Mich. 511.

§ 48. ——For services and expenses in other matters.

¶ 186. An attorney has a lien upon his client's money to secure payment for his professional services, not only in the suit to which it pertains, but in other suits.—Pierce v. Underwood, 103 Mich. 62.

¶ 187. An attorney has a lien upon his client's money and papers in his hands for his services, not only in the suit to which they pertain but in others; yet his lien is limited to the amount due for services, and he is liable in tort if he retains more than he in good faith believes to be due.—Robinson v. Hawes, 56 Mich. 135.

§ 49. Protection of lien by court.

Objection to substitution of attorneys, see ante § 12.

Notice to prevent discontinuance, see post § 53.

¶ 188. The court should protect a solicitor before putting out of its control funds upon which he has a lien for services; and he is entitled to notice of an application to withdraw such funds.—Dennis v. Kent Circuit Judge, 42 Mich. 249.

¶ 189. The court should protect an attorney before putting out of its control funds on which he has a lien for services.—Sheahan v. Wayne Circuit Judge, 42 Mich. 69.

¶ 190. Where the circuit court has entered an order for the substitution of attorneys and the only ground presented by the client is a disagreement as to the amount of fees, the order is improper and mandamus will lie on behalf of the attorney to compel the court to preserve the attorney's lien.—Lanagan v. Wayne Circuit Judge, 170 Mich. 435.

¶ 191. One Charles Wipfler brought suit against a defendant corporation and others to determine his rights as a stockholder in said corporation. During the pendency of the suit said Wipfler was appointed receiver of said corporation. The suit was determined in favor of the defendants. Said Wipfler was ordered to turn over the funds in his hands to the said corporation. Held, that upon a motion to substitute one Gottman as attorney for one Warren, who had acted in that capacity for defendants, the court had power to protect Warren's attorney's lien on said funds in the receiver's hands and to determine the amount of such lien.—Wipfler v. Warren, 163 Mich. 189.

¶ 192. While, ordinarily, every litigant has the right to change solicitors or attorneys as often as fancy dictates, the courts will require that the just claim of the discarded solicitor or attorney for services be satisfied.—Brown v. Brown, How. N. P. 94.

§ 50. ——Power of sheriff or levying officer.

¶ 193. A sheriff has no judicial power to fix the amount of an attorney's lien on a judgment.—Reed v. Coots, 43 Mich. 321.

§ 51. Waiver or loss of lien.

¶ 194. An attorney's lien for his service upon papers in his hands or upon a prospective judgment is lost when he recovers judgment for such services.—Jones v. Muskegon Circuit Judge, 95 Mich. 289.

¶ 195. If an attorney's demand is reduced to a judgment against his client, his lien is lost.—Wipfler v. Warren, 163 Mich. 189.

¶ 196. An attorney's protest against the dismissal, on the application of the parties, of a certiorari, was overruled, where relator seeking to review refusal of a writ of restitution has filed affidavit recognizing the adverse party's right to exclusive possession.—Buchanan v. Moore, 113 Mich. 555.

§ 52. Discontinuance or settlement in violation of lien.

Public policy as to contract against settlement, see Contracts, IV, B.

¶ 197. The attorneys alone manage a case, but they cannot prevent their clients compromising or settling it.—Wright v. Hake, 38 Mich. 525.

¶ 198. An attorney has no lien such as invalidates a settlement of the suit made by his client.—Parker v. Blighton, 32 Mich. 266.

¶ 199. As an attorney's lien upon a suit does not attach until rendition of judgment, he cannot before that time prevent his client from settling and discontinuing the suit.—Voight Brewery Co. v. Wayne Circuit Judge, 103 Mich. 190.

¶ 200. Third parties sued for tort and sought to be held liable for having settled contrary to an invalid agreement between attorney and client, prohibiting the latter from settling, pending litigation, without the attorney's consent, may avail themselves of such invalidity.—Nichols v. Waters, 201 Mich. 27.

¶ 201. A contract between attorneys and client in a personal injury suit provided that if the client failed to recover judgment or get a settlement, the attorneys should receive nothing. Held, the contract impliedly recognized the right of the client to settle the case so long as he did not prejudice the lien of the attorneys.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 202. Where, in a suit against a railroad, complainant by the terms of his contract with his attorneys has a right to make a settlement without their consent, and the contract provides that in the event of such settlement the attorneys shall have a lien on any money obtained from the railroad, the attorneys'

lien attaches at the percentage fixed by the agreement at the moment the amount of the settlement is agreed upon by plaintiff and the railroad.—Foley v. Grand Rapids & I. Ry. Co., 168 Mich. 496.

¶ 203. Where in a suit against a railroad the contract with plaintiff's attorneys provides that he may make a settlement with the railroad and without their consent, and that said attorneys shall receive one-half of the money obtained, and where pursuant to such a settlement the railroad pays into court one-half the amount of the settlement agreed upon and costs, the court properly may direct a verdict in favor of defendant.—Foley v. Grand Rapids & I. Ry. Co., 168 Mich. 496.

¶ 204. Where an attorney takes a case against a railroad company under a contract for a contingent fee, giving notice thereof to the attorneys for the defendant as well as to his client's employer, who was actively looking after the plaintiff's interests, and, without the knowledge of the latter's attorney, a settlement was made directly with the plaintiff, through his employer, by the attorneys for the railroad company, they are all liable to the plaintiff's attorney for his agreed compensation.—Lehman v. Detroit, G. H. & M. Ry. Co., 180 Mich. 362.

¶ 205. A client, after making a contract with attorneys giving them a lien on money to be recovered in a personal injury suit, settles with the adverse party without their consent. The attorneys proceed in the cause, and prove the lien agreement with the client. The defendant in the personal injury suit proves the settlement agreement with the client. Held, the attorneys will be entitled to recover the amount of their fees as shown by their lien agreement with the client, upon the basis of the settlement made by him.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 206. A stipulation by the parties without the knowledge or consent of plaintiff's attorney, and in fraud of his rights, for the discontinuance of a case, will not be treated as valid by the court.—Jackson v. Cole, 81 Mich. 440; Carpenter v. Myers, 90 Mich. 209.

¶ 207. An action instituted by the attorney for a judgment creditor, in the name and with the approval of the latter, upon a bond conditioned for the payment of the judgment, cannot be discontinued by the agreement of the parties thereto, without the consent of the attorney, to the prejudice of his lien upon the judgment recovered in the former action.—Heavenrich v. Alpena Circuit Judge, 111 Mich. 163.

¶ 208. A stipulation signed by the parties without the knowledge or consent of plaintiff's attorney, for a discontinuance of a case after its submission in the Supreme Court, and for an affirmance of the judgment without costs, is not valid.—Jackson v. Cole, 81 Mich. 440.

¶ 209. A contract between a defendant in ejectment and his attorney whereby the latter is to have one-half of the land or of the values of any compromise he may effect or, the defendant may, in preference, pay $300 in lieu of half of the land, does not warrant the defendant to compromise and settle the suit so as to deprive the plaintiff of his agreed compensation.—Millard v. Jordan, 76 Mich. 131.

¶ 210. Where with notice that plaintiff had assigned his interest in the suit to his attorney to secure the payment to him, for his services in the case, of an agreed percentage of the amount recovered, defendant settles with plaintiff and pays him the amount found to be due him, less the percentage due the attorney which defendant retains, and a stipulation is filed, signed by plaintiff and defendant, setting forth the settlement, and consenting to a discontinuance of the suit and directing the clerk to enter an order to that effect, which order is not entered, nor the sum so retained tendered to the attorney or paid into court, the suit is not discontinued, and the attorney may recover judgment therein for the sum so retained by defendant.—Carpenter v. Myers, 90 Mich. 209.

§ 53. ——Notice and claim of lien.

See also ante ¶ 118.

¶ 211. A notice claiming an attorney's lien is sufficient when made by letter and in general terms.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 212. Where an attorney serves a notice of a lien for fees against any moneys to be recovered by judgment or settlement, it is not necessary that he set forth in detail the terms of his lien agreement with his client.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 213. Attorneys made a contract with their client in a personal injury suit by which they were to have a lien on one-half of all money recovered by judgment or settlement. Defendant in the suit was notified of the contract and claim of lien. Held, the contract operated as an assignment to the attorneys and the client could not, without their assent, give a valid discharge of the cause of action.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 214. If a party obtained a discharge of an action under such circumstances as ought to have put him on inquiry as to the claim

of an attorney of a lien for fees, the discharge will certainly be void as to the attorney as it would be after actual notice of his lien.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 215. Where an attorney testifies that he notified the attorneys for a defendant railway company, together with his client's employer, who was actively looking after the plaintiff's interests, that he had a contract with the latter for a contingent fee, and without the knowledge of the attorney a settlement was made with the plaintiff, through his employer, by the attorneys for the railway company, held, that the question of notice was one of fact for the jury in an action against the employer, the railroad company and its attorneys, by the plaintiff's attorney to recover his stipulated compensation.—Lehman v. Detroit, G. H. & M. Ry. Co., 180 Mich. 362.

§ 54. ——Remedy of attorney.

See also ante ¶¶ 185, 204.
Remedy of client, see post § 56.

¶ 216. Where a client, after making a contract with his attorneys giving them a lien, settles with the adverse party without their consent, the proper practice is for the attorneys to proceed in the cause, upon the forming of a proper issue, to recover the amount of their fees.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 217. A client, after making a contract with attorneys giving them a lien on money to be recovered in a personal injury suit, settles with the adverse party without their consent. The attorneys proceed in the cause, and establish their agreement with the client as valid and binding. The defendant in the personal injury suit fails to show the making of a settlement agreement wth the client and a settlement thereunder. Held, the attorneys will be permitted to prosecute the original cause of action, prove their client's case as though there had been no attempted settlement, and recover their contract share of any damages awarded.—Grand Rapids & I R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 218. A stipulation dismissing the suit pending appeal and without the consent of attorneys, holding a lien on the judgment for their services for which the client is indebted, will be set aside on their motion.—Kirby v. La Dow, 102 Mich. 345.

§ 55. ——Procedure and evidence to enforce rights.

Proper remedy, prosecution of original action, see ante § 54.
Notice as question of fact, see also ante ¶ 215.

¶ 219. Where a client, after making a contract with his attorneys giving them a lien, settles with the adverse party without their consent, in order for the attorneys to be able to proceed in the original suit for the purpose of recovering their fees under their agreement, it is necessary for them to have the stipulation of settlement and discontinuance set aside, or stricken from the files.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 220. Where a client, after making a contract with attorneys giving them a lien on money to be recovered in a personal injury suit, settles with the adverse party without their consent, the attorneys may proceed in the cause, and defendant will be permitted to give notice of its alleged settlement agreement, in the nature of a plea puis darrein continuance.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 221. Where a client, after making a contract with attorneys giving them a lien on money to be recovered in a personal injury suit, settles with the adverse party without their consent, and the attorneys proceed in the cause, it will devolve upon the defendant in the personal injury suit to prove the making of the alleged settlement agreement with the client, and that the settlement was made in accordance with its terms.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 222. Where a client, after making a contract with attorneys giving them a lien on money to be recovered in a personal injury suit, settles with the adverse party without their consent, and the attorneys proceed in the cause, it will devolve upon the attorneys to show that their agreement with the client was duly made in good faith.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 223. A client, after making a contract with attorneys giving them a lien on money to be recovered in a personal injury suit, settles with the adverse party without their consent. The attorneys proceed in the cause, but fail to prove and establish as bona fide their alleged agreement with the client Held they can recover nothing.—Grand Rapids & I. R. Co. v. Cheboygan Circuit Judge, 161 Mich. 181.

¶ 224. A claim that the settlement was made in fraud of the attorney's lien cannot be tried on affidavits in support of a motion to set aside the settlement and reopen the case.—Voight Brewery Co. v. Wayne Circuit Judge, 103 Mich. 190; Grand Rapids & I. R Co. v. Cheboygan Circuit Judge, 161 Mich 181.

¶ 225. Where action was brought for the conversion of the proceeds of a judgment which defendants as attorneys had obtained for plaintiff's assignor, the defense being that the money was held for both defendants, who had dissolved partnership, to satisfy their lien for services and expenses, the date of the dissolution of the partnership is immaterial.—Reynolds v. Cavanagh, 139 Mich. 387.

§ 56. ——Remedy of client.

See also ante ¶ 187.

¶ 226. Satisfaction of judgment filed by non-appealing co-defendant collusively will be set aside and costs retaxed in favor of appellant defendant who, prior to such satisfaction, had assigned judgment to his attorneys in payment of their fees; since the appellant has a right to see that his attorney's lien is protected.—Potter v. Hunt, 68 Mich. 242.

§ 57. Accountability of attorney.

Continuance of attorneyship until accounting is had after client's death, see ante § 11.
Of agents in general, see Agency, § 99.
Accountability to estate for proceeds of claim for death by wrongful act settled by attorney, see Estates of Decedents, V, A.

¶ 227. Where a member of a firm of attorneys which had been retained for an agreed share of the proceeds to contest a will, effected, in connection with one of his clients who was the attorney in fact of the rest, a settlement, and received his firm's share, after which, without his partner's knowledge, and in collusion with the attorney in fact, he obtained from some of the other clients releases of their claims, they not being informed of the settlement, it was held, upon a bill filed by the defrauded clients for a proper distribution of the settlement money, that as the attorney acted in his individual capacity, and not for the firm, in procuring the releases, and as his conduct until after the settlement was correct, the firm had a right to retain the compensation received, and that the innocent partner was not liable, and that the other member of the firm was, to those from whom releases had been obtained, for such part of the diverted fund as could not be traced and recovered.—Richardson v. Richardson, 100 Mich. 634.

F. NEGLIGENCE, MALPRACTICE AND BREACH OF CONTRACT.

§ 58. Degree of skill required; negligence.

General nature of duty to client, see ante §§ 13, 14.
Damages and the measure and proof thereof, see Damages.
Instruction as to want of skill trenching on jury province, see Instructions, V, A.

¶ 228. Attorneys and solicitors must exercise reasonable skill, care, discretion and judgment in the conduct and management of the cases in which they are retained.—Eggleston v. Boardman, 37 Mich. 14.

¶ 229. Independently of special contract an attorney is not an insurer of the result in a case in which he is employed, nor can more than ordinary skill, care and diligence be required of him; and if he acts in good faith and with a fair degree of diligence in the discharge of his duties under the usual implied contract, he cannot be held responsible except for errors so gross as to render wholly improbable a disagreement among good lawyers as to the manner of the performance of the services in the particular case.—Babbitt v. Bumpus, 73 Mich. 331.

¶ 230. An attorney, engaged to lend money for a client, lent it, and took a note for the amount made to himself, which he indorsed and delivered to her. Held, that she could not recover against him for failure to advise her as to all proper action necessary for her to take for her security, in that he did not in fact advise her that she must protest the note at maturity in order to charge himself as indorser.—Gott v. Brigham, 41 Mich. 227.

¶ 231. Quære whether, in an action against an attorney for negligence in failing to perfect an appeal, when negligence has been shown, it is incumbent upon the attorney to show that the client has not been damaged thereby.—Cornelissen v. Ort, 132 Mich. 294.

¶ 232. A verdict of not guilty in favor of two attorneys employed as counsel is justified by the evidence in an action for negligence in failing to perfect an appeal, where plaintiff in an affidavit signed by himself and in one signed by his solicitor upon a motion to extend the time for taking the appeal, stated that he relied upon the solicitor to perfect the appeal and not upon the two employed as counsel.—Cornelissen v. Ort, 132 Mich. 294.

§ 59. Fraud and bad faith.

Disbarment for fraud, see ante § 4.
Conversion of funds or instruments by attorney, see also Conversion, I.
Election between remedies against attorney, see also Election and Waiver.
Embezzlement by attorney, see Crimes, II.
Statutory penalties and liabilities, see Jud. Act, Chap. I, §§ 64-68; Comp. L. 1915, §§ 12069-12073.

¶ 233. The relation of attorney and client is one of the confidence based upon the ability and integrity of the attorney; and the attorney cannot withhold money belonging to his client in order to make the latter agree to unreasonable terms for professional services rendered.—Robinson v. Hawes, 56 Mich. 135.

¶ 234. It is in fraud of a client's rights for the attorney, after bidding off an undivided interest in land at a sale on execution in the client's favor, to sell such interest before the equity of redemption has expired, to the execution debtor, and to bring about such sale on the ground that it would be to the buyer's interests as against his client.—Taylor v. Young, 56 Mich. 285.

¶ 235. Where a party is urged into a settlement by the agency of one whom he is known by all concerned to regard as his own counsel, but who, in fact, favors the other side, and an unconscionable advantage is taken of him, it amounts to fraud.—Briggs v. Withey, 24 Mich. 136.

¶ 236. An attorney who held a second mortgage on one of two pieces of property on which his client held a first mortgage, and who to enforce his legal right to redeem on both lands, took an agreement from the mortgagor recognizing such right, and then assisted in raising the money to pay the first mortgage, did nothing more than he had a right to do, when after ceasing to represent such mortgagee, he sought to compel a conveyance of the land is question which had been conveyed to the mortgagee's wife for a nominal sum.—Sheehan v. Farwell, 135 Mich. 196.

¶ 237. In an action against an attorney by a client based on fraud, where it appeared that the attorney had been employed to purchase the original title to land which he held a tax title, at the lowest possible price, and the attorney instead of purchasing the land for him purchased it for himself, taking the deed therefore in the name of a third party, who is a co-defendant, and the plaintiff was compelled to purchase it at a substantial advance, it was error to direct a verdict for both defendants, and the case should have been submitted to the jury because the plaintiff was entitled to recover the difference in the price paid to defendant and the price actually paid, which sum in equity and good faith belonged to the plaintiff and was in the hands of the attorney.—Roberts v. Gates, 146 Mich. 169.

¶ 238. An attorney who neglects to comply within a reasonable time with his client's demand for money and papers belonging to such client held by the attorney, is guilty of professional misconduct, and is liable as for a misdemeanor, or in an action of tort, except so far as the papers and moneys are subject to the attorney's lien for his professional services. (How. St., § 9152.)—Robinson v. Hawes, 56 Mich. 135.

§ 60. Contract and liabilities.

Liability of attorney to client for costs paid which attorney assumed, see also ante ¶¶ 116, 117.

¶ 239. In an action against an attorney upon his alleged agreement to prosecute plaintiff's suit and pay the costs, receiving half the recovery if successful, the attorney testified that after he had obtained judgment for plaintiff in the circuit court, and after the defendant in that case had announced its intention to remove the case to the Supreme Court, he and his client agreed that if he failed in the higher court he was to have no fees but was not to be liable for costs; also, that when the case was removed he declined to prosecute it if he was to be liable for costs in case of failure, and that he told his client he could then discontinue without paying costs. Held, that it was competent as bearing on his theory of the case for him to prove by the officers of the defendant in that case that defendant would have agreed to such discontinuance.—Wildey v. Crane, 69 Mich. 17.

III. ATTORNEY GENERAL AND OTHER PUBLIC ATTORNEYS.

§ 61. Attorney general and his functions.

Information or bill to restrain usurpation, official misdoing, nuisance, or other wrong to public, see Injunctions; Franchises; Nuisances, II, III; Municipal Corporations, XVI, A; Corporations, XXI.

Attorney general as party relator, see Injunctions, III; Mandamus, V; Quo Warranto, III.

Attorney general as plaintiff to prosecute injunction for public nuisance, see Nuisances, III.

Attorney general or prosecuting attorney as officer to bring quo warranto, see Quo Warranto, III.

Power to sue for enforcement of charitable gift, see Charities.

Interference to set aside public contract by city, see Public Contracts, VI.

Control of criminal case in Supreme Court, see Indictment and Prosecution, XVI, B.

Officer to sue for city moneys, see Municipal Corporations, XVI, A.

Officer to sue for county moneys, see Counties, VIII.

General provisions relative to the attorney general, see Comp. L. 1915, chap. 13, §§ 132-147.

¶ 240. The attorney general is the proper representative of the state in the Supreme

Court in proceedings to which the state is a party; and no other attorney appearing without his consent or approval to represent the public interest will be recognized. He only can make the people plaintiffs in error.—People v. Navarre, 22 Mich. 1; Babcock v. Hanselman, 56 Mich. 27; Frey v. Michie, 68 Mich. 323; Vrooman v. Michie, 69 Mich. 42.

¶ 240a. Where a relator brings suit in mandamus to compel the state veterinary board to grant a registration certificate, the respondent can be represented only by the attorney general as counsel.—Jennings v. State Veterinary Board, 156 Mich. 417.

§ 62. Prosecuting attorney and his functions.

Assistants and their qualifications and selection, see post §§ 64-66.
Counsel for accused on preliminary examination, see Arrest, Commitment and Bail, § 32.
General law of officers as applied to prosecuting attorneys, see Elections; Officers.
Officer to sue for county moneys, see also Counties, VIII.
Conduct and control of criminal cases, see Indictment and Prosecution, IX, A, XVI, B.
Representation of prisoner in absence of counsel for defense at passing sentence under plea of guilty, see Indictment and Prosecution, XI.
Fees to appointed counsel for accused as county charge, see Counties, IV.
Certification of costs to charge state, see Costs, II, IV.
Public policy of private contract with attorney relating to institution of prosecution, see Contracts, IV, B.
General provisions relative to the prosecuting attorney, see Comp. L. 1915, chap. 70, §§ 2405-2429.

¶ 240b. The history and nature of the office of prosecuting attorney, and the legislation concerning it, considered, and the conclusion reached that no person who has not been admitted as an attorney at law is eligible to the office of prosecuting attorney.—People ex rel. Hughes v. May, 3 Mich. 598.

¶ 241. The prosecuting attorney is a sworn minister of justice, whose duty it is to see that the innocent are protected as well as that the guilty are brought to punishment, and he must act impartially.—Wellar v. People, 30 Mich. 16; People v. Gordon, 40 Mich. 716; People v. Davis, 52 Mich. 569; People v. Quick, 58 Mich. 321; People v. Cona, 180 Mich. 641.

¶ 242. The prosecuting attorney is a quasi judicial officer, and he and any one associated with him represent public justice exclusively, and stand indifferent as between the accused and any private interest.—Meister v. People, 31 Mich. 99; Sneed v. People, 38 Mich. 248; People v. Hurst, 41 Mich. 328; People v. Bemis, 51 Mich. 422.

¶ 243. A prosecuting attorney is vested with a personal discretion as a minister of justice and not as a mere legal attorney, and he must act impartially, as well in refraining from prosecuting as in prosecuting. He must guard the real interest of public justice in behalf of all concerned, and he must not become entangled with private interests or grievances in any way connected with charges of crime.—Engle v. Chipman, 51 Mich. 524.

¶ 244. No one who is not a duly qualified attorney is eligible to the office of prosecuting attorney.—People ex rel. Hughes v. May, 3 Mich. 598.

¶ 245. It is the constitutional province of the prosecuting attorney in criminal cases to select the witnesses for the state, and an act depriving him of this function and conferring it upon the court is unconstitutional.—People v. Dikeron, 164 Mich. 148.

¶ 246. Const. art. 6, § 10, authorizing the circuit judge within his jurisdiction to fill a vacancy in the office of prosecuting attorney, and How. St., §§ 663, 664, conferring this power authorized by the Constitution, evidently refer to vacancies and not to appointment of a special prosecutor in case of disqualification.—Sayles v. Genesee Circuit Judge, 82 Mich. 84.

§ 63. ——Disqualification in criminal cases.

Objections to disqualification, and proofs thereon, see Indictment and Prosecution, IV, IX, A.

¶ 247. A prosecuting attorney is disqualified from prosecuting for obtaining money by false pretences where the complaining witness is his brother, and a firm to which he himself belongs is affected by the transaction.—People v. Cline, 44 Mich. 290.

¶ 248. Under How. St., § 557, as amended by Laws 1883, Act No. 32, which forbids any attorney from prosecuting "any person for an alleged criminal offense where he is engaged or interested in any civil suit or proceeding depending upon the same state of facts" against such person, a prosecuting attorney thus disqualified cannot act in such a criminal case, even with the unqualified consent of the respondent.—People v. Bussey, 82 Mich. 49.

¶ 249. Under How. St., § 557, an attorney for the plaintiff in a pending replevin suit is disqualified from prosecuting the defendant

in a prosecution for larceny alleged to have been committed in recapturing the property replevied; the title of plaintiff in replevin, and the statement of facts under which he claims to maintain his title, being the same as those upon which the charge of larceny is based.—People v. Hillhouse, 80 Mich. 580.

¶ 250. A prosecuting attorney is not disqualified from appearing in a criminal case by the fact that an unsuccessful effort had been made to employ him in a civil cause growing out of the same state of facts, and that thereupon his father was employed therein.—People v. Summers, 115 Mich. 537.

¶ 251. The prosecuting attorney of a county to which a criminal case has been transferred for trial is not disqualified from participating in the trial by his having been employed, prior to the transfer, by the board of supervisors of the county in which the prosecution was begun to assist in the trial of the case.—People v. Fuhrmann, 103 Mich 593.

¶ 251a. Section 2561, Comp. Laws 1897, How. St., 2nd Ed., § 1158, disqualifies a prosecuting attorney, who is a depositor in a bank, from conducting the trial of a person for embezzlement from it, where facts sufficient to support a conviction would also sustain a civil action by the bank against the respondent to recover the money misappropriated, since the prosecutor as a depositor, had a direct interest in the assets of the bank.—People v. Fitzsimmons, 183 Mich. 284.

§ 64. Assistant or substitute prosecuting attorney.

See also post §§ 65, 66.

¶ 252. The prosecuting attorney, by the court's leave, can have the aid of counsel in a criminal prosecution if the counsel is not disqualified by interest or otherwise.—Ulrich v. People, 39 Mich. 245; Sneed v. People, 38 Mich. 248.

¶ 253. How. St., § 551, requiring the prosecuting attorney to conduct all criminal prosecutions in the circuit court, and section 560, authorizing the employment of additional counsel upon a prosecution for a felony, do not prohibit the employment of counsel to assist in the preparation and investigation of cases before the grand jury, although involving misdemeanors only, if, in the judgment of the board of supervisors, the prosecuting attorney, and the court, such action is necessary.—People v. O'Neill, 107 Mich. 556.

¶ 254. A prosecuting attorney may, perhaps, employ assistants in ways not involving his official discretion or responsibility, but this discretion can only be delegated on special grounds, where an assistant has been provided for by law.—Engle v. Chipman, 51 Mich. 524.

§ 65. ——Selection, qualifications and appointment.

See also ante ¶ 246.
Competency of disqualified attorney to be amicus curiæ, see Amicus Curiæ.
Presumptions on writ of error, see Indictment and Prosecution, XVI, D.

¶ 254a. It is not error for the court to appoint a special prosecutor in a case when the prosecuting attorney states that he does not propose to act but is going to allow a certain attorney to proceed who is not objected to as being disqualified, and the court appoints such attorney because he considers the prosecuting attorney disqualified.—People v. Auerbach, 176 Mich. 23.

¶ 255. An attorney appointed on the request of the prosecuting attorney to assist in the prosecution need not be excluded where it appears that he is acting under an agreement that the prosecuting attorney shall pay him for his services, and that he has received no money, and has made no arrangements to receive any, from any other person.—People v. Perriman, 72 Mich. 184.

¶ 256. Under How. St., § 560, authorizing the prosecuting attorney, under the direction of the court, to procure assistance in the trial of felonies, he may secure an assistant who is not a resident of his county.—People v. Thacker, 108 Mich. 652.

¶ 257. The fact that an attorney is strongly prejudiced against the liquor traffic does not disqualify him from assisting in the prosecution of one charged with a violation of the local option law.—People v. O'Neill, 107 Mich. 556.

¶ 258. C., an attorney for R., who had lent money to L. on L.'s depositing with R. his title deed to certain land, was asked by R. to investigate L.'s arrest upon a charge of perjury, and he told W., another attorney, that if he went into the county to force L. to give a deed of the land to him, he would follow him and prevent his doing it. In a prosecution against W. for maliciously threatening to accuse L. of perjury, in order to force L. to give the deed, it appeared that C. was not interested in L. at the time the prosecution was commenced, but that he had since been retained to defend L. in another criminal proceeding. Held, that C. could not be said to be employed as attorney in any civil proceeding involving the same state of facts, so as to be disqualified under How. St., § 557, from prosecuting the case under

appointment by the court, the prosecuting attorney being disqualified from acting.—People v. Whittemore, 102 Mich. 519.

¶ 259. Counsel who represent private interests cannot be supposed to be impartial, and, therefore, cannot be retained to assist in criminal prosecutions growing out of such interests.—People v. Hurst, 41 Mich. 328.

¶ 260. Counsel to assist the prosecuting attorney in a particular prosecution may properly be employed by the board of supervisors, with the sanction of the circuit court and the approval of the prosecuting attorney.—People v. Bemis, 51 Mich. 422.

¶ 261. The court has discretion to permit the prosecution to be assisted by the prosecuting attorney's partner who is not employed for the purpose by any private person, and who is not interested in the matter.—People v. Foote, 93 Mich. 38.

¶ 262. It is within the court's discretion to permit to be associated as counsel with the prosecution an attorney who has been involved in political and legal controversies with respondent's brother, but who has never been employed against respondent and who testifies that he can act fairly in the prosecution.—People v. Montague, 71 Mich. 447.

¶ 263. How. St., § 559, providing that the Supreme Court and the circuit courts may in certain cases appoint an attorney to perform the duties of the prosecuting attorney refers to cases arising in or pending in those courts, and not to cases outside of such courts.—Sayles v. Genesee Circuit Judge, 82 Mich. 84.

¶ 264. A circuit judge has no authority under How. St., §§ 559, 560, 663, 664, to appoint a special prosecuting attorney to investigate a charge of crime, or to conduct an examination before a justice of the peace. So held where, owing to the disqualification of the prosecuting attorney, and at his request, the circuit judge appointed a special prosecuting attorney to conduct a criminal examination, and after the discharge of the respondent upon such examination, and on the petition of the complaining witness, the judge appointed another attorney as special prosecutor to investigate the case, and prosecute the complaint if, in his judgment, it was well founded.—Sayles v. Genesee Circuit Judge, 82 Mich. 84.

¶ 265. In the absence of a contrary showing by respondent, an attorney appointed by the court to assist the prosecuting attorney in the prosecution of a criminal case will be presumed to be qualified to perform such duty, and need not be sworn as to his qualifications.—People v. Wright, 89 Mich. 70.

¶ 266. An assistant prosecuting attorney has no power in the matter of retaining counsel to assist in criminal prosecutions.—People v. Hurst, 41 Mich. 328.

§ 66. ——Privately employed associates.

Private interest as affecting qualification for appointment by court, see ante §§ 64, 65.
Right to employ in bastardy proceedings, see Bastards, § 4.

¶ 267. A prosecuting attorney may be aided by counsel in the trial of criminal causes, but it is error to allow any counsel employed by private parties to act for or with him in that capacity. The policy of the law intrusting the management of criminal business to an official prosecuting officer was adopted to secure the administration of criminal justice from being abused or used for private purposes.—Meister v. People, 31 Mich. 99; People v. Hurst, 41 Mich. 328.

¶ 268. Respondents on trial for burning property with intent to defraud insurers have a right to object to the employment of counsel on the trial who were in the interest and employment of the insurers.—Meister v. People, 31 Mich. 99.

¶ 269. General counsel for a bank cannot take part in a criminal prosecution for obtaining money therefrom by false representations to its president, especially if such counsel is also acting for the bank in a civil suit involving the same subject matter. The fact that complaint was made by the president and that the counsel was not retained by him personally makes no difference. (Laws 1879, Act No. 195, p. 179.)—People v. Hendryx, 58 Mich. 319.

§ 67. City and village attorneys.

City attorney or corporation counsel, see Municipal Corporations, XV, XVI.

ATTORNMENT.

Cross-References.

Attornment—
Of tenancy in general, see Landlord and Tenant.
Of possession adverse to owner, see Adverse Possession.

AUCTIONS AND AUCTIONEERS.

TREATS of sales by competitive bidding at public outcry, and of the occupation of auctioneers and the regulation thereof.

Analysis.

§ 1. Nature, functions and authority in general.
§ 2. Rights and liabilities.
§ 3. Auction sales.

§ 1. Nature, functions and authority in general.

Licenses and regulating ordinances, see Licenses; Municipal Corporations, IX, C.
Ratification of acts by tendering conveyance of land sold, see Agency, ¶ 350.

¶ 1. Assignees in bankruptcy who have employed an auctioneer to make sale of the assets of the estate, and have put him in charge, must be understood as authorizing him to speak for them, and when he accepts a bid and knocks down the property a bargain is closed. Where the assignees were present, and through inattention misunderstood the bids, it was held no excuse for refusing to carry out the sale.—Ives v. Tregent, 29 Mich. 390.

¶ 2. Where an auctioneer discloses the fact of agency and his principal, the law presumes that he does not contract upon his own behalf but for the principal.—Mercer v. Leihy, 139 Mich. 447.

§ 2. Rights and liabilities.

¶ 3. An auctioneer who, though not knowing that the person from whom he receives property for sale has not title, sells such property in good faith and pays over the proceeds less his commission, is liable to the true owner as for conversion.—Kearney v. Clutton, 101 Mich. 106.

¶ 4. An auctioneer offered some horses for sale. He stated that they did not belong to a named party, and asked, "Where is the man who brought these horses," whereupon the man stepped out so as to be identified, though his name was not given. The horses were in fact stolen. Held, that the principal was sufficiently identified so as to relieve the auctioneer from personal liability to the purchaser.—Mercer v. Leihy, 139 Mich. 447.

§ 3. Auction sales.

Sale of estrays at public auction, see Animals, § 5.
Right of assignee to sell at auction, see Assignments for Creditors, § 22.
Requisites of contract under Statute of Frauds, see Frauds, Statute of.

¶ 5. Auction sale implies a sale to the highest bidder, and it is presumed that it was so made.—McCammon v. Detroit, L. & N. R. Co., 103 Mich. 104.

¶ 6. A bidder at auction sale is presumed to have known what interest was being offered and sold, where it was publicly announced at the auction and in hand bills advertising the sale.—Stowell v. Ames, 148 Mich. 439.

¶ 7. Where an auctioneer makes a sale of land different from the terms authorized by the owner, and from those stated in the printed advertisement, the owner is not liable for the money paid thereon to the auctioneer, and which he himself has refused to receive.—Muffat v. Gott, 74 Mich. 672.

¶ 8. The law does not approve of one who is the auctioneer at a chattel mortgage foreclosure sale, occupying the dual position of such auctioneer and agent of the buyer, as well as that of attorney for the mortgagor and the mortgage trustees.—Smitton v. Selbert, 136 Mich. 410.

AUDIT to BAIL.

Cross-References.

Audit—
Of claims against public bodies, see Counties, VI; Municipal Corporations, XIV; Townships, VI; State of Michigan; Schools, IV.
Certiorari to review action, see Certiorari.
Mandamus to compel action, see Mandamus, III.
In the sense of reference by court, see Reference.
Audita Querela—
See Judgments, VI.
Aunts—
Rights as heirs or next of kin, see Descent.

Australian Ballot Law—
See generally, Elections.
Authentication—
See generally topics treating of thing to be authenticated.
Of documents to be admissible as evidence, see Evidence. VIII; Indictment, VIII.
Authorities in Briefs—
Mode of citation, see Appeal, XI, E; Indictment, XVI; Certiorari.
Authority—
See generally topics treating of the person or officer or representative, or of the thing requiring authority, e. g., Agency; Corporations, XVII; Attorneys, II, III; Brokers; Officers, VI; Municipal Corporations, XV; and see Acknowledgments; Oaths; Notaries Public; etc.
Judicial or public authorization as protection or justification, see Officers, VI, A; Sheriffs, IV; Arrest, Commitment and Bail, I; False Imprisonment.
Of precedent or former decision, see Courts, IV; Appeal and Error, XII, G, XV.
As used in the sense of power inherent in actor, see cross-references under "Power," and see specific topics, e. g., Corporations; Municipal Corporations; Constitutional Law (power of legislature).
Authorized Nuisance or Obstruction—
See Nuisances; Highways, XI; Navigable Waters, II.
Authors—
Literary property, see Literary Property.
Automobiles—
See generally Highways, XIII, XIV (Motor Vehicle Laws and Regulations).
Garage keepers as bailees, see Bailments.
Power of carrier to regulate taxicabs at stations, see Carriers, I.
Damages and the measure and proof of same for injuries, see Damages.
Crimes involving use of, see Crimes, II: Indictment.
Manslaughter in use of, see Homicide.
Autopsy—
Rights and liabilities respecting corpses, see Corpses and Burial.
As evidence of cause of death, see Evidence, VI, B (expert); Indictment, VIII; Insurance, XX; Homicide, VII.
Autrefois Acquit; Autrefois Convict—
See Crimes, I.
Available Defenses—
Merger in judgment, see Former Adjudication, IV.
Raising on review for first time, see Saving Questions.
As furnishing adequate remedy at law, see generally Equity, III, B; and see specific topics like Injunctions; Rescission; Fraud, III; Quieting Title.
Avenues—
See Highways.
Average—
In insurance or shipping, see Insurance, XVI; Shipping.
Average Verdicts—
See Verdicts, I.
Avoidance—
Of contracts, conveyances and transfers, see Rescission; Insurance; Fraternal Associations; Infants; Insane Persons; Gifts; Fraudulent Conveyances; Corporations, XII, XIV, XXIII.
Grounds for, see Fraud; Duress; Mistake; Contracts, IV.
Awards—
By arbitrators, see Arbitration and Award.
Of alimony, see Divorce, X.
Of damages generally, see Damages.
Of condemnation damages, see Eminent Domain, V, E; Highways, II, B.
Awnings—
Over streets as encroachments, see Highways, XI.
Bad Character—
Admissibility of evidence as to, see Assault and Battery; Homicide; Indictment, VIII; Evidence, VII, B; Libel.
Bad Counts—
One bad count as harmless error, see Harmless Error; Indictment, XV.
Rules of pleading generally and of variance, see Pleading; Indictment and Prosecution, I.
Bad Faith or Intent—
In general, see Fraud and Deceit.
Doctrine of bona fides and notice, see Negotiable Instruments, XIII; Notice and Record of Title, I.
Element in torts, see specific topics, e. g., Conversion, Trespass; Libel; Malicious Prosecution; False Imprisonment; Assault and Battery.
General presumptions as to, see Evidence, II.
Badge of Fraud—
See Fraud; Fraudulent Conveyances; and see Chattel Mortgages, I, D.
Baggage—
Duties and liabilities of carriers, see Carriers, V.
Duties and liabilities of innkeepers, see Inns.
Ordinary bailments of, see Bailments.
Bail—
In criminal cases, see Arrest, Commitment and Bail.
In civil cases, see Civil Arrest and Bail.

BAILMENTS.

TREATS of the transfer of possession of chattels without change of title, to be redelivered after the purpose of such transfer is accomplished, and of the rights and liabilities incident to such transfers; but excludes for specific treatment certain bailments, e. g., Carriers; Pledges; Auctions; Inns; Warehousing. The right of possession incident to contract or lien is treated in Chattel Mortgages; Contracts, VI; Liens.

Analysis.

§ 1. In general; bailment or sale.
§ 2. Creation, duration and termination.
§ 3. Title and rights of possession and liens.
§ 4. ——As to third persons.
§ 5. General duties and responsibilities.
§ 6. ——As dependent on hire, compensation or special agreement.
§ 7. ——Negligence, what constitutes.
§ 8. Conversion by bailee.
§ 9. Accidental loss or injury or theft.
§ 10. Involuntary bailee.
§ 11. Loans and hiring.
§ 12. Deposits and keeping.
§ 13. ——Garage keepers.
§ 14. Carriage, work and labor.
§ 15. Pledge and pawn.
§ 16. Actions and procedure.

§ 1. In general; bailment or sale.

Specific kinds of bailments are treated under appropriate heads. See Agency, V; Animals; Auctions; Brokers; Carriers; Inns, Restaurants and Lodging Houses; Pledge; Shipping; Warehousing.

Contract as one of agency or bailment, see Agency, § 1.

Brokers and factors as bailees of goods or securities in their charge, see Brokers; Agency, V.

¶ 1. A bailment implies a return of the original thing that is the subject of the bailment; a deposit of money that is not to be kept identically, but is to be used in a particular manner, is not a bailment.—Havens v. Church, 104 Mich. 135.

¶ 2. A bailment is created by a contract whereby sheep of another are received by a person to hold for a number of years, on rendering a portion of the increase and wool annually as rental.—In re Parsell's Estate, 184 Mich. 522.

¶ 3. A delivery of grain into custody and the issuance against it of a receipt or of an agreement to redeliver it out of a mass is a bailment and not a sale.—Erwin v. Clark, 13 Mich. 10; Ledyard v. Hibbard, 48 Mich. 421.

¶ 4. A consignee of part of grain in a mass cannot be regarded as a bailee of it, where neither he nor the consignor has possession of receipts necessary to establish and claim the right of possession of the grain.—Perkins v. Dacon, 13 Mich. 81.

§ 2. Creation, duration and termination.

Necessity of notice to terminate, see also ¶¶ 52, 53.

Treating nondelivery on demand as conversion, see post § 8.

Adverse possession of bailee, see post ¶ 8.

Joinder of distinct bailments in one suit, see post ¶ 60.

Authority of agent to charge principal for keeping of horse, see Agency, ¶ 304.

In so far as creation of a bailment contract involves the general law of contracts, see generally Contracts.

Effect of statute to invalidate entire contract of bailment not to be performed within one year, see Frauds, Statute of, III, A.

¶ 5. In trover for the conversion by a lessee of property which he had held over his term, a charge that, if he had failed to keep and care for the goods as a prudent man would as to his own, the relation of bailor and bailee was ended, and so entitled plaintiff to bring trover without any demand, was held too broad where it had not appeared that the alleged want of care and diligence,

if any, related to more than a part of the goods, or that this part was actually injured.—Thompson v. Moesta, 27 Mich. 182.

¶ 6. Where bailed chattels are not redelivered to the owner at the time stipulated in a contract of bailment, and the failure of the bailee, who does not deny the bailor's right to possession, is not excused, the bailment is not at an end, but the bailee continues to hold the goods in trust.—In re Parsell's Estate, 184 Mich. 522.

¶ 7. The fact that the possession of chattels is retained by a bailee without objection after the expiration of the time stipulated in a contract of bailment, may, in connection with other persuasive circumstances, raise a question for the jury whether the bailment was terminated or was continued and renewed.—In re Parsell's Estate, 184 Mich. 522.

§ 3. Title and rights of possession and liens.

Right of possession as requisite to bailment, see also ante ¶¶ 3, 4.
Duration and termination of right, see ante § 2.
Conversion by withholding possession, see post § 8.
Obeying orders of owner as conversion, where bailor had lien, see also post ¶ 31.
Delivery of animal as essential to create livery stable lien, see Animals, § 24.
Construction of contracts for use of property, see also Contracts, VI.
Liens of laborers at common law and by statute, see Liens.

¶ 8. The mere retention of possession of property by a bailee, without assertion of an adverse claim, however long continued, will not of itself work a change of ownership.—In re Parsell's Estate, 184 Mich. 522.

¶ 9. The fact that one who had left money with defendant for keeping sent to his wife for part of it while away, and that she did not send it, but defendant sent a small sum, does not tend to show that it was the money of the wife to whom as bailor the defendant was responsible.—McGraw v. Lapham, 72 Mich. 191.

¶ 9a. A wife who had taken and deposited in a bank in her own name part of a sum of money which her husband had secreted in his house, afterwards returned to him part of the deposit, and, pending divorce proceedings, let her solicitor have $170 which she had drawn from the deposit, and for which she took a receipt stating it was "to be returned on demand." Subsequently she brought trover against the solicitor for the money, and testified that her husband assented to her retaining the rest of the deposit not repaid to him. The husband denied this. Held, that as the solicitor when he received the money knew the facts of her claim concerning it, he was estopped afterwards from saying the money was not the wife's, and claiming the right to show title in the husband.—Pierce v. Underwood, 103 Mich. 62.

¶ 10. Defendants in possession of certain patterns belonging to plaintiffs were not entitled to the payment of storage as a condition of turning over such property to plaintiffs, suing in trover, where it appeared that a certain agreement had been executed between the parties whereby all matters of difference between them were settled and providing that such patterns should be delivered to plaintiffs on demand, and where subsequently to the date of such agreement the acts of defendants indicated that a demand for such property would be useless.—Galvin v. Galvin Brass & Iron Works, 81 Mich. 16.

§ 4. ——As to third persons.

Liability of depositary for misdelivery to adverse claimant, see also post § 12.
Remedy for misdelivery to claimant of title, see also post § 16.
Relationship of servant in custody of bailed goods, whether bailor's or bailee's servant, see Master and Servant; Agency.

¶ 11. One who hires for the use of a third person a horse and carriage, and is charged for the horse, is not liable for injury to the horse by the negligence of the third person in driving, the horse having been entrusted by the bailor to the third person and not delivered to the person charged for the hire.—Wallace v. Langeland, 66 Mich. 365.

§ 5. General duties and responsibilities.

What constitutes negligence or care, see post § 7.
As dependent on reward or compensation, see post § 6.
Contract liability and duty of hirers, see also post § 11.
Bailee's responsibility for negligence of third person, see also ante ¶ 11.
Responsibility of hirer of horse for acts of third person entrusted with care of it, see post ¶ 20.
Responsibility for acts of servant, see also post ¶ 43.
Measure of damages on contract, see Damages, II, D.
Damages for negligence, see Damages, III, B, C.

¶ 12. Where the rights and duties of the parties are not defined by a contract of bailment, the bailee is required in conserving the thing bailed, to exercise such care and diligence as a person of average prudence and diligence would bestow under similar circumstances.—In re Parsell's Estate, 184 Mich. 522.

¶ 13. Where a contract of bailment is for the sole benefit of the bailor, bailee is only required to act in good faith, and he is consequently responsible for nothing less than gross neglect.—Cadwell v. Peninsular State Bank, 195 Mich. 407.

¶ 14. A gratuitous bailee of goods destroyed by fire is liable only for gross negligence.—Barrows v. Cushway, 37 Mich. 481.

¶ 15. A gratuitous bailee must not be reckless; so a railway company receiving property for gratuitous carriage must observe such care as the circumstances reasonably require.—Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111.

¶ 16. One taking horse for pasturage under contract void because made on Sunday is liable if he turns it into a pasture knowing of disease among other horses there, which it contracts.—Costello v. Ten Eyck, 86 Mich. 348.

¶ 17. Where one has possession of another's cattle under a contract that he shall pay for any damages they may sustain, and they are injured by his servant's beating them cruelly, evidence that other cattle were not injured by similar treatment is inadmissible.—Smith v. McGill, 27 Mich. 142.

¶ 18. Where one has by contract leased sheep to another to be properly cared for, and to be returned unless the sheep died without his negligence, the fact that the lessor, on being shown sheds where the sheep were to be kept, said that they were good for the purpose, does not raise an estoppel against alleging their unfitness if keeping the sheep in them was negligence.—Wolscheid v. Thome, 76 Mich. 265.

¶ 19. In an action against the lessee of sheep for breach of contract to care properly for them, etc., a request by defendant for an instruction that, to find against him on account of the improper location of the sheds wherein the sheep were kept, the jury must be satisfied from the evidence that men of ordinary skill and prudence in keeping sheep would not have located the sheds as defendant did, should be granted.—Wolscheid v. Thome, 76 Mich. 265.

¶ 20. One who hires horses and entrusts them to the care and attention of a driver agreed on by the owner is liable for the negligence of such driver only, and not for that of an innkeeper or his hostler, to whom such driver without negligence has entrusted them.—Ruggles v. Fay, 31 Mich. 141.

¶ 21. A traveling salesman entrusted with samples to be taken care of on his personal responsibility, and without orders to send them by express, has no duty laid on him to entrust them to any one else, and is not bound in the absence of complaint by his employer to put the property out of his personal custody to save the expense of his journey.—Lamb v. Henderson, 63 Mich. 302.

§ 6. ——As dependent on hire, compensation or special agreement.

See also ante § 5, post § 7.
See also ante ¶ 46.
What constitutes conversion by gratuitous bailee, see post § 8.
Liability of naked depositary for misdelivery, see also post § 12.
Garage keeper's liability, see also post ¶¶ 52, 53.

¶ 22. One who has possession and use of another's cattle under a contract to pay for any damages they may sustain is absolutely liable for injuries thereto without reference to any failure to use due care, and without reference to their being less serviceable than expected or injured when received, unless there was fraud in such respects.—Smith v. McGill, 27 Mich. 142.

¶ 23. In an action for damages for breach of contract to feed and properly care for plaintiff's horses, evidence tending to show that they were returned in bad condition by defendant, and that such condition was due to want of proper care and food, warrants a charge that this casts on defendant the burden of proving other cause, if there was any, for their condition.—Hynes v. Hickey, 109 Mich. 188.

¶ 24. The bailment whereby diamonds are sent for selection to a retail dealer, being for the mutual advantage of the parties, the bailee is held to the exercise of ordinary care and diligence only in his custody of the goods.—Knights v. Piella, 111 Mich. 9.

¶ 25. In an action to recover the value of certain property lost, where the issue was whether the storing of the property was a part of the consideration for a lease of the premises where it was stored, and whether the defendant had thus assumed the obligation of a bailee for hire, or was a gratuitous bailee, the evidence examined was held to support the finding that the defendant as part of the agreement for renting the store had agreed to store the lost property.—Henry v. Salomon, 148 Mich. 467.

§ 7. ——Negligence, what constitutes.

See also ante § 6.
See also post ¶¶ 45, 47.
General duty of care, see also ante § 5.
Negligence by bailee as termination of bailment, see ante § 2.

¶ 26. Ordinary care means such care as ordinarily prudent men, as a class, would exercise, in caring for their own property under like circumstances.—Fraam v. Grand Rapids & I. Ry. Co., 161 Mich. 556.

¶ 27. Whether it is prudent for the driver of a hired horse to entrust it to the care of an innkeeper with whom he puts up as a guest depends largely upon circumstances, and the customs of the place, and should be left to the jury as a question of fact.—Ruggles v. Fay, 31 Mich. 141.

¶ 28. One who hired a horse for a specified journey and drove it beyond what his contract contemplated, so that the horse died, was held in trover for its value.—Fisher v. Kyle, 27 Mich. 454.

§ 8. Conversion by bailee.

Necessity of demand, see also ante ¶ 10.
Accidental loss of goods, see also post § 9.
Liability of third person, see also ante ¶ 11.
Trover or assumpsit as remedy, see post § 16; and see generally Assumpsit, §§ 6-10 (waiver of tort).
See also generally Conversion.
Damages for conversion, see Damages, III, C.

¶ 29. The general rule is that if a bailee having authority to use a chattel in a particular way, uses it in a different way, or to a greater extent than authorized, such unauthorized use is a conversion of the chattel, and the bailor may maintain an action for its value.—Baxter v. Woodward, 191 Mich. 379.

¶ 30. An agent who has possession of an automobile for the purpose of sale and has no authority to drive the car, even for demonstration purposes, without the consent of the principal, is liable for a conversion thereof where he takes the automobile to another city without the consent of the principal and it is wrecked in a collison with another car.—Baxter v. Woodward, 191 Mich. 379.

¶ 31. Where one who has a lien on goods leaves them with his bailee, who ships them against his directions, this is a conversion; and the owner's orders to ship them would not justify the bailee though they might affect the question of damages.—Edwards v. Frank, 40 Mich. 616.

¶ 32. An action does not lie for the value of property gratuitously lent on a showing merely that the lender had sent for it and had not received it back; it is not presumable without proof that the borrower wrongfully withheld it.—Beller v. Schultz, 44 Mich. 529.

¶ 33. Where, without authority therefor, the bailee of a note delivers it to the maker for destruction, there is a conversion.—Hicks v. Lyle, 46 Mich. 488.

¶ 34. It is the duty of the proprietor of a skating rink to preserve skates delivered to him by his patrons, and for which he has given checks, and his failure to deliver them on demand, because he cannot find them, is a conversion.—Donlin v. McQuade, 61 Mich. 275.

¶ 34a. The mere failure of a bailee to account is not proof of a conversion.—Hutchins v. Vinkemulder, 187 Mich. 676.

§ 9. Accidental loss or injury or theft.

See also ante ¶ 34, post ¶¶ 57, 58.
Loss by elements, see also post ¶ 42.
Loss amounting to conversion, see also ante § 8.
Under absolute agreement to be responsible, see also ante ¶ 22.
Injury due to agreed use being excessive, see post ¶ 44.
Mistake of depositary on paying reward, see also post ¶ 51.
Liability of garage keeper for collision damage, see post § 13.
Duty and liability of bailor as to defects in or accidents to the thing bailed, resulting in damage to or loss of the thing bailed, or injury to the bailee or his employees, see note, 15 N. C. C. A. 1033-1047.

¶ 35. One who hired a horse for a specified journey was not liable in trover if the horse died where the driving was within what the contract contemplated as to distance, time, etc.—Ruggles v. Fay, 31 Mich. 141.

¶ 36. If one hires a horse to go to a funeral on Sunday and goes elsewhere and, while on his return, the horse steps through a defective bridgeway and receives injuries resulting in its death, the one hiring the horse is guilty of conversion and is liable for the value of the horse.—Thompson v. Shaw, How. N. P. 262.

¶ 37. In an action by the bailor to recover the value of the goods from the bailee upon failure of the latter to redeliver, the bailee may show, under a plea of the general issue, that the goods were stolen from him; and no presumption of negligence arises from the mere fact of the loss by theft.—Knights v. Piella, 111 Mich. 9.

¶ 38. In assumpsit for value of the goods, the bailee having shown a fact which prima facie excuses loss and his failure to redeliver, the burden rests upon the bailor to prove want of due care.—Knights v. Piella, 111 Mich. 9.

¶ 39. A letter written by the bailee to the bailor immediately after their theft, apprising the bailor of the fact, and promising to pay for the goods, does not conclusively establish the liability of the bailee, independent of all the other circumstances surrounding the transaction.—Knights v. Piella, 111 Mich. 9.

§ 10. Involuntary bailee.

Carriers as bailees for carriage, see generally Carriers.
Innkeepers, see Inns, Restaurants and Lodging-Houses.
Sheriff as bailee of goods, see Attachment, VI, C; Executions; Sheriffs, IV.

§ 11. Loans and hiring.

General duties and responsibility, see ante §§ 5-7.
General rules as applied to hirings, see also ante §§ 5-7.
Hiring for the use of third person, see ante ¶ 11.
Accidental injury or loss, liability for, see also ante § 9.
Exceeding terms of bailment as conversion, see also ante ¶ 28.
Conditional sale agreements in form of lease with title to pass on payment, see Sales, XII.
Charter parties, and towage, see Shipping.
Liability for loss of or injury to articles loaned for exhibition purposes, see note, 2 N. C. C. A. 885-886.
Liability of livery stable keeper for injury caused by unsuitable or vicious horse hired from him, see note, 8 N. C. C. A. 718-721.

¶ 40. One who hires a horse for a specified journey and drives it beyond what his contract contemplated takes upon himself all the consequences of such additional driving, and if the horse dies while being so driven he is liable in trover for its value.—Fisher v. Kyle, 27 Mich. 454.

¶ 41. A borrower of property is not an insurer of it even when it is gratuitously lent. —Beller v. Schultz, 44 Mich. 529.

¶ 42. A man lent a flag to his employer, helped him to hoist it, and left it flying when he went away. It was afterwards damaged by a hail storm. Held, that the employer was not liable for the damage done, without proof, at least, that he had failed to take due care of it.—Beller v. Schultz, 44 Mich. 529.

¶ 43. The failure of a bailee for hire, or his servants, to use and treat a horse with the degree of reasonable care ordinarily exercised by prudent men, renders the bailee liable to the bailor for all injuries traceable to improper treatments.—Pesola v. Forsten, 182 Mich. 94.

¶ 44. One who has let his horse to go a specified journey within a given time cannot recover for its loss if it is driven only in the time and by the way and by the driver agreed upon, if its death results from its being overtasked to accomplish only that which its owner contracted that it should perform. —Ruggles v. Fay, 31 Mich. 141.

¶ 45. One who has hired a horse is bound to use such prudence and foresight in the care of the animal as is usual under the circumstances, and no more, and whether it would be prudent for the driver to entrust it without further attention to the care of an innkeeper with whom he put up as a guest depends much upon circumstances and the customs of the place, and should be left as a question of fact for the jury to determine upon the whole facts of the particular case.—Ruggles v. Fay, 31 Mich. 141.

¶ 46. Where the owner of a team, after hiring it out and binding himself to furnish a driver, makes a temporary arrangement with the other party whereby the latter takes the team into his own charge and promises to furnish a driver himself if he has occasion to use it, the transaction, being for the benefit of both parties, amounts to a bailment for hire, and the party in possession of the team is bound to take such ordinary care of it as a prudent owner would take. And the driver whom he furnishes is his servant and not that of the owner of the team. —Hofer v. Hodge, 52 Mich. 372.

¶ 47. In an action to recover for the death of hired horses, alleged to have been occasioned by improper driving, it is not error for the court to state to the jury a matter of common knowledge and experience as to a certain condition of horses, where he instructs that if such condition of the horses in question was such that a man of ordinary prudence would have known that it was unsafe to proceed, it was defendant's duty to have turned around and placed the horses somewhere.—Lewis v. Bell, 109 Mich. 189.

§ 12. Deposits and keeping.

Degree of care required of gratuitous bailee, see also §§ 5, 7.
Liability as dependent on gratuitousness, see also ante ¶ 25.
Person entitled to possession, and right to retain possession, see also ante ¶¶ 9, 10.
Nature of money deposits, see ante § 1.
Conversion by bailee, see also ante § 7.
Proper remedies, see post § 16.
Contracts for the keeping of animals and liability thereunder, see Animals, § 24.

Carriers as warehousemen, see Carriers, II, F.
Safe deposit business in general, see Banking and Money Affairs, IX.
Warehousing and storage, see Warehousing.

¶ 48. A naked bailee cannot be held answerable for delivering the goods held by him to the wrong person, if the agent of the person properly entitled thereto has given him to understand they were for the one to whom they were delivered.—Brant v. McMahon, 56 Mich. 498.

¶ 49. A gratuitous bailee with whom money is deposited for the purpose of paying for stock held by such bailee for another is not guilty of gross negligence in paying the money to the supposed owner of the stock where he has no knowledge that the stock belongs to another person, and the supposed owner, upon inquiry, informs him that the stock belongs to him.—Cadwell v. Peninsular State Bank, 195 Mich. 407.

¶ 50. An officer of a bank with whom is deposited preferred corporate stock under an arrangement with the corporation and purchaser under which the purchaser is to pay for same when sold and is to have as a bonus a certain number of shares of common stock likewise deposited and is to account to the corporation for the price of the preferred stock when sold and to such purchaser for the shares of common stock is merely a gratuitous bailee where he neither asks, nor is promised nor receives any compensation or payment of any kind for his acts in protecting the rights of the subsequent purchaser of such common stock from another person.—Cadwell v. Peninsular State Bank, 195 Mich. 407.

¶ 51. County officers deposited with A. a sum of money to be paid by him to persons who should cause certain stolen books of record to be returned. On receiving a paper signed by a county officer acknowledging the receipt of the books, A. paid over the money. Held, that A. being a simple bailee without compensation, and having acted in good faith, the county could not afterwards recover of him the money which he has so paid because a few leaves of the books were missing, and some pages rendered illegible.—Eldridge v. Hill, 97 U. S. 92, 24 L. ed. 970.

§ 13. ——Garage keepers.

Conversion by unauthorized use of car, see ante ¶ 30.
Motor vehicle law in general, see Highways, XIV.
Liability of garage keeper for loss of or injury to car, see note, 10 N. C. C. A. 1007-1014, 15 N. C. C. A. 308-312.

¶ 52. Where a contract by an automobile owner with a garage proprietor contemplates storage and extras which are incidental to garage service, including conveyance to and from the garage, and the automobile is being taken to the garage from the owner's home by a garage employee at the time it is struck by a street car and the owner of the automobile has had no notice of a change of ownership of the garage, the contract is still in effect so as to render the former proprietor of the garage liable for the negligence of such employee.—Banks v. Strong, 197 Mich. 544.

¶ 53. In an action by the owner of an automobile against the former proprietor of a garage, with whom such owner had a contract for storage and conveyance to and from the garage, for damages for injury to the automobile while under the control of an employee of the garage taking it from plaintiff's home to the garage, an instruction that the transfer of the business was not involved because plaintiff had no notice thereof; that the contract of bailment continued after the transfer, and that defendant had no right to change the contract by transferring his liability to some one else, held to be correct.—Banks v. Strong, 197 Mich. 544.

¶ 54. In an action against a garage proprietor for damages for injury to a car left by the owner for repairs and which was taken out by an employee of defendant for his own personal pleasure and damaged, an instruction setting out the respective claims of the parties and stating that there could be no recovery unless plaintiff established by a fair preponderance of the evidence that there had been a neglect of duty that the defendant owed to him when the defendant became a bailee for hire, held proper.—Smith v. Bailey, 195 Mich. 105, 15 N. C. C. A. 308.

¶ 55. A prima facie case of negligence by a garage owner is made out by proof of delivery of an automobile to such owner for repairs in good condition and failure to produce it in a condition similar to that in which it was received.—Smith v. Bailey, 195 Mich. 105, 15 N. C. C. A. 308.

§ 14. Carriage, work and labor.

Care required of gratuitous carrier, see also ante ¶ 15.
Common carriage in general, see Carriers.
Contract rights and duties and liabilities of person engaging to perform work and labor on another's chattels, see generally Contracts; Implied Contracts; Master and Servant.
Liability for loss of or injury to clothing or other article while in possession of another for purpose of being cleaned, repaired or dyed, see note, 5 N. C. C. A. 807-813.
Liability of clothes cleaner, etc., for articles left in clothes, see note, 12 N. C. C. A. 362.

§ 15. Pledge and pawn.

See generally Pledges.

§ 16. Actions and procedure.

Presumption as to negligence, see also ante ¶ 37.
Presumption as to wrongful withholding, see also ante ¶ 32.
Redelivery in impaired condition as prima facie case, see also ante ¶ 55.
Burden as to care, see also ante ¶ 38.
Burden of proof in loss by bailee, see ante § 9.
Burden of proof of cause of injury, see also ante ¶ 23.
Receipt as evidence of bailment, see ante ¶¶ 3, 4.
Evidence as to which of two persons was bailor, see also ante ¶ 9.
Evidence as to gratuitousness of bailment, see also ante ¶ 25.
Evidence as to other acts of care or neglect, see also ante ¶ 17.
Promise to pay as admission of liability for loss, see also ante ¶ 39.
Jury question as to proper care, see also ante ¶¶ 27, 45.
Jury question as to termination, see ante ¶ 7.
Instruction on negligence, see also ante ¶ 19.
Instruction on care in driving, see also ante ¶ 47.
Instruction on effect of transfer of business by bailee, see also ante ¶ 53.
Charge on termination by reason of breach of duty, see ante ¶ 5.
Instruction on sufficiency of proof, see also ante ¶ 54.
See also generally Assumpsit; Contracts, X; Conversion; Replevin; Trespass; and see the procedural topics such as Evidence; Pleading; Trial.
For the procedure and remedies incident to particular bailments, see topics treating thereof.
Waiver of conversion to sue in assumpsit, see Assumpsit, I.

¶ 56. A person who leaves property with a bailee may sue in trover for conversion, or, waiving the tort, may sue in assumpsit, and recover the value of the property, where the defendant converts such property to his own use.—Newman v. Olney, 118 Mich. 545.

¶ 57. Evidence that defendants have come lawfully into the possession of government bonds as gratuitous bailees for plaintiff's intestate, and have delivered them to a third person on an apparently well founded claim of ownership, will not support a count by the administratrix for money had and received to her use. The appropriate remedy is either trover, or a special action on the case for violation of duty as agents or bailees.—Barnum v. Stone, 27 Mich. 332.

¶ 58. A lumber dealer gave an order for a lot of shingles and a larger quantity was forwarded to him than the amount called for. He received and held the excess subject to the consignor's order, advanced the freight charges and notified the consignor, and immediately afterwards they were destroyed by fire without his fault. Held, that assumpsit would not lie for their value.—Larkin v. Mitchell & Rowland Lumber Co., 42 Mich. 296.

¶ 59. A debtor who has delivered lumber to his creditor to sell and out of the proceeds thereof to pay the debt cannot sue in assumpsit for money had and received, based on breach of the contract of bailment in selling the lumber at less than the agreed price.—Anderson v. Corcoran, 92 Mich. 628.

¶ 60. Where each of two persons has received for safe keeping a part of a sum of money, they cannot be held jointly liable in assumpsit.—O'Connor v. O'Connor, 86 Mich. 189.

¶ 61. Under the plea of the general issue in assumpsit for their value, a bailee who was held to the exercise of ordinary care only in his custody of the goods may show that the goods were stolen from him.—Knights v. Piella, 111 Mich. 9.

BALANCED EVIDENCE to BALLOTS.

Cross-References.

Balanced Evidence—
Rule as to preponderance in civil cases, see Evidence, X.
Rule as to sufficiency in criminal cases, see Indictment and Prosecution, VIII, C.
Presumptions as to sufficiency and effect of evidence in review of findings, see Appeal and Error, XII, E.
Sufficiency to go to jury or to take case from jury, see Directing Verdict; and see specific topics treating of the issue or cause to which the evidence is addressed.
Balances on Accounts—
See Account Stated; Accounting Suits; Limitations of Actions, IV-VI.
Interest on balances, see Interest.
Ball Games—
Offense of playing on Sunday, see Crimes, II; Indictment and Prosecution; Arrest.
As nuisance, see Nuisances.
Ballots—
See generally Elections.
In corporate elections, see Corporations, IX.

BANKING AND MONEY AFFAIRS.

TREATS of the business of banking and finance in general, including trust, safe deposit, and investment companies, and the regulation thereof by the public and matters peculiar to banking corporations and associations and partnerships as distinguished from corporations and partnerships generally. The treatment herein of the law of deposits, loans and discounts, collections and exchange, etc., is not intended to include any portion of the law of Negotiable Instruments, which see for such matters.

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§ 2. Foreign banks and banking corporations.

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A. Deposits and Credits to Depositors.

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§ 4. What constitute deposits and credits.
§ 5. Persons entitled to deposits; name or designation.
§ 6. ——Joint deposits with right of survivorship.
§ 7. ——Adverse claims.
§ 8. ——Presumptions and evidence of title.
§ 9. Termination or change of relation of depositor and bank.
§ 10. Right to repay or have repayment.

B. Payment of Checks, etc., and Withdrawals and Charges.

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C. Application of Deposits, Liens and Setoffs.

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§ 20. Lien of bank for debt.
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D. Certification and Acceptances by Bank.

§ 22. In general.

III. Time and Other Special Deposits and Withdrawals.

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§ 28. Effect on depositor of by-laws.
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§ 30. Certificates of deposit, cashier's checks and drafts.
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§ 39. ——Actions, pleading and evidence.
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IX. Banks and Banking, Trust or Moneyed Corporations.

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§ 94. In general.

Financial corporations other than banking and trust or fiscal corporations, see Building and Loan Associations; Insurance; Fraternal Associations.

Right to corporate name and infringements of name, see Corporations, III; Trade Marks and Trade Names.

Use of assumed or fictitious trade name, necessity of filing same, and right to sue or defend in such name, see Trade Marks and Trade Names.

For the general law of commercial paper, see Negotiable Instruments.

Crimes against banks or relating to the banking business, see Crimes, II.

[Note. Owing to the great number of detailed references which would be required, no attempt has been made to incorporate into this topic any but the most general references to the statutes. Consult the indexes to the published statutes.]

I. IN GENERAL; FRANCHISES AND PUBLIC REGULATION AND CONTROL.

§ 1. In general; what constitutes banking.

Presumption on appeal as to compliance with banking law by plaintiff's intestate, see Appeal and Error, ¶ 1583.

Purpose and function of national bank reports, see post § 88, ¶ 281.

Safe deposit of money or valuables, see post X.

General Banking Laws, see Comp. L. 1915, chap. 152.

¶ 1. The issue of paper, designated to circulate, in the form and similitude of bank-bills, is an act of banking.—People ex rel. Attorney General v. River Raisin etc. R. Co., 12 Mich. 389.

¶ 2. Banking business is not privileged from judicial scrutiny.—Heath v. Waters, 40 Mich. 457.

§ 2. Foreign banks and banking corporations.

General law of foreign corporations, see Foreign Corporations.

¶ 3. Act No. 205, Pub. Acts 1877, as amended by Act No. 34, Pub. Acts 1903, which prescribes the terms and conditions upon which foreign corporations may be admitted to transact business in Michigan, does not authorize foreign banking corporations, and foreign corporations within the contemplation of the banking laws of this state, to transact business in this state.—New York Mortg. Co. v. Secretary of State, 150 Mich. 197.

¶ 4. The secretary of state may, in determining whether he shall issue a certificate entitling a foreign mortgage company to do business within the state, consider the history of the company, the character of its business, and the principal upon which its bonds or mortgages are secured.—New York Mortg. Co. v. Secretary of State, 150 Mich. 197.

¶ 5. Mandamus will not issue to compel the secretary of state to issue a certificate authorizing a foreign mortgage company to transact business within this state, where the legitimate conclusion to be drawn from the facts before the court is that said company's purpose is to sell bonds and securities which are practically worthless.—New York Mortg. Co. v. Secretary of State, 150 Mich. 197.

II. DEPOSITS AND CHECKING ACCOUNTS.

Savings deposits, see post IV.

A. DEPOSITS AND CREDITS TO DEPOSITORS.

§ 3. Relation and contract of depositor and bank.

In savings bank deposits, see post § 26.
Deposits of public moneys, see post §§ 24, 25.
Special deposits, see post III.
Deposits of money for safe keeping, see post § 94; and see also Bailments.
Relation created by joint deposits or deposits to the order of another, see post § 6.
Effect of accepting banker's successor as depositary, see also post ¶ 30.
Statutory liability of stockholder to depositor, see post § 65.
Right of withdrawal and termination, see post § 10.
Insolvency as termination of deposit contract, see § 10.
Termination or change of relation, see post § 9.
Bank book as evidence of contract, see also post ¶ 70.
Money deposits as bailments, see Bailments, § 1.
Depositary bank as affected by fraud between depositor and another, see Fraud, III, C.

¶ 6. The relation of debtor and creditor exists between a bank and a depositor therein.—State Sav. Bank of Detroit v. Foster, 118 Mich. 268.

¶ 7. Money deposited on general account and not left as a special deposit becomes the money of the bank, and the bank is then the depositor's debtor for the amount.—Perley v. Muskegon County, 32 Mich. 132; Neely v. Rood, 54 Mich. 134.

¶ 8. A depositor's contract with his banker is not materially different from any other contract by which one person becomes bound to take charge of and repay another's funds.—Davis v. Lenawee County Sav. Bank, 53 Mich. 163.

¶ 9. A bank as well as a private individual may become a depositor in another bank.—State Sav. Bank of Detroit v. Foster, 118 Mich. 268.

§ 4. What constitute deposits and credits.

Transfer of credit from one deposit to another, see also post ¶ 63.
Effect of deposit and credit of paper to be charged back if dishonored, see post ¶ 69.
Effect of unauthorized entry of collections to credit of deposit, see also post §§ 269, 270.
Redeposit of check as release of guarantor, see Guaranty, III.

§ 5. Persons entitled to deposits; name or designation.

Deposits of public moneys, see post §§ 24, 25.
Title to savings deposit, see post § 27.
Name of depositor as prima facie evidence of ownership, see also post § 8.
Right of persons doing business in firm or trade name, see generally Partnership; Trade Marks and Trade Names.
Devolution of right on death of depositor otherwise than by reason of terms of the contract of deposit, see Descent; Estates of Decedents.

Right of trustee in bankruptcy of private bank to pursue fraudulent deposits made by it in other banks, see Bankruptcy; and see also Fraud, I.
Receipt of deposit as diversion of assets void under Bankruptcy Act, see Bankruptcy, ¶ 37a.
Requisites and sufficiency of gift or trust of deposit, see Gifts; Trusts.

¶ 10. A bank deposit is prima facie the property of the person in whose name the deposit is made, although the word "agent" is affixed to his name.—Burch v. Barendsen, 192 Mich. 369.

¶ 11. A depositor contracting with a bank for the care of his money can control his funds until he has disposed of them, no matter in what name the account is kept, so long as it is understood to be his account, and has not been put beyond his control by some act that he cannot revoke. And if the contract is unwritten, its terms and character can be shown by testimony. It is not determined by the bank book, which only shows the state of the funds.—Davis v. Lenawee County Sav. Bank, 53 Mich. 163.

¶ 12. A bank was not required at its risk to assume that a deposit in the name of a depositor as trustee, belonged to the depositor, and therefore an indorser on a note held by the bank, was not discharged by the failure of the bank to appropriate enough of such fund to pay the note.—State Bank of St. Johns v. McCabe, 135 Mich. 479.

§ 6. ——Joint deposits with right of survivorship.

Joint savings deposits, see also post § 27.
Sufficiency of title of act relating to the right of joint deposits with right of survivorship, see Statutes, III.
Statute regulating deposits in joint names or in name of minor or in name of trustee, see Comp. L. 1915, §§ 8038-8040.

¶ 13. Where a husband changes his bank accounts, making the same payable to himself or wife, or either, and to the survivor he creates a title in the wife at the husband's death under Pub. Acts 1909, No. 248, How. 2nd Ed., § 6468 et seq.—Powell v. Pennock, 198 Mich. 573.

¶ 14. Under Pub. Acts 1909, No. 248, § 3, How. 2nd Ed., § 6470, providing that when a deposit shall be made in a bank by any person in the name of the depositor or any other person, and in form to be paid to either or the survivor of them, such deposit shall be the property of such persons as joint tenants, and may be paid to either during the lifetime of both, or to the survivor, the ownership of the fund is actually fixed, and the fund, when deposited, becomes the property of such persons as joint tenants.—In re Rehfeld's Estate, 198 Mich. 249; Bloss v. Schreiter, Id. (Fellows, J., dissenting.)

¶ 15. An order upon a bank by a depositor having an account therein to "make it a joint account payable to either or survivor," held to be sufficient to bring it within Pub. Acts 1909, No. 248, § 3; Comp. L. 1915, § 8040, How. 2nd Ed., § 6470, relating to the creation of a joint tenancy with rights of survivorship in a deposit made in the name of the depositor and another person, in form to be paid to either or the survivor of them.—People's State Bank of Holland v. Miller's Estate, 198 Mich. 783.

¶ 16. Where a decedent left at the plaintiff's bank an order that her account therein should be a joint account with another person payable to either or survivor, held that if decedent's intention was that such person should take by right of survivorship such intent would be given force and would not be defeated by the fact decedent did not intend to present gift inter vivos.—People's State Bank of Holland v. Miller's Estate, 198 Mich. 783.

¶ 17. Pub. Acts of 1909, No. 248, § 3, How. 2nd Ed., § 6470, relating to the protection of a bank paying an account to either of joint tenants during their lives or to the survivor, even though it would protect the bank in making payment out of a fund carried in the wife's name to the surviving husband, or to his representative, after the death of the husband, has no application where the bank has not paid the money and admits notice not to pay money to the surviving husband.—Wayne County & Home Sav. Bank v. Smith, 194 Mich. 151.

¶ 18. On a bill by a bank interpleading the executrix of the estate of a married woman, who had carried an account in the plaintiff's bank in her own name with a notation of the husband's name on the books, and the administrator of the estate of the husband to determine title to money on deposit in the bank which the husband in his lifetime had been informed had been transferred to his account but not to be drawn until the claim of the executrix of his wife's estate was determined, which had been brought to the attention of the bank, held that the rights of the parties must be determined on the facts as of the date of the death of the wife, and that nothing could be predicated by either party upon what was said or done with respect to the account after the death of the wife; as no new contract was made by the bank after the wife's death and no particular existing contract was recognized by merely making a conditional change in the account to the husband on the books of the bank.—Wayne County & Home Sav. Bank v. Smith, 194 Mich. 151.

¶ 19. Whether, where moneys are deposited on an understanding with the banker that all orders drawn against the deposit are to be to the order of another, the ordinary relation of debtor and creditor is established between the depositor and the banker, or whether such deposit does not leave it a question of fact whether the money was understood to be deposited to the use of the one or the other, or the joint use of the two who were to act in drawing it out, quære. —Detroit Sav. Bank v. Burrows, 34 Mich. 153.

§ 7. ——Adverse claims.

Duty of bank in regard to adverse claimants, see post § 15.

Right of bank to interplead claimants, see Interpleader.

¶ 20. Where an agent or trustee has deposited money belonging to his principal or beneficiary in a bank to which he is himself indebted, and the bank, without his authority and in ignorance of the true ownership of the fund, has applied it on the debt, the owner is not debarred from recovering it from the bank if it can be identified.—Burtnett v. First Nat. Bank of Cosunna, 38 Mich. 630.

¶ 21. Where a wife was impleaded in garnishment proceedings as a claimant of a bank deposit sought to be reached by her husband's creditors, and it appeared that the account had stood for three years in the name of the husband, and that the income from the wife's investments was insufficient to account for all the deposits, and the husband refused to swear that all the deposits belonged to the wife, but stated merely that they were "principally hers," the court was not in error in submitting to the jury the question of the ownership of the fund.—McIntyre v. Farmers' & Merchants' Bank, 115 Mich. 255.

§ 8. ——Presumptions and evidence of title.

Presumption as to ownership of deposit, see also ante ¶ 10.

Presumption and proof of gift of deposit, see Gifts, III.

¶ 22. The burden of proof rests upon a third party to a garnishment action claiming a bank deposit to show clear title to the fund.—Burch v. Barendsen, 192 Mich. 369.

¶ 23. Money deposited in a bank in the name of one defendant interpleaded is prima facie its property, and cannot be disturbed unless the other defendant interpleaded shows a perfect title to it.—Detroit Sav. Bank v. Haines, 128 Mich. 38.

¶ 24. In a garnishment action where the property garnished consisted of a bank deposit which was claimed by the wife of the defendant and was in the name of the husband with the word "agent" added, where the plaintiff's only evidence consisted of an inspection of the bank account itself coupled with the cross-examination of the two witnesses sworn in the defense, and defendant's evidence consisted of the testimony of the husband and wife that the bank account was that of the wife, that the actual business in connection with the account was transacted by the husband for the wife and that no money was deposited therein except such as was the property of the wife or such as was made by the husband in repayment of loans by the wife, and there was evidence that the wife owned certain properties, that the conveyances were of record and that there were deposited in the bank proceeds of the sales and rentals of her property largely in excess of the amount involved, held that the wife as claimant had sustained the burden of proof to show title to the fund so that a verdict in her favor was properly directed. —Burch v. Barendsen, 192 Mich. 369. (Bird, J., dissenting.)

¶ 25. On a bill of interpleader by a bank against the executrix of a married woman who carried an account in the bank in her name and the administrator of the estate of the deceased husband to determine title to the fund in the bank, held that the burden of proof was upon the representative of the deceased husband to prove that the fund was his or was in fact a joint fund, the title to which passed to him upon the death of his wife.—Wayne County & Home Sav. Bank v. Smith, 194 Mich. 151.

¶ 26. On a bill of interpleader by a bank against the executrix of a married woman who had carried an account in the bank in her own name and the administrator of the estate of the husband to determine title to such account, evidence held insufficient to show that such fund was a joint fund or that it belonged to the husband.—Wayne County & Home Sav. Bank v. Smith, 194 Mich. 151.

¶ 27. Where, in a suit brought to recover money deposited with a banking firm, plaintiff claims that a certificate of deposit was issued to her, which she afterwards indorsed in blank and delivered to one of the defendants, to be placed to her credit and checked out for the use of a firm of which she was a member, and defendants claim that the certificate was indorsed so as to be payable to another firm, of which plaintiff's husband had been a member, and was placed to their credit, and the certificate, on being introduced in evidence by plaintiff, bears such latter indorsement, which plaintiff claims was made, except as to her name, after she had indorsed the certificate in blank, the burden is upon defendants to substantiate their claim as to said indorsement.—Ehrenkrook v. Webber, 100 Mich. 314.

§ 9. Termination or change of relation of depositor and bank.

Relation and contract formed by deposit, see also ante § 3.

General deposit changed to joint deposit with right of survivorship, see ante § 6.

¶ 28. Relation of debtor and creditor ceases to exist between bank and depositor when latter, with intent to defraud creditors, withdraws deposit and redeposits it in third person's name.—Connor v. Third Nat. Bank, 90 Mich. 328.

¶ 29. A contract between a city and an individual banker for the deposit of moneys with the latter upon the payment of certain interest, is a personal contract and not assignable and terminated upon the death of such individual.—City of Marquette v. Wilkinson, 119 Mich. 413.

¶ 30. Where the defendants conducting a private bank received a deposit from the plaintiff and subsequently sold their business to parties who assumed all the obligations, and where the plaintiff on receiving notice of the same, by his actions, consents to such substitution of debtors, he cannot after the new owners have failed and he has filed his claim and received his pro rata share of the assets, proceed against the defendants to recover the balance of his deposit.—Gillett v. Ivory, 173 Mich. 444.

§ 10. Right to repay or have repayment.

Repayment of public funds deposited, see post §§ 24, 25.

In savings banks, see post § 27.

Right to look to original bank, where deposit has been transferred to successor, see ante § 30.

Payments after insolvency or in anticipation thereof, see post § 80.

Claims of depositors in insolvency and payment of such claims, see post §§ 81, 82.

Right to offset deposits in insolvent bank against notes due by depositor, see post ¶ 262.

Depositary bank as bona fide holder of checks deposited by insolvent bank, see Negotiable Instruments, XIII, A.

Recovery of trust funds from bank by executor of receiver, see Estates of Decedents, V.

¶ 31. A bank can at any time tender the full balance due to a general depositor, but cannot compel him to receive less.—Coots v McConnell, 39 Mich. 742.

¶ 32. Money on deposit in a bank subject to check becomes due without demand when the bank becomes insolvent.—Thompson v. Union Trust Co., 130 Mich. 508.

B. PAYMENT OF CHECKS, ETC., AND WITHDRAWALS AND CHARGES.

Certification as payment, see post II, D.

§ 11. In general; manner of checking.

Collections through bank and payment through banks, see post VI.

Care required of bank, see post § 13.

Overdrafts due to violation of depositor's instructions as to payment of checks, see post § 16.

Production of pass book on withdrawing savings deposit, see post § 29.

Payments affected by insolvency, see post § 80.

Medium and proof of payment, and rules for application of payments, see Payment.

¶ 33. A bank will be protected, as against the depositor, in paying out money on such terms as he has authorized.—Davis v. Lenawee County Sav. Bank, 53 Mich. 163.

§ 12. Necessity of acceptance or payment.

Contract rather than name of deposit as governing disposal of it, see ante § 5.

Liability for amount of certificate of deposit surrendered without paying over money, see also post ¶ 91.

General rule that check is not an assignment of fund, see Assignments, § 14.

¶ 34. Where one in extremis drew his check upon a bank, with directions to the payee to defray the funeral expenses of the drawer from the amount, and pay the balance to his heirs, and the check was not accepted by the bank at the death of the drawer, it was held that it did not operate as an assignment of the fund so as to make the bank liable to the payee.—Second Nat. Bank of Detroit v. Williams, 13 Mich. 282.

¶ 35. The giving of a check, drawn in the ordinary form, against funds on deposit in a bank, does not, before the acceptance of such check, amount to an equitable assignment of the amount of the check, so as to prevent its garnishment as money of the drawer.—McIntyre v. Farmers' & Merchants' Bank, 115 Mich. 255.

§ 13. Duty, care and responsibility in paying.

Liability for paying forged paper, see post VII.

¶ 36. Banks have a right to expect their depositors to know and conform to the ordinary usages of business, and they may rely to a reasonable extent on the presumption that their customers deal with them accordingly.—American Nat. Bank v. Bushey, 45 Mich. 135.

¶ 37. By drawing an order upon which a depositor's money may be paid, and by paying money thereon, a bank is not estopped

from denying the order's sufficiency as between interpleaded claimants; for it did not guarantee as a professional adviser such sufficiency as matter of law.—Wayne County Sav. Bank v. Airey, 95 Mich. 520.

¶ 38. A bank upon which a check is drawn is not liable to the payee for the amount of the check, either on the theory that it received the money from the drawer for payee's use, or that money was paid to the bank for payee's use where the check was given to payee's agent in payment of an account to payee, and without authority such agent indorsed the name of the payee upon the back of such check and took it to the bank upon which it was drawn and received the money therefor, and thereupon absconded without accounting to the payee, and the bank charged such check to the maker and returned it to him as paid.—Lonier v. State Sav. Bank, 149 Mich. 483.

§ 14. ——Identification of payee.
See also post ¶ 52.

¶ 39. A bank paying a check owes a duty to the drawer to use due diligence in identifying the payee named with the presenter, even where the check comes to it through other banks, and if the paying bank chooses to rely upon the identification by the bank which cashed the check, it does so at its own risk.—Harmon v. Old Detroit Nat. Bank, 153 Mich. 73.

¶ 40. Where a bank upon which an order is drawn relies upon an identification accepted by the bank cashing the order, the negligence of such bank is imputable to the drawee bank.—Harmon v. Old Detroit Nat. Bank, 153 Mich. 73.

§ 15. Duty in defending against claims.
Title and rights of adverse claimants, see also ante § 7.

¶ 41. A bank sued by an adverse claimant for money deposited with it is under no obligation, after having given the depositor timely notice of the proceedings and of the facts on which they are based, to make a strenuous and persistent defense, or to resort to any measures to prevent the cause being brought to trial according to the regular course of the court; the implied obligation of a bank to its depositor to protect the interests of the latter do not go beyond the requirement of good faith in refusing to surrender the moneys confided to its custody, except upon a lawful demand lawfully established.—Detroit Sav. Bank v. Burrows, 34 Mich. 153.

¶ 42. Where a bank depositor and her attorney had ample notice of a suit brought by another to recover the deposit, and the depositor's agent was present at the trial, the bank's failure to notify the depositor's attorney of the time of the trial, such notice not having been requested, is no breach of duty or evidence of negligence on its part; nor is its omission to apply for a continuance until the depositor can be present and take part in the trial; nor its neglect to move for a new trial, that being the agent's duty.—Detroit Sav. Bank v. Burrows, 134 Mich. 153.

¶ 43. Where money deposited in a bank by one person was recovered by another in a suit against the bank, the omission to tax costs after judgment, and the statement of plaintiff's attorney in his precept for execution that "the defendant preferred to have an execution, and both parties want it done at once," and the prompt payment of the judgment by the bank, were held no evidence of collusion between the parties to the suit.—Detroit Sav. Bank v. Burrows, 34 Mich. 153.

§ 16. Recovery for overdrafts and dishonored paper.
Cashier or builder as liable for overdraft on building account, carried in builder's name but controlled by cashier, see also Payment, VI.

¶ 44. One partner drew his own check payable to the order of the firm's bookkeeper, who indorsed and deposited it to the firm's account, to which account it was charged back, not being paid. Held, that as the check was sent as a firm asset and was received and deposited as such to the drawer's knowledge, the bank could recover thereon in suit against the firm for overdrafts paid on the firm's checks.—Gladstone Exchange Bank v. Keating, 94 Mich. 429.

¶ 45. A firm sued by a bank for overdrafts on checks is not estopped because of an opportunity to examine the account and checks from relying on the defense that its instruction not to pay checks not countersigned by its bookkeeper was violated.—Gladstone Exchange Bank v. Keating, 94 Mich. 429.

¶ 46. A member of a firm for whose benefit the proceeds of a check cashed by a bank have with the firm's knowledge been used is estopped from denying liability for overdrafts embracing a charge for the amount of such check charged back as unpaid, even though they did not indorse it.—Gladstone Exchange Bank v. Keating, 94 Mich. 429.

¶ 47. Where a bank instructed not to pay checks not countersigned by defendant's bookkeeper sues for overdrafts on checks not so countersigned, it has the burden of showing that the moneys drawn went for defendant's benefit.—Gladstone Exchange Bank v. Keating, 94 Mich. 429.

¶ 48. Where, in a bank's action for overdrafts, it appears that one check deposited by defendants was not accompanied by a deposit check, the bank claiming it was cashed and not deposited, other deposit checks made by defendants were admissible to show the amount deposited.—Gladstone Exchange Bank v. Keating, 94 Mich. 429.

§ 17. ——For collection items charged back.

Title and rights in paper received for collection, see also post § 34.

Amount of deposit owing as affected by right to charge back dishonored paper, see also post § 69.

¶¶ 49, 50. The fact that one depositing commercial paper with a bank for collection is permitted to check against it does not change the import of the transaction so as to preclude the bank charging back the amount of such paper if dishonored.—People's State Bank v. Miller, 185 Mich. 565.

§ 18. Presumptions and evidence as to payment or charge.

Bill, check or note as payment of debt, see Payment, I, II.

¶ 51. As between the depositor and the bank, the burden of proving payment by valid check or other voucher is upon the bank.—Harmon v. Old Detroit Nat. Bank, 153 Mich. 73.

¶ 52. Where, in an action against a bank for wrongfully paying an order, a prima facie case of a fictitious payee is established, the burden is upon the bank to show the existence or nonexistence of such a payee, and that another bank whose identification was accepted by defendant, had taken the proper means to identify the payee.—Harmon v. Old Detroit Nat. Bank, 153 Mich. 73.

¶ 53. Where plaintiff drew on a sum deposited to his credit in defendant's bank, instructing the latter to forward the draft to him at a certain address, but the draft was, according to plaintiff's evidence, never received, though defendant's witnesses testified to its having been mailed, in an action for the money, and not on the lost instrument, defendant declined to pay unless indemnified, held that the issue as to whether the draft was in fact sent to plaintiff was for the jury, and a verdict for plaintiff would not be disturbed.—Smith v. City Nat. Bank of Lansing, 182 Mich. 76.

C. APPLICATION OF DEPOSITS, LIENS AND SETOFFS.

§ 19. In general; deposits affected with trust or agency.

Deposits of public moneys, see post §§ 24, 25.

(1 Mich. Dig. 38)

Ownership of trust fund and application by bank on agent or trustee's debt, see also ante § 7.

Right to set off depositor's note against deposits as affected by intent to prefer creditors under Bankruptcy Act, see Bankruptcy, § 8, ¶ 40.

¶ 54. Funds held by a bank in the name of one as trustee, could not be appropriated to the payment of such trustee's individual note, so as to relieve an indorser.—State Bank of St. Johns v. McCabe, 135 Mich. 479.

¶ 55. A court of chancery which has appointed a receiver must determine the disposition of trust funds in its hands through such receiver, and a bank in which such fund has been deposited, though it has an interest in the fund, has no right to appropriate it until the court shall make an order for its distribution.—Avery v. Preston Nat. Bank, 132 Mich. 445.

¶ 56. In an action by a fraternal benefit society to recover the amount of a draft drawn by its finance keeper in favor of defendant bank, of which he was assistant cashier, it being alleged that it was done to pay his individual indebtedness, when plaintiff showed that defendant received a draft bought with its funds, of which fact defendant's officer had knowledge, and that it received the money thereon, a prima facie case was made and it then became the duty of defendant to show that plaintiff received full value for the amount of the draft.—Supreme Tent K. O. T. M. v. Port Huron Sav. Bank, 137 Mich. 627.

¶ 57. A fraternal benefit society brought suit against defendant bank to recover the amount of a draft for $5,000 drawn by its finance keeper, who was also assistant cashier of the bank, and received by the bank. It appeared that two drafts aggregating $35,000 had previously been drawn on the bank and the proceeds received by plaintiff. A statement of debits and credits presented by plaintiff showed that this amount was necessary to balance its account, but if such statement had covered earlier transactions, it would have shown that the account balanced without the $35,000. Held, that the amount should be deducted from any recovery had from the bank.—Supreme Tent K. O. T. M. v. Port Huron Sav. Bank, 137 Mich. 627.

¶ 58. In an action by a fraternal benefit society to recover the proceeds of a draft drawn by its finance keeper, who was also assistant cashier of defendant bank, where it appeared that defendant knew that the draft was procured with plaintiff's funds and that the finance keeper had no right to use such funds to pay his individual indebtedness, the question whether defendant was a

bona fide holder is immaterial, it being a question for the jury whether the money was used to pay the officer's individual indebtedness as claimed by plaintiff, or to reimburse the bank for money used to pay warrants and other items properly chargeable to plaintiff.—Supreme Tent K. O. T M. v. Port Huron Sav. Bank, 137 Mich. 627.

§ 20. Lien of bank for debt.

Lien on collections realized, see also post § 35.

Lien of bank on stock for debt of holder, see post §§ 69-71.

¶ 59. The general rule is that a bank has a lien on all moneys, notes and funds of a customer in its possession, for any indebtedness of the customer to the bank which is due and unpaid.—Gibbons v. Hecox, 105 Mich. 509.

¶ 60. A demand note made to a bank by a depositor is due at once, within the rule that banks have a lien upon deposits for debts "due" from their depositors, and it may, therefore, without actual demand, be treated as a matured debt for the purpose of setoff in proceedings between the bank and the depositor.—Citizens' Sav. Bank v. Vaughan, 115 Mich. 156.

¶ 61. It cannot be said that it was the duty of a bank holding a matured note to apply thereon the amount of a deposit subsequently made, and that the failure to so apply it released the indorser; since the bank had no lien at the time.—State Bank of St. John's v. McCabe, 135 Mich. 479.

§ 21. ——To meet unmatured debts.

Deposit made after rights are fixed on note, see ante ¶ 61.

¶ 62. Bank deposits made prior to the maturity of a note cannot be held to meet such note when it matures.—State Bank of St. Johns v. McCabe, 135 Mich. 479.

¶ 63. A customer deposited a draft in the bank, the item being duly credited in his pass book which he left to be balanced. Upon the return of the pass book, after the bank had failed, it appeared that the cashier had canceled the credit and had transferred it to the credit of a lumber company to which the depositor owed some notes not yet due, pursuant to an understanding that the proceeds of the draft were to be used for such purpose. Held, that the cashier had no authority to make such transfer while the notes were in the hands of another bank, which prevented the credit from being indorsed on the notes so as to relieve the debtor of liability.—Kunze v. Tawas State Sav. Bank, 130 Mich. 688.

D. CERTIFICATIONS AND ACCEPTANCES BY BANK.

§ 22. In general.

Acceptance of draft, forwarded for collection, as payment, see post ¶ 120.

Evidence to show that certifications in form were loans in fact, see post ¶ 134.

Effect of insolvency of certifying bank upon liability of indorser of check, see Negotiable Instruments, VII.

Rights of bona fide holders of certified checks, see Negotiable Instruments, XIII.

Evidence to impute notice of illegal certification, see Negotiable Instruments, XIII. A.

¶ 64. The certification of a check not drawn against funds when presented by the indorsee is equivalent to payment as to both the maker and indorser.—First Nat. Bank of Detroit v. Currie, 147 Mich. 72.

¶ 65. Where a check was certified by the drawee at the request of the indorsee who thereupon parts with value, a new contract is created which is enforceable by the indorsee against the drawee.—First Nat. Bank of Detroit v. Currie, 147 Mich. 72.

¶ 66. Where the certification of a check drawn against funds is procured by the payee or indorsee both the maker and indorsee are discharged, because certification is equivalent to payment.—First Nat. Bank of Detroit v. Currie, 147 Mich. 72.

¶ 67. The certifying bank is estopped to deny the certification of a check presented by an indorsee not drawn against funds when the indorsee has changed his position or parted with value on the strength of the certification.—First Nat. Bank of Detroit v. Currie, 147 Mich. 72.

¶ 68. The plaintiff was accustomed to take checks from one Andrews drawn on the defendant bank, and to get the checks certified by the defendant before releasing to Andrews the stocks and other securities for which the checks were given in payment. Held, that the fact of this custom being known to Andrews tended to show that he was an original party in securing the certification.—First Nat. Bank v. Union Trust Co., 158 Mich. 94.

III. TIME AND OTHER SPECIAL DEPOSITS AND WITHDRAWALS.

§ 23. In general; conditional deposits and credits.

Rules regulating handling and deposit of

moneys by executors, administrators and trustees, and their accountability for moneys, see Estates of Decedents; Trusts; Guardianship; etc.
Payment of trust and preferred claims in insolvency, see post §§ 83-87.

¶ 69. Where, when an account was opened between a bank and a depositor, it was agreed that he should be privileged to deposit drafts drawn by him on his customers, and should be credited for them, such as should not be accepted to be charged back, and that he should always keep on deposit a certain sum to cover liability on drafts returned, held, the bank having been garnished on his account, that such agreement was competent, and that the bank could not be charged as garnishee, if, at the time of garnishment, the depositor's nominal credit was more than offset by unaccepted drafts which before trial came back unpaid.—Rice v. Third Nat. Bank, 97 Mich. 414.

¶ 70. A bank book which only shows the state of the funds does not determine the terms of an unwritten contract between a bank and a depositor as to the care of the money deposited.—Davis v. Lenawee County Sav. Bank, 53 Mich. 163.

§ 24. Public funds and depositories.

Power of national banks to accept and to give security for the deposit of public funds, see post §§ 91, 92.
Public deposits as trust deposits, see post § 45.
Right of bank to apply trust funds, see ante § 19.
Deposit of public funds as preferred claim against insolvent bank, see post § 85.
Nontransferable nature of banker's contract for deposit, see ante ¶ 29.
Constitutionality of law for designation of depositary for county funds, see Constitutional Law II, V.
Criminal misuse of public funds, see Crimes, II.

¶ 71. Under the common law there seems to be nothing which distinguishes public moneys deposited in bank from the general rule that the deposit becomes the property of the banker and he the debtor of the depositor. —Perley v. Muskegon County, 32 Mich. 131.

¶ 72. How. St. §§ 424, 427, prohibiting public officials from commingling public moneys with their own or deriving a profit therefrom or receiving a consideration for the deposit of them in any bank, are violated by depositing money received for water rates as treasurer of a city water department in his own private bank commingled with the funds of the bank.—Boards of Fire & Water Com'rs of Marquette v. Wilkinson, 119 Mich. 665.

¶ 73. A county treasurer cannot refuse to deposit public funds in a depository designated by the supervisors on the ground of want of authority in the president and cashier of the bank designated as such depository to execute, on behalf of the bank as principal, the bond given to secure the deposits when such bond is signed by the proper officers and the sureties are bound to a distinct independent liability.—Board Sup'rs Gratiot Co. v. Munson, 157 Mich. 505.

¶ 74. Under Comp. L. 1897, §§ 1189, 1190, providing for selection of a state depository, and sections 1197-1204, providing for the safe keeping of public moneys, the state treasurer may select the depositories and any number of them, not being bound in selection by the acts of the auditor general and the secretary of state, or he may decline to select any and keep the money in the treasury, but he cannot deposit them in a bank wherefrom he will receive personal benefit, direct or indirect, through his interest in the bank.—People v. Glazier, 159 Mich. 528.

¶ 75. Under Laws 1879, Act No. 393, authorizing the county treasurer and board of auditors of Wayne county to designate some bank as depository for the county funds it is their duty to make such appointment as soon as convenient after the treasurer qualifies and enters upon his duties, and without unnecessary delay.—City Savings Bank v. Huebner, 84 Mich. 391.

¶ 76. Under Laws 1879, Act No. 393, authorizing the county treasurer of Wayne county and the board of auditors to designate some bank as a depository for the county funds the treasurer and the board have an equal voice.—City Savings Bank v. Huebner, 84 Mich. 391.

¶ 77. Under Laws 1879, Act No. 393, authorizing the county treasurer and the board of auditors of Wayne county to designate some bank as depository for the county funds, such designation is valid until the expiration of the term of office of the county treasurer, and until a new designation is made by his successor and the board of auditors.—City Savings Bank v. Huebner, 84 Mich. 391.

¶ 78. Under Laws 1879, Act No. 393, authorizing the county treasurer and board of auditors of Wayne county to designate some bank as depository for the county funds, until a new designation is made it is the duty of the treasurer to deposit the county funds in the existing depository.—City Savings Bank v. Huebner, 84 Mich. 391.

§ 25. ——Bonds or security for deposits.

See also ante ¶ 73.
Power of banking partnership to obtain public deposits and give bond or security, see post ¶ 151.

¶ 79. A bond given to a county treasurer for the repayment of money deposited in a private bank, may be supported as a common law obligation though it does not conform strictly to the statute governing such bonds. —Buhrer v. Baldwin, 137 Mich. 263.

¶ 80. The fact that a contract made by a state treasurer for the deposit of funds with a bank is illegal does not prevent the state from recovering on bonds given by defendants guarantying the repayment of the funds.—People v. Bankers' Surety Co., 158 Mich. 30; Same v. Federal Union Surety Co., Id.; Same v. United States Fidelity & Guaranty Co., Id.

¶ 81. A bond given to secure the state for funds deposited by it in a bank, provided that the surety should be liable only for the proportion of the total loss suffered which the amount of the penalty on its bond bore to the amount of the penalties of all other surety bonds. Held, that where the state's declaration alleged as the total loss a sum larger than the total penalties of all the bonds, the declaration was sufficient on demurrer, in a suit to recover the full amount of the defendant's bond, without alleging the exact total loss sustained by the state.—People v. Title Guaranty & Surety Co., 158 Mich. 35.

¶ 82. A bank selected as a depository contracted with the state treasurer to return all moneys deposited by the latter. Held, a surety on a $50,000 bond of the bank was bound for the repayment by the bank of all moneys deposited, and its liability was not confined to any specific sum deposited.—Commissioners of Banking v. Chelsea Sav. Bank, 161 Mich. 691.

¶ 83. Where a statute requires the state treasurer to take ample security for money deposited with banks, an omission on his part to do so does not diminish the obligation of a surety of a bank below the sum specified in its bond.—Commissioner of Banking v. Chelsea Sav. Bank, 161 Mich. 691.

¶ 84. In a suit on a bond, plaintiff, the state of Michigan, alleged in its declaration that the state treasurer had contracted with a certain bank to receive deposits of funds of the state of Michigan; that defendants had given bond for the repayment of funds deposited during the first term of office of the state treasurer, that funds had been deposited pursuant to the agreement; that demand had been made of the bank for repayment; and that the bank had not paid. Held, on demurrer, that these allegations set forth a good cause of action without specifying that the funds not repaid were deposited during the first, and not during a subsequent, term of office of the treasurer.—People v. Bankers' Surety Co., 158 Mich. 30; Same v. Federal Union Surety Co., Id.; Same v. United States Fidelity & Guaranty Co., Id.

IV. SAVINGS DEPOSITS AND WITHDRAWALS.

§ 26. In general; relation of depositor and bank.

Savings bank corporations, see post IX; and see also Corporations.

By-law as part of depositor's contract with bank, see post § 28.

Savings deposit as preferred claim in insolvency, see post § 86.

Effect of placing in savings account money deposited against letter of credit, see post § 83.

Payments and deposits in building and loan associations, see Building and Loan Associations.

General savings bank laws, see Comp. L. 1915, chap. 152, § 7995 et seq.

¶ 84a. Savings banks organized under the General Banking Law and having stock and stockholders are unlike those organized under the mutual system, wherein the officers and agents of the bank are the trustees of the depositors; and the relation of the depositor and the bank is that of creditor and debtor.—Ackenhausen v. People's Savings Bank, 110 Mich. 175.

§ 27. Title to deposit; joint accounts.

[Note. The rights under joint accounts as regulated by the statutes applying equally to savings and commercial accounts are treated ante II, A.]

¶ 85. A savings bank cannot refuse to return a depositor's money to him because he deposited it in the name of somebody else.—Davis v. Lenawee County Sav. Bank, 53 Mich. 163.

¶ 86. A savings account is not shown to have been a joint account by an entry in the wife's name on the signature book with a notation of the husband's name beneath and her name only on the ledger, where the evidence as to the sources of income whence the money might have been derived show that his earnings were meagre and that some of the money was derived from rent received from her property, some from sale of joint property, and that he wrote her name in the pass book, and where there were other accounts to which her estate made no claim against her husband's estate.—Wayne County Savings Bank v. Smith, 194 Mich. 151.

§ 28. Effect on depositor of by-laws.

¶ 87. The by-laws of a savings bank organized under the General Banking Law with stockholders and directors are by-laws of the bank and do not bind the depositor unless under conditions making them part of the depositor's contract.—Ackenhausen v. People's Savings Bank, 110 Mich. 175.

§ 29. Repayments and withdrawals.

See also ante ¶¶ 85, 86.

Application of assets of savings department of insolvent bank, see post ¶ 259.

¶ 88. A savings bank by-law printed in the pass book and providing, "this institution will not be responsible for loss sustained when a book has been mislaid, stolen or lost, if, before the cashier is notified thereof, such book be paid * * * on being presented," cannot relieve the bank from the liability imposed upon it by How. St., § 3208c5, to repay all deposits to "the depositor or his lawful representative," unless the attention of the depositor is called to such by-law, and he actually or impliedly assents thereto, although the book was stolen and the money was drawn by means of forging the depositor's signature.—Ackenhausen v. People's Sav. Bank, 110 Mich. 175.

¶ 89. Comp. L. 1897, § 6117, providing that no savings bank deposit shall be repaid unless the pass book is produced "except for good cause and on assurances satisfactory to the officers of the bank," when construed in light of the provision of section 6107, making all violations of the banking act a felony, does not by virtue of the further provision of section 6117, requiring rules to be printed in the pass book, authorize insistence on a rule making the production of the pass book indispensable under all circumstances; and, accordingly, where the depositor was dead and the demand for payment is made by a duly qualified administrator several months after death and without any other demand having been made there is "good cause" to pay it to him, and on refusal he may recover without an indemnity bond. Vincent v. Port Huron Savings Bank, 147 Mich. 437, affirming judgment of lower court by equal division, four judges contending that the bank rule made a contract requiring production of the pass book at all events.

V. CERTIFICATES OF DEPOSIT, CASHIER'S CHECKS, DRAFTS, LETTERS OF CREDIT AND CIRCULATING NOTES.

§ 30. Certificates of deposit, cashier's checks and drafts.

Certificates of deposit as negotiable instruments, and the rights of parties thereto depending on the law of negotiable instruments, as well as that of bona fide takers, are treated of in Negotiable Instruments. The same treatment is given to cashier's checks and bank drafts in so far as the law of negotiable instruments is decisive of the points involved.

Indorsement of certificates of deposit as evidence of ownership, see also ante § 8.

Buying exchange as discounting, see post § 43, ¶ 181.

Certificate of deposit to cover drawing account as a loan rather than a deposit, see also post ¶ 133.

President's trust in deposit as affecting issuing bank, see also post ¶ 184.

Effect of bills drawn by illegally incorporated bank, see also post ¶ 145.

Holder of certificate of deposit as a bona fide holder, see Negotiable Instruments, XIII, A.

Evidence as to certificate being taken as payment, see Payment, II.

Possession and acts of dominion over certificate of deposit as evidence of ownership, see also Payment, II.

¶ 90. A bank issuing its certificate of deposit to its president in his name is not a trustee of the moneys merely because the president holds them on a trust to pay certain debts.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

¶ 91. Where plaintiff deposited money in defendant bank, and received certain certificates of deposit therefor, and thereafter returned such certificates to the cashier of defendant bank, whereupon the cashier gave him a receipt, and agreed to pay upon demand, the bank is liable upon demand, for the amount so received, whether or not plaintiff indorsed the certificates at the time of their surrender; and the defense that the cashier had canceled the certificates, and absconded with the money, is of no avail.—Griffin v. Marlette State Bank, 150 Mich. 499.

§ 31. Letters of credit and traveler's checks.

Deposit against letter of credit as trust fund, see also post ¶ 266.

Defacement of countersignature of traveler's check, see Alteration of Instruments, ¶ 44.

¶ 92. A letter addressed to a bank suggesting advances and stating among other things that the writers guarantee the payment of drafts drawn on them by a produce dealer is not a general letter of credit for the benefit of any party paying out money on such drafts.—Lyon v. Van Raden, 126 Mich. 259.

¶ 93. An express company had the right to refuse to pay a traveler's check which did not bear the countersign agreed upon.—Samberg v. American Exp. Co., 136 Mich. 639.

§ 32. Circulating Notes.

¶ 94. Under the charter of the Government Stock Bank, after the stocks deposited with the state treasurer for securing its circulating notes had been sold for their redemption, it was his duty forthwith to apply the proceeds for that purpose.—People ex rel. Duffield v. Holmes, 3 Mich. 544.

¶ 95. The proceeds of stocks of the Government Stock Bank deposited with the state treasurer for securing its circulating notes and sold for their redemption must be applied to that purpose and it did not vary the case that the bank had been declared insolvent and a receiver appointed, and a notice published for creditors to present and prove their claims. Circulating notes were to be first paid and did not require proof. —People ex rel. Duffield v. Holmes, 3 Mich. 544.

¶ 96. Upon the presentation of the circulating notes of a bank for redemption, the mode adopted by the officers was to take up and separate from the rest one at a time, examine it, step back to the table, pick up the requisite amount of coin, and pay over to the bill holder; and so proceed, redeeming the notes one by one, until the close of banking hours, and then refuse to redeem further for the day. The officers also tendered to the bill holders bags of coin at the sums marked thereon, but on the condition that there should be no recourse to the bank for the correction of errors, if any, but only to those from whom the bank received the coin. The bank also refused to employ more than one person to redeem its notes; and large amounts presented failed of redemption, upon the claim that the bank was unable to make further redemption during banking hours. Held, that the course of the bank officers was evasive, and tantamount to a refusal to redeem.—People ex rel. Duffield v. Whittemore, 4 Mich. 27.

¶ 97. The provision in the charter of the Government Stock Bank, that upon filing affidavit of refusal to redeem, etc., with the state treasurer, he shall thereupon give notice that the notes of said bank will be redeemed at his office, made it the duty of the treasurer to act at once. He has no right to wait for counter-affidavits from the bank, and his doing so might be treated as a refusal on his part to act.—People ex rel. Duffield v. Whittemore, 4 Mich. 27.

VI. COLLECTION AND PAYMENT OF PAPER AND CLEARINGS.

§ 33. In general.

What constitutes a collection, passing credit to debtor, see also post ¶ 271.
Authority of officers to undertake collections, see post § 54.
Choosing obligor bank as agent to collect, see post §§ 36, 38.
Proceeds of collection as trust fund in insolvent bank, see post § 84.
Liability for loss or negligence, and actions for same, see post §§ 36-39.
Rights of bank taking paper on conditional deposit subject to be charged back if dishonored, see also ante ¶ 69.
Liability of depositor on uncollected paper, see ante § 17.
Withdrawal from clearing house as evidence of insolvency, see post ¶ 229.
Judicial notice of functions of bank as collection agency, see Evidence, I.
Liability of drawer upon check forwarded to drawee bank for collection, see Negotiable Instruments, VIII.
Agency in making payments through banks, see also Agency, §§ 6, 36.
Implication of agency to collect where paper is payable at the bank, see Agency, ¶ 94.

¶ 98. A bank to which a note is sent for payment upon request of its president, the indorser of the note, and which pays the same in accordance with his instructions, is estopped from asserting, as against the holder of the note, that payment was in fact made from a trust fund created and placed in the hands of the president for the purpose of paying said note and certain other obligations held by the bank, which fund had proved inadequate to discharge the indebtedness in full.—Fifth Nat. Bank v. Dunham, 109 Mich. 23.

§ 34. Title and rights in paper received for collection.

Lien of collecting bank for balance owing by forwarding bank, see post ¶ 103.
Form of indorsement as fixing title to paper received for collection, see Negotiable Instruments, VII.

¶ 99. Where paper comes from one bank to another indorsed and with directions to collect it, and there is nothing to indicate that the paper does not belong to the bank sending it, it may be regarded as the property of the bank sending it, although it was in fact deposited by the indorser in the first bank for collection.—Cody v. City Nat. Bank of Grand Rapids, 55 Mich. 379.

¶ 100. The title to commercial paper remains in one depositing in bank either indorsed "for collection," or with a definite understanding that such is his purpose.—People's State Bank v. Miller, 185 Mich. 565.

¶ 101. A bank has no right to sell a note left with it for collection.—Fuller v. Bennett, 55 Mich. 357.

§ 35. Lien by bank on collections.

Rights under general indorsement, see Negotiable Instruments, VII.

¶ 102. Where one whose note for $2,000 is held by a bank leaves with the bank for collection a note for $1,000, and where, after the former note becomes due, the maker, now insolvent, assigns the other note to a third person, a court of equity will declare

a lien in the bank's favor upon the $1,000 note.—Gibbons v. Hecox, 105 Mich. 509.

¶ 103. Where a bank sending a draft to another for collection has a running account with the collecting bank, to which account the proceeds of the draft are credited, the collecting bank has a lien on the proceeds of the draft for any balance due it on its account with the forwarding bank, unless it has notice that the latter was merely an agent for collection, or has disobeyed instructions with reference thereto.—Garrison v. Union Trust Co., 139 Mich. 392.

¶ 104. The proceeds of a draft sent for collection but conveying apparent title because of general indorsement may be the subject of a lien by a third bank for a general balance due it from the second bank when sent by the second bank for "collection and credit."—Garrison v. Union Trust Co., 139 Mich. 392.

¶ 105. A sight draft drawn against a car of grain was forwarded to a bank for collection and credit, with instructions to "return at once if not paid." The bank presented it at once and the drawee stated that he would pay it as soon as the car arrived whereupon the bank, according to practice in such cases, held the draft until the car arrived when it was paid. Held, that the delay was not such disobedience of instructions that the collecting bank would lose its lien on the proceeds, for a general balance due it from the forwarding bank.—Garrison v. Union Trust Co., 139 Mich. 392.

§ 36. Liability of bank for negligence or loss.

Reliance of drawee bank upon identification of payee by corresponding bank, see ante § 14, ¶ 39.

Liability of bank for negligence in making collection, see note, 7 N. C. C. A. 388-407.

¶ 106. A bank to whom a certificate of deposit is sent by another bank for collection, is not liable for loss resulting from the sending of the certificate direct to the drawer, where the instructions to the collecting bank justified so sending the certificate, and the collecting bank acted in good faith.—First Nat. Bank of Chicago v. Citizens Sav. Bank of Detroit, 123 Mich. 336.

¶ 107. A bank sued for not turning over, as ordered, to attorneys, a draft in its hands for collection, which it held until it had secured its own debt, cannot defend on the ground that it received the order after banking hours on Saturday, while the security was taken early Monday morning.—Finch v. Korste, 97 Mich. 20.

¶¶ 108, 109. The delay of a defendant bank in turning over to attorneys as ordered, a draft put in its hands for collection and which it held until it secured its own debt from the drawee is not excused by the fact that the draft was improperly indorsed to the bank by a collection agency with which it had been placed to be turned over to the bank.—Finch v. Karste, 97 Mich. 20.

§ 37. ——Draft with bill of lading attached.

Waiting until shipment arrives, see also ante ¶ 105.

Bills of lading as incident to draft, see also Bills of Lading.

¶ 110. A bank to whom a sight draft was forwarded for collection by a consignor with an attached bill of lading indorsed in blank, but containing no instructions to hold the bill until the draft was paid, was negligent in making delivery to an insolvent consignee upon acceptance of the draft without the draft having first been paid, and was liable to such consignor for its amount.—W. & A. McArthur Co. v. Old Second Nat. Bank of Bay City, 122 Mich. 223.

¶ 111. The rule or custom that a sight draft is entitled to three days' grace, does not negative the presumption that a bill of lading indorsed in blank which is attached to the draft without instruction, is to be held by a collecting bank until the draft is paid.—W. & A. McArthur Co. v. Old Second Nat. Bank of Bay City, 122 Mich. 223.

¶ 112. A bank to which a draft was sent for collection with a bill of lading attached, and which delivered the bill of lading upon acceptance of the draft without having received payment, was liable to the sender upon the insolvency of the consignee before payment.—W. & A. McArthur Co. v. Old Second Nat. Bank of Bay City, 122 Mich. 223.

§ 38. ——For default of corresponding bank.

Forwarding to bank which is liable, see also ante ¶ 105.

Effect of instructions to send to drawer bank, see also post, ¶ 121.

¶ 113. Where a bank is employed to collect foreign drafts and is left to select its own agents, it is responsible for the failure or dishonesty of its correspondent, a bank selected by itself, to whom the draft had been paid by the drawee.—Simpson v. Waldby, 63 Mich. 439.

¶ 114. The bank upon which a check is drawn is not a suitable agent for its collection.—Carson, Pirie, Scott & Co. v. Fincher, 129 Mich. 687.

¶ 115. A bank holding collaterals under an agency to collect them and apply the proceeds to the payment of the principal obligation is liable for the act of its collecting

agent in making a collection and misappropriation of the proceeds, substituting forged notes in exchange for those collected.—First National Bank v. Walker, 115 Mich. 434.

¶ 116. In an action against a bank for money received to plaintiff's credit, proof that the defendant bank was employed to collect certain drafts, that the money was paid to its correspondent, a bank in the town where the drawee lived, by a New York draft payable to the defendant, devolves upon the defendant a burden thereupon to show that, through no fault or want of diligence on its part, the draft was not paid.—Simpson v. Waldby, 63 Mich. 439.

Negligence of collecting bank in sending draft or check directly to drawee bank for payment, see note, 2 N. C. C. A. 722-735.

§ 39. ——Actions, pleading and evidence.

Burden of proof of negligence, see also ante ¶ 116.

¶ 117. A declaration alleging that plaintiffs, suing defendant bank for negligence, drew a draft in favor of a collection agency named, delivered it to the agency, procured its indorsement, and "caused said draft so indorsed to be sent by mail * * * to (defendant) for collection," is sufficient to permit the introduction of proof that the bank was employed by plaintiffs through a collection agency in favor of which the draft had been indorsed.—Finch v. Karste, 97 Mich. 20.

¶ 118. A declaration alleging that a bank received a draft for collection and was not diligent in collecting or in turning over the draft to a designated attorney, and that it retained possession of the draft until the debtor became insolvent, so that it "became and was" impossible to collect and "by reason of the carelessness, negligence," etc., of defendants plaintiffs "have lost all opportunity to collect," sufficiently shows loss resulting from the alleged negligence.—Finch v. Karste, 97 Mich. 20.

¶ 119. The jury may consider whether a drawee would have paid a draft if promptly presented where defendant bank with whom it had been placed for collection delays in turning it over to attorneys, according to instructions, until it has secured a debt of its own from the drawee and so made the collection of the draft impossible.—Finch v. Karste, 97 Mich. 20.

§ 40. Rights and liabilities between the banks.

Liability of forwarding bank for acts or neglect of correspondent bank, see ante § 38.

Lien of collecting bank upon collections, see ante § 35.

Proceeds or credit in hands of correspondent as trust for forwarding bank, see post § 84.

Remittance by draft, effect to create trust in account with drawer, see also post ¶ 273.

¶ 120. A bank that is another bank's agent for the collection of a draft against one of its own depositors cannot bind its principal by treating the draft, when accepted, as payment, the agency being to collect the money, not to make an arrangement whereby it should assume the debt.—Midland State Bank v. Byrne, 97 Mich. 178.

¶ 121. In an action by one bank against another for negligence resulting in loss of the amount of a certificate of deposit sent by plaintiff to defendant for collection, the rule that in the absence of instructions to do so, it is negligence to send the collection direct to the drawer and that such negligence makes the sender liable for resulting loss had no application, where under the instructions of plaintiff, the defendant was to send the certificate directly to the drawer, a third bank in another town, for collection.—First Nat. Bank of Chicago v. Citizens Sav. Bank of Detroit, 123 Mich. 336.

VII. FORGED AND ALTERED PAPER.

§ 41. In general; liability of bank for cashing or paying.

General duty in paying out deposits, see ante § 13.

Payment of savings deposit on presentment of stolen bank book with forged signature, see ante § 28, ¶ 88.

Liability of forwarding bank for substitution of forged paper for collections by corresponding bank, see ante ¶ 115.

Alteration of instruments and effect thereof in general, see Alteration of Instruments.

Defacement of countersignature of traveler's check, see Alteration of Instruments, ¶ 44.

Statute regulating liability on payment of forged paper, see Comp. L. 1915, § 8041.

¶ 122. Where a bank cashes a draft upon which the payee's name has been forged, prima facie the loss falls on the bank, the forgery being a nullity.—Brown v. People's Nat. Bank, 170 Mich. 416.

¶ 123. 2 Comp. L. 1897, section 4870, applies only to cases where the drawer knowingly draws a check to the order of a fictitious payee, and affords no protection to a bank paying the check, from which the name of the original payee had been erased, and the name of a fictitious payee or of a real payee not intended by the drawer, inserted.—Harrison v. [illegible] Nat. Bank, 153 Mich. 73.

¶ 124. Where a payee named in a warrant is a fictitious person, an indorsement in the name of such fictitious person is in effect a forgery.—Harmon v. Old Detroit Nat. Bank, 153 Mich. 73.

¶ 125. The time and place of a forgery, as fixing the liability of a bank making payment of the forged order, is immaterial, unless the forgery is committed under such circumstances as to show negligence on the part of the drawer.—Harmon v. Old Detroit Nat. Bank, 153 Mich. 73.

§ 42. Duty of depositor to inform bank; estoppel.

Negligence of depositor as affecting bank's liability to him for payment of check forged in signature or indorsement, see note, 14 N. C. C. A. 812-831.

¶ 126. Plaintiff's attorney forged her indorsement to a draft in which plaintiff was payee, and cashed same June 4, 1907. Defendant bank had in its possession sufficient personal property belonging to the attorney up to June 27, 1908, to enable it to recover on the forged instrument. Demand was first made on the bank and notice of the forgery given August 4, 1909. In May, 1907, plaintiff receipted to the administrator for the money. June 1, 1908, she was advised by letter from her brother of the attorney's dishonesty and that he had drawn her money from a bank, but was not specifically advised as to the forgery. Following her brother's suggestion, she left the whole matter to him. The brother made no demand on the bank but started criminal proceedings against the forger. Held, plaintiff was estopped from recovery against the bank by her failure to give it seasonable notice of the forgery.—Brown v. People's Nat. Bank, 170 Mich. 416.

¶ 127. Estoppel arises against the payee of a draft which has been cashed by a bank upon a forged indorsement, where the payee, with knowledge of the forgery, fails to give notice until an opportunity of recovery on the forged instrument, which would have been available if prompt notification had been given, is lost to the bank.—Brown v. People's Nat. Bank, 170 Mich. 416.

¶ 128. Where a plaintiff is informed by her brother that her name as payee to a draft has been forged and the money paid to the forger by the bank, and leaves it to the brother to collect the money from the forger, the brother is such an agent as to estop plaintiff from recovering against the bank by his failure to give it seasonable notice of the forgery.—Brown v. People's Nat. Bank, 170 Mich. 416.

VIII. LOANS AND DISCOUNTS, TRUSTS AND FISCAL OPERATIONS.

§ 43. Loans and discounts in general.

Power of national bank to loan and discount money, see post § 93.

Authority of officers in discounting, see post §§ 54-56.

Liability to persons buying stock on strength of fraudulent report of loans and discounts, see post § 64.

Discounting bank as bona fide purchaser, see Negotiable Instruments, XIII, A.

Discount on recommendation of officer as notice of equities, see Negotiable Instruments, XIII, A.

¶ 129. A loan or discount is an advance of money to be repaid at a future day. When the interest is paid in advance it is a discount; but when it is to be paid at the expiration of the credit it is a loan. A mortgage for a pre-existing debt is neither a loan nor a discount.—Bailey v. Murphy, W. 424.

¶ 130. A bank may take a mortgage with seven per cent. interest for a debt due to it, notwithstanding it is prohibited by its charter from taking more than six per cent. in advance of its loans and discounts.—Bailey v. Murphy, W. 424.

¶ 131. The buying of exchange by a bank is, in effect, discounting paper.—People ex rel. Platt v. Oakland County Bank, 1 D. 282.

¶ 132. Where a banking institution had power to lend deposits on the public stock of the state or the United States on bond and mortgage or "upon any other securities which should be deemed by the board of directors ample," it was held that it was not limited to the first-mentioned securities, but could discount commercial paper.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

¶ 133. A transaction whereby a bank holds certificates of deposit issued to it by another bank, permitting it to draw its drafts upon it to the amount represented by the certificates without any deposit of money, is not a deposit, but a mere loan, within the meaning of How. St., § 3208e5, imposing liability upon stockholders of a bank for the benefit of depositors, as such statute not intended to compel the stockholders to meet the ordinary debts of the bank.—State Sav. Bank of Detroit, v. Foster, 118 Mich. 268.

¶ 134. The facts that more money was advanced upon certified checks to their drawer than plaintiff bank was authorized to loan, and that usurious interest thereon was charged, are admissible, in an action upon a similar check fraudulently certified to determine whether such transactions were a legitimate discounting of certified checks,

or were in reality loans, though such testimony of itself did not invalidate plaintiff's claim.—Detroit Nat. Bank v. Union Trust Co., 145 Mich. 656.

§ 44. Rediscounts.

Delegated power to make rediscounts, see post § 57.

Rediscount of renewed paper by bona fide holders, see Negotiable Instruments, XIII, A.

¶ 135. A bank has power to rediscount its paper.—Davenport v. Stone, 104 Mich. 521.

¶ 136. Where a bank accepts from a debtor a renewal note with the same indorser, and said note is rediscounted for the bank under an arrangement with third parties for the rediscounting of its paper, and the proceeds are received by the bank, the nonsurrender by the bank of the old note, and its failure to enter the new note on its books, will not prevent the new note from being regarded as rediscounted paper. —Davenport v. Stone, 104 Mich. 521.

¶ 137. In response to a letter from plaintiff bank for "some good paper with your bank indorsement" for investment of surplus funds, defendant bank sent to plaintiff, "for discount and returns," a note payable at defendant bank to the order of third parties, indorsed by them in blank, and bearing defendant's guaranty of payment. Held, that as the transaction was in accordance with defendant's usual method of rediscounting paper, the note would be treated as paper rediscounted by the bank, although no record was made upon the bank books, except to credit the maker of the note with the proceeds thereof, less a charge made by the bank.—First Nat. Bank v. Stone, 106 Mich. 367.

§ 45. Trusts and trust funds.

Effect of Federal Reserve Act empowering national banks to act as trustees, see post § 90, ¶ 284.

Application of trust deposit by bank, see ante § 19.

President's trust as affecting bank, see also post ¶ 184.

General statutes relating to Trust, Deposit and Security Companies, see Comp. L. 1915, chap. 153.

¶ 138. Under Pub. Acts 1875, Act No. 131, providing for the safe keeping of public moneys, money deposited by the treasurer of a city board of fire and water commissioners in his own bank, constituted a trust fund, although the board seemed to have been content to treat the funds as a deposit in the bank.—Board of Fire & Water Com'rs of Marquette v. Wilkinson, 119 Mich. 655.

¶ 139. Moneys deposited by a City Board of Education and a Library Commission in a bank whose cashier was treasurer of the board and ex-officio treasurer of the commission, with the knowledge of the board and under an agreement for the payment of interest by the bank on daily balances, were not a trust fund in the first instance under Comp. L. 1897, § 1197 et seq., forbidding public officers from commingling public funds with their own, and from using such moneys other than as provided by law, or for their private use, or for loaning to any person, corporation or firm.—Board of Education of Detroit v. Union Trust Co., 136 Mich. 454.

¶ 140. Funds deposited in a bank by the clerk or register in chancery in compliance with Comp. L. 1897, § 420, cannot be regarded as a special deposit and trust fund as against the bank's general creditors.—Retan v. Union Trust Co., 134 Mich. 1.

§ 46. Investments and fiscal agencies.

Validity of Blue Sky Law as affecting interstate commerce, see Commerce.

Constitutionality of Blue Sky Law, see Constitutional Law; Commerce.

Regulation of corporations engaged in investing and selling investments, see also Corporations, XXV.

For regulation of the business of selling stocks, bonds and securities under the Blue Sky Law, see Comp. L. 1915, chap. 230.

Statutes regulating tontine, bond, certificate, and investment companies, see Comp. L. 1915, chap. 154.

IX. BANKS AND BANKING, TRUST OR MONEYED CORPORATIONS.

A. IN GENERAL; PRIVATE BANKS AND STATE BANKING CORPORATIONS.

[Note. In so far as it involves the general law of corporations applied to banking corporations, the matter is excluded from this topic and is treated in Corporations, which see. Only such matters as are peculiar to banking corporations and are not governed by general law are retained here.]

For the general law, excepting only matters peculiar to banking corporations, see generally Corporations.

General law of procedure and pleading in actions and suits by or against banking corporations, see Corporations, XIX; Equity; Pleading; Receivers; and other specific topics.

§ 47. Corporations; reorganization, consolidation and succession.

Many, or perhaps most, of the questions of corporation law involving banks contain nothing essentially distinctive from corporations in general. For that reason such matters are treated in Corporations, and should be there consulted.

Banking franchises and regulation in general, see ante I.
Organization and existence of national banks, see post § 90.
Nature of mutual savings banks, see also ante ¶ 84a.
Validity of by-laws, see also post ¶ 148.
Transfer of deposit to successor as discharging original bank, see also ante ¶ 30.
Generally as to succession of corporations, see Corporations, XXII.
Validity of incorporation acts passed by less than two-thirds vote of legislature, see Statutes, V.
Taxation of banks, bank corporations, and shares, see generally Taxes.
Injunction to protect bank name, see Injunctions, II, F.
See General Banking Laws, Comp. L. 1915, chap. 152.

¶ 141. Where a national bank holding defendant's written authorization to a former copartner of his to use the name of their dissolved firm in renewing indorsed paper, was reorganized under How. St., § 3208 b 6, as a state bank, such authority inured to the benefit of the latter, and authorized the indorsement of said firm name upon a renewal note taken by said state bank for the unpaid part of a note held by the national bank when the authority was given.—First Commercial Bank v. Talbert, 103 Mich. 625.

¶ 142. Where one banking institution is organized as successor of another whose securities are assigned to it in writing, it can enforce their payment as against parties liable thereon, even though the assignor might have rights which it did not consider of enough importance to ask the court to protect.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

§ 48. Invalid and irregular organizations.

Effect of invalid organization upon stockholders' and directors' liability to creditors, see post § 65.
De facto and imperfect corporations generally, see Corporations, V.
Liability of incorporators and stockholders, see generally Corporations, VI, XXIV, E.

¶ 143. The general banking law of 1837, being unconstitutional and invalid in so far as it attempts to confer corporate powers, no foreclosure can be maintained upon a mortgage executed to a bank organized under its provisions.—Hurlbut v. Britain, 2 D. 191.

¶ 144. A mortgage executed to a bank organized under the unconstitutional law of 1837 cannot be foreclosed.—Hurlbut v. Britain, 2 D. 191.

¶ 145. Quære, whether a bill of exchange, invalid if issued by an incorporated bank, drawn by an association organized under the general banking law, acting as a corporation but not one, could be treated as legal and valid, and an action maintained upon it against the acceptors.—Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457.

§ 49. Meetings and elections.

For meetings and elections held by corporations generally, see also Corporations IX.

¶ 146. Comp. L. 1897, § 6101, providing that in elections for directors of banks, each share shall entitle its holder to one vote for each director, repeals if necessary the provision of the minority stockholder's cumulative voting act, Comp. L. 1897, § 8553, in so far as it ever applied to banks.—Attorney General ex rel. Hurley v Bridgman, 134 Mich. 379.

§ 50. ——Appointment and term of cashier and officers.

¶ 147. Under Comp. Laws 1897, § 6093, How. 2nd Ed., § 6399, giving bank directors power to appoint a cashier and dismiss him at pleasure, the cashier serves at the pleasure of the board, and it is immaterial that the directors are chosen annually.—Webster v. Jossman, 199 Mich. 98.

¶ 148. A by-law of a saving bank fixing the term of the cashier different from the provision of Comp. Laws 1897, § 6093, How. 2nd Ed., § 6399, making his terms of service subject to the pleasure of the board of directors, is ultra vires and void.—Webster v. Jossman, 199 Mich. 98.

§ 51. Capital, shares and surplus.

Except as the statutes have enacted rules of specific application to banking corporations, the decisions on capital and shares, and subscriptions thereto and dividends, are treated in Corporations, which topic should be consulted.
Cross-bill to enforce lien on bill to compel transfer, see post § 71, ¶ 224.
Application of surplus in insolvency, right of stockholders and creditors, see post ¶ 209.
Stockholders as creditors for share of surplus, see Corporations, XXIV, C.
Rights of bona fide takers of stock in general, see Corporations, XXIV, B.
Estoppel to question transfer, see Corporations, XXIV, B.
Effect of insolvency upon validity of transfer of bank stock, see Corporations, XXIV, B.
Suits to rescind stock purchases and transfers, see generally Corporations, XXIV, B: Rescission and Cancellation.

Necessary parties to suit against insolvent bank for rescission of stock purchase, see Rescission and Cancellation, VI.
Duty and obligation of paying taxes upon shares of stock, see Taxes, IX.

¶ 149. Except as a surplus fund is required by the law, the surplus of a bank is a fund created and augmented for convenience and profit, and, like the capital, is payable out of the assets of the bank after the creditors have been paid in full.—Wedemeyer v. Hindelang, 161 Mich. 600.

§ 52. Powers and place of business.

Of savings banks, see post § 53.
Powers of national banks, see post §§ 91-93.
Discounting and rediscounting and rate of interest chargeable, see ante §§ 43, 44.
Bank as depositor in other banks, see ante § 8.
See generally, Corporations, III, XI-XIV.
Ultra vires and illegal contracts by corporations generally, see Corporations, XIV.

¶ 149a. The establishment by a bank of an agency for the transaction of banking business at another place than that specified in the charter is a violation of the charter. Attorney General v. Oakland County Bank, W. 90; People ex rel. Platt v. Oakland County Bank, 1 D. 282.

¶ 149b. Where a bank has power, under its charter, to take and hold lands for the convenient transaction of its business and to secure debts, but for no other purpose, it has no right to purchase lands for the purpose of selling them again; and the court of chancery will not assist it in enforcing a contract made with that intent.—Bank of Michigan v. Niles, W. 99; Bank of Michigan v. Niles, 1 D. 401.

¶ 150. Under How. St., § 3208b, providing that it shall be lawful for banks to purchase, hold, and convey real estate mortgaged to them in good faith, and such as they shall purchase at sales under judgments, decrees, or mortgage foreclosures under securities held by them, a bank can foreclose a mortgage by advertisement.—Gage v. Sanborn, 106 Mich. 269.

¶ 151. The obtaining of deposits of public money deposited by a township treasurer and the signing of the official bond of such treasurer in consideration thereof is within the scope of the business of a banking partnership.—Township of Wexford v. Seeley, 196 Mich. 634.

¶ 152. Semble, that a bank may lawfully have an agency to redeem its bills at a place other than that in which it is located by the charter.—People ex rel. Platt v. Oakland County Bank, 1 D. 282.

§ 53. ——Of savings banks.

Effect of by-laws upon depositor in savings bank, see ante § 28.
Validity of by-laws fixing term of cashier, see ante ¶ 148.

¶ 153. A savings bank is a creature of the statute, and has the powers expressly granted to it, and such as are fairly incidental thereto.—Webster v. Jossman, 199 Mich. 98.

§ 54. Directors, officers and agents; authority.

Of president or cashier as such, see post §§ 55, 56.
Appointment and term, see ante § 50.
Power of assignment for creditors, see post § 73.
Authority to execute bond to secure public deposits, see also ante ¶ 73.
Delegation to cashier, see post § 57.
Liability to bank for making bad loans, see post § 63.
Director's knowledge as notice to bank, see post § 59.
Of corporations generally, including banking corporations when not peculiarly involving banking law, see Corporations, XVII.
Compensation of directors and officers of corporation, see Corporations, XVII, F.
Authority of agents in general, see Agency.

¶ 154. The officers of a bank cannot consent to any arrangement by which the security of the bank on paper due to it will be impaired.—Gallery v. National Exch. Bank of Albion, 41 Mich. 169.

¶ 155. It is fairly within the scope of the powers of the officers of a bank to receive for collection, from an indorser of a note due to the bank, securities which the maker has turned out to him, and to agree to apply the moneys on the note when collected. And if they fail to make the application equity will compel it.—Wales v. Bank of Michigan, H. 308.

¶ 156. A transfer, by way of security, of a portion of the effects of a bank, for the purpose of enabling it to continue business, is within the powers of the directors.—Bank Com'rs v. Bank of Prest, H. 106.

§ 55. ——President.

Admissions by or notice to, see post §§ 58, 59.
Individual or official nature of act, see post § 60.

¶ 157. Whether a general authority in a bank president to make discounts could empower him to make an arrangement under which the bank would surrender securities

on receiving others, which it was at the same time agreed should be mere nullities so far as the sureties were concerned, quære.—First Nat. Bank of Sturgis v. Bennett, 33 Mich. 520.

¶ 158. The directors of a bank, in the presence of one who had agreed to purchase property owned by the bank, authorized the president to execute to such purchaser a bond of indemnity against any legal claim or lien which a specified company might have upon the property. The bond given by the president with the purchaser's consent was conditioned upon the bank's obtaining from the company a good and sufficient written lease. The agreed bond was not given. The lease procured was not satisfactory to the purchaser, and he declined to accept it, and refused to pay the amount due on a purchase money mortgage until the condition of the bond should be satisfied. Held, on foreclosure of the mortgage, that the giving of the bond conditioned for the procuring of a lease was unauthorized, and did not bind the bank.—Sturgis Nat. Bank v. Levanseler, 115 Mich. 372.

¶ 159. A president and director of a bank who takes active part in the bank's affairs and in advising on discounts, and who is also a broker of commercial paper must not take undue advantage; and where the evidence shows that he sold the note of an insolvent party to the bank the sale may be rescinded by the bank.—Hicks v. Steel, 126 Mich. 408.

§ 56. ——Cashier.

Term and election, see ante § 50.
Authority to make admissions or receive notice, see post §§ 58, 59.
Individual or official nature of act, see post § 60.
Ratification by bank, see post § 61.
Liability of bank for certificate of deposit or proceeds appropriated by cashier, see also ante ¶ 91.
General law of agency, see Agency.
Liability of cashier on ultra vires contract, see also Agency, ¶ 465.

¶ 160. Usually, the authority of the cashier of a bank is a limited authority, and a party seeking to show a release by the cashier from liability upon commercial paper held by the bank, except in the ordinary course, must show that the cashier had authority from the directorate, or that the act had been ratified or acquiesced in by the bank. Such authority, however, may be shown expressly or by necessary implication, or it may be established by the particular usage practice, or mode of doing business of the bank; as by allowing the cashier to exercise general authority for a considerable time.—Wing v. Commercial & Sav. Bank, 103 Mich. 565.

¶ 161. The general powers of the cashier of a bank being defined and limited by law, persons dealing with the bank are presumed to know their extent.—Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457.

¶ 162. The rules of law governing national banks must be presumed to be known by the cashiers of such banks so that in giving an indemnity bond a cashier cannot be presumed to intend binding the bank.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 163. The extent of the general powers of the cashier of a bank is a question of law and not of fact; and a charge is erroneous which refers it to the jury to determine whether a cashier, as such, had power to accept certain bills for the bank.—Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457.

¶ 164. A cashier's authority to execute a contract in the bank's behalf is shown by evidence that the bank's attorney, one of the directors, having been consulted, approved the contract, and that the cashier's acts in similar transactions were acquiesced in, and by his own testimony that the act in question was approved by the directors.—Whitney v. Foster, 117 Mich. 643.

¶ 165. The cashier, in the absence of proof to the contrary, will be presumed to have authority to turn out the notes and assets of the bank in payment of its indebtedness. —Kimball v. Cleveland, 4 Mich. 606; Peninsular Bank v. Hanmer, 14 Mich. 208.

¶ 166. Whether the cashier's general power to apply the assets of the bank in payment of its indebtedness includes also a power to guaranty their collection or availability, quære.—Peninsular Bank v. Hanmer, 14 Mich. 208.

¶ 167. The cashier of a bank is presumptively authorized to represent the bank in an action on a promissory note indorsed in blank and alleged to be owned by the bank.—Battersbee v. Calkins, 128 Mich. 569.

¶ 168. The cashier of a bank has no power to accept bills of exchange on behalf of the bank for the accommodation, merely, of the drawers; and the holder, with notice of bills so accepted, cannot recover against the bank. —Farmers' & Mechanics' Bank of Michigan v. Troy City Bank, 1 D. 457.

¶ 169. Plaintiff bank sued on defendant's note. Defendant set up that plaintiff's cashier had compromised the note with him by accepting certain bonds in payment of it. The evidence showed that plaintiff bank had

a discount committee which regularly met to pass on loans. There was no evidence that the cashier was expressly given special powers or that the bank pursued any course of business which would warrant the belief that he had such powers. Held, in a suit on the note, that the alleged compromise made by the cashier was beyond his authority, and the court should have directed a verdict for plaintiff.—Farmers' & Mechanics' Bank v. Clancy, 163 Mich. 586.

¶ 170. A contract was entered into by the cashier in behalf of a bank, by which security was given by a debtor, on long time, to a creditor, in the interest and on the motion and arrangement of the cashier, who, in order to procure the assent of the creditor, made and delivered a bond of indemnity against a prior mortgage on the property covered by the collateral security. The bank received the benefit of this transaction, and defended the creditor against a suit to foreclose this prior mortgage. Held, that the bank could not dispute the cashier's authority to execute the contract of indemnity.—Peninsular Bank v. Hanmer, 14 Mich. 208.

§ 57. ——Delegation of authority.

Delegation by directors of power to cashier to lease liability on commercial paper, see ante ¶ 160.

By agents in general, see Agency, § 29.

¶ 171. Plaintiffs, who had an oral arrangement with a bank to rediscount its paper, at the request of the cashier, to whom the directors had given the entire management of the bank, rediscounted a note in the due course of business, and without any notice or reason to believe that the cashier had not full authority. Held, that the directors had authority to rediscount the note, and that the exercise by the cashier of such authority is binding upon them, even though the occasion was not extraordinary or emergent.—Davenport v. Stone, 104 Mich. 521.

¶ 172. A bank the directors of which have for several years intrusted the entire management to the cashier is liable upon the latter's indorsement in its behalf of paper negotiated by him for rediscount as the property of the bank in the usual course of the business.—First Nat. Bank v. Stone, 106 Mich. 367.

§ 58. ——Admissions or waivers by officers.

¶ 173. A bank cashier, by his declarations that the bank has no lien upon the stock of a shareholder, estops the bank, as against one who relies thereon to his detriment, from asserting a lien on the stock for an indebtedness then due it, notwithstanding that, under How. St., § 3208a8, a transfer upon the books of the bank can be made only by the consent of the directors, when the holder is indebted to it on matured paper.—Oakland County Savings Bank v. State Bank, 113 Mich. 284.

¶ 174. A bank cashier's statement, in answer to inquiry, that his bank has no lien on a shareholder's stock, estops the bank from asserting, as against one who to his detriment relies upon such statement, a lien on the stock for an indebtedness then due.—Oakland County Sav. Bank v. State Bank, 113 Mich. 284.

§ 59. ——Notice to bank through officers.

General rule as to notice through agents, see Agency, II, E.

Notice of equities to bank through individual knowledge of officer, see also Negotiable Instruments, XIII, A.

¶ 174a. A bank is not charged with knowledge of the character of negotiable paper by the mere fact that it discounts it on the recommendation of a director, if the latter does not control its discretion or discount the paper himself as an officer or agent of the bank.—Shaw v. Clark, 49 Mich. 384.

¶ 175. Where a bank is a corporation consisting of a number of branches, and the resident manager of each branch, though keeping its business distinct, is treated as an agent of the entire corporation, and drafts on the bank are indorsed by one branch to another, so that the manager of the indorsee branch or his subordinates sees to their presentation, an acceptor dealing with a manager may fairly infer that he is the proper person to be notified of anything affecting the acceptor's responsibility, if he has no notice or knowledge to the contrary.—Canadian Bank of Commerce v. Coumbe, 47 Mich. 358.

¶ 176. A bank president who persuaded the cashier not to disclose some of his acts and directions to the directors can claim nothing because of the cashier's knowledge; that officer's silence might, under such circumstances, make him accessory to the fraud, but could not tend to excuse the principal.—First Nat. Bank of Sturgis v. Reed, 36 Mich. 263.

¶ 177. The knowledge of the cashier of a bank that certain notes discounted by it for a corporation of which the cashier was president were without consideration, is not chargeable to the bank, in an action to recover from the maker of the notes.—People's Sav. Bank of West Bay City v. Hine, 131 Mich. 181.

¶ 178. An action by a bank payee against an accommodation maker of one note and indorser of another cannot be defeated by showing misrepresentation and fraud on

the part of the cashier who is known to the defendant to be the principal debtor; the knowledge of the cashier cannot be imputed to the bank where his interests are adverse.—State Sav. Bank of Ionia v. Montgomery, 126 Mich. 327.

§ 60. Individual or official nature of act.

Indemnity bond given by the cashier of a national bank, see also ante ¶ 162.

In so far as governed by general corporation law, see Corporations, XV.

Assignment and transfer or execution of instrument in officer's name, see Corporations, XV.

Effect of use of name of officer in signing, see Execution of Instruments, II; and see also Negotiable Instruments, II.

Bank or officer as proper plaintiff in action on paper running in officer's name, see Negotiable Instruments, XIV.

¶ 179. A guaranty against loss or liability for signing as sureties, given by a bank president in his own name and without authority from the directors, to those whom he had solicited so to sign a note given to the bank to retire a prior note held by it against their principal, is the president's individual contract and does not bind the bank.—First Nat. Bank of Sturgis v. Bennett, 33 Mich. 520.

¶ 180. A written undertaking by the cashier of a national bank to save harmless one who should sign a replevin bond for customers of the bank was held to render him individually liable, such an undertaking being ultra vires for the bank, and not clearly appearing on its face to have been intended as the bank's undertaking.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 181. Under an agreement complainant corporation mortgaged its property to a trust company to secure an issue of bonds, which were left in the mortgagee's possession, to be delivered to the defendant bank's cashier, for sale, on his demand, the proceeds to be credited to complainant's account at the bank. Part of the bonds had been sold and credit given, when, in the cashier's absence, complainant was notified that certain of its paper was due. An agreement was thereupon made with the bank, through the assistant cashier that credit should be extended until the cashier's return, upon the condition that the remainder of the bonds should be held by the bank as collateral security, complainant thereupon giving a note reciting that it was secured by said bonds, and stating by indorsement that it was given for the notes then due. Upon the cashier's return a renewal of those notes and surrender of the other was provided for, complainant consenting that the bank should hold the bonds as collateral for all of its indebtedness. The cashier, after obtaining the bonds from the mortgagee, and depositing them in the vaults of the bank, sought to pledge them to the bank as security for his own debt. Held, that the bonds were received by the cashier in his official capacity, as collateral to complainant's indebtedness, and that they should so be treated by the bank.—Detroit Motor Co. v. Third Nat. Bank, 111 Mich. 407.

¶ 182. A bank being prohibited under Comp. L. 1897, § 6093, subd. 7, from selling stock as part of its legitimate business, it could not be held liable in trover for the conversion of shares of stock by its cashier; and where the testimony showed that the transaction in question was the individual transaction of such cashier it was proper to direct a verdict for the bank.—Preston v. Marquette County Sav. Bank, 122 Mich. 696.

¶ 183. A cashier's act in charging to an irresponsible borrower money lent to him by the bank president's order does not necessarily fix the transaction as a loan by the bank; for the bank, if it did not ratify or acquiesce in it, could repudiate it as a dealing with the nominal borrower and insist on repayment by the president.—First Nat. Bank of Sturgis v. Reed, 36 Mich. 263.

¶ 184. A bank not connected with the trust property cannot be held as trustee for money collected by its president and manager as trustee for the benefit of the creditors of a maker of notes, which money was paid into the bank on a certificate of deposit in the president's name and made applicable to payment of the notes.—Alpena Nat. Bank v. Greenbaum, 80 Mich. 1.

§ 61. Ratification and estoppel.

Customary ratifications of similar acts as evidence of cashier's authority, see ante ¶ 164.

Ratification of one officer's act by another officer, see also ante ¶ 183.

Ratification of bad loans made by bank officers, see also post § 63.

Of acts of agents in general, see Agency, II, C.

Ratification and estoppel to question unauthorized doings of corporation officials generally, see Corporations, XVII, D.

Estoppel to follow trust funds where bank officer acts as trustee, see Trusts, XIII.

¶ 185. Where the directors of a bank intrust its entire management to the cashier, neither the bank nor its receiver can be heard to deny the authority of the cashier to do any of those acts which the bank or its directors might lawfully authorize the cashier to perform.—Davenport v. Stone, 104 Mich. 521.

¶ 186. The effect to be given to the long silence of bank directors after a charge was entered upon the bank books, against a nominal borrower who was supposed to be irresponsible, is one of ratification, and should be submitted to a jury as such.—First Nat. Bank of Sturgis v. Reed, 36 Mich. 263.

¶ 187. Upon the facts of a particular case a bank was held to be estopped from repudiating its cashier's agreement to release complainant from liability on his note to the bank, and such note is held to have been paid.—Wing v. Commercial & Sav. Bank, 103 Mich. 565.

§ 62. Liability of officers to bank or shareholders.

Officers in mutual savings banks, distinguished, see also ante ¶ 84a.

Rights and liabilities of officers and agents generally to corporations, see Corporations, XVII, F.

Bill by stockholders on refusal of receiver to sue, see Corporations, XXIV, F.

Evidence of fraud in carrying note until officer was discharged as indorser, see also Fraud, III.

¶ 188. A bank president is personally liable to the bank for moneys paid out by the cashier under his directions and without security to one who is supposed to be irresponsible, but with whom the president is interested in the business for which the money was obtained, such payments being kept from the knowledge of the directors.—First Nat. Bank of Sturgis v. Reed, 36 Mich. 263.

§ 63. ——For negligence in making loans.

Of national bank director for making excessive loan, see post § 93.

Officer's scope of authority in transferring property, making loans and giving and accepting security, see ante §§ 54-56.

¶ 189. In an action by a bank against its president for negligence in loaning the bank's funds, the burden of proof is on the bank to show that the loans were not approved or ratified by the board of directors.—Commercial Bank of Bay City v. Chatfield, 127 Mich. 407.

¶ 190. In an action by a bank against its president for negligence in loaning the bank's funds, it is competent to show that the directors when they learned of the loan relied upon the statement that it was secured by collateral in the hands of the president as this evidence goes to negative ratification, approval, or negligence by the board.—Commercial Bank of Bay City v. Chatfield, 127 Mich. 407.

¶ 191. In an action by a bank against its president for negligence in loaning the bank's funds, it is not erroneous to admit testimony that the loans in question were not read off at the meetings of the directors and not reported to the board by the committee appointed to examine the paper of the bank; as this testimony bears on the question of approval or ratification by the directors.—Commercial Bank of Bay City v. Chatfield, 127 Mich. 407.

¶ 192. In an action by a bank against its president for negligence in loaning the bank's funds, the fact that the loans were read in the meeting of directors and approved in the usual way, will not prevent recovery where the directors relied upon a false statement that they were secured by sufficient collateral in the hands of the president and the president sat by without correcting the impression.—Commercial Bank of Bay City v. Chatfield, 127 Mich. 407.

¶ 193. Evidence that a cashier informed a director that he wanted money to put into a mining venture, is competent in an action by a bank to recover sums of money taken by the cashier on the theory of negligence of the director, who was also president of the bank part of the time, and who permitted the taking without adequate security, as such evidence bears upon the good faith of the director, and whether he exercised the care and prudence required of a director in approving a loan.—Commercial Bank of Bay City v. Chatfield, 121 Mich. 641.

¶ 194. An instruction, in an action by a bank against a director for negligence in permitting loans of money to a cashier on inadequate security, which states that the director is not liable if he acted in good faith, believing that the cashier would pay the note, and was fairly responsible for it, is erroneous, the director being liable for his negligence.—Commercial Bank of Bay City v. Chatfield, 121 Mich. 641.

¶ 195. A requested instruction authorizing recovery by a bank from a director because of negligence in permitting loans of money to a cashier without adequate security, which states that a verdict should be rendered for the bank if the director consented to the taking of money, upon a note secured by an insurance policy, if such collateral was not in the exercise of ordinary judgment believed by the director to be good for the money, is properly refused by the court as ignoring a claim of the director that the loan was presented to the board of directors in the usual course of business, and approved by them.—Commercial Bank of Bay City v. Chatfield, 121 Mich. 641.

¶ 196. Requested instructions charging a director of a bank with fidelity and prudence such as a careful man would exercise in his own affairs of like magnitude and importance, and also requiring him to exercise such degree of supervision and diligence as the situation and nature of the business of the bank required, and as a prudent and careful man ought to do for the protection of the interests of others intrusted to his charge, being liable for a failure to do so resulting in loss to the bank, is properly refused where a bank seeks to recover from the director for negligence in permitting loans to a cashier on inadequate security, as a claim of the director that the loans came to the knowledge of other directors and were ratified by them is ignored.—Commercial Bank of Bay City v. Chatfield, 121 Mich. 641.

§ 64. Liability for fraud on stockholders or buyers.

Pleading fraud to avoid liability as stockholder for debts, see post ¶¶ 216, 217.

Remedies of stockholders generally for fraud, see Corporations, XXIV.

Right of purchaser of national bank stock to rely upon truth of report to the Comptroller, see Fraud, II.

Remedy of purchaser of bank or bank stock for fraudulent representations, see Fraud III, A.

Diligence in rescinding fraudulent purchase from bank official, see Rescission and Cancellation, I.

¶ 197. Directors of a bank are bound to exercise that degree of care in the business affairs of the bank that ordinarily prudent and careful men would exercise in the affairs of like importance. The liability of the directors in a case against bank directors for damages sustained by the purchase of stock in their bank in reliance on official reports as to its financial condition is independent of the national banking act and is derived from the principles of common law.—Smalley v. McGraw, 148 Mich. 384.

¶ 198. Where the directors of a bank in signing a report as to the financial condition of the bank knew, or by the exercise of ordinary diligence in the discharge of their duties would have known prior to signing such report, that the item "Loans and Discounts" contained paper worth much less than its face value, which would materially affect the value of its stock, they are individually liable to the purchaser of the stock who relied in good faith upon the report as stating the true financial condition of the bank.—Smalley v. McGraw, 148 Mich. 384.

¶ 199. In an action against bank directors for damages sustained by the purchase of stock in reliance on reports as to the financial condition of the bank made to the comptroller of currency the question of plaintiff's knowledge of the reports, the contents of the report, and his reliance thereupon are questions for the jury.—Smalley v. McGraw, 148 Mich. 384.

¶ 199a. Fraudulent representations by the directors of a bank inducing the purchase of stock is not proved, in an action against such bank for such fraud, where the evidence showed that the plaintiff was induced to purchase such stock by the commissioner's report of such bank, summarized from the statement of the bank's officers, and that in such report, through some unaccountable oversight, such commissioner had treated as real estate such items in the statement as, "Unadjusted errors in loans and discounts," "Unadjusted errors in stocks, bonds and mortgages," "Unadjusted errors in cash paid," "Unadjusted errors in real estate," etc.; since such statement of the directors rightly understood showed an impairment of the bank's capital, and such directors were not responsible for the error of the commissioner.—Penfold v. Charlevoix Sav. Bank, 140 Mich. 126.

§ 65. Liability of Stockholders and directors to creditors.

The liabilities of officers and stockholders of banks may be either that of corporations generally, in which case it has been treated in Corporations, XVII, XXIV, or may be a liability peculiar to banking corporations. Their liabilities under the banking laws, including the "double" liability to depositors or others, is here treated.

Estoppel to deny liability, see post § 68.

Actions to enforce liability, see post §§ 78, 79.

In corporations generally, including banking corporations where general law applies, see Corporations, XXIV, E.

¶ 200. The stockholders of an insolvent bank at the time of its insolvency are liable under the statute (Pub Acts 1887, No. 205, § 46) to the depositors who are such at that time.—Foster v. Row, 120 Mich. 1.

¶ 201. How. St., § 3208e5, limiting the liability of stockholders in banks to depositors only, does not violate Const. Art. 15, § 3, which provides that stockholders shall be liable for all debts, the constitutional provision relating to banks of issue only.—Foster v. Row, 120 Mich. 1.

¶ 202. The directors and stockholders of a bank organized under the act of March 15, 1837, commonly called the general banking law, could neither be held liable for the bills and other indebtedness of the bank, as stockholders and directors of the association, nor as partners.—State of Michigan v. How, 1 Mich. 512.

¶ 203. By the general banking law of 1837 the directors of a bank were to be individually liable for the payment of the debts in case of its insolvency. By a prior act banking was made unlawful unless authorized by law, and penalties were imposed for engaging in it. In an action brought against the directors of an association formed under the general banking law, to charge them with the payment of one of its debts, it was held that the law against illegal banking was not repealed by the general banking law, except in favor of incorporated banks organized under it; and as by the Constitution corporations could not be created under this law, and the banks so organized were illegal, the action against the directors could not be sustained.—Brooks v. Hill, 1 Mich. 118.

¶ 204. Assumpsit was brought against certain persons jointly to recover back money which the plaintiff had deposited with one of them in reliance upon his false and fraudulent representations that he conducted a bank of which the others were directors. Held, that even though the others had allowed their names to be so used, the facts did not establish any joint liability against them and they were not estopped from denying it.—Bennett v. Dean, 41 Mich. 472.

§ 66. ——Extent of liability.

What constitutes deposit for which stockholders are liable, see also ante ¶ 133.
Interest upon unpaid assessment, see Interest, II.

¶ 205. A shareholder in a bank is, as regards creditors, not only a surety for the bank, but, as one of the associates therein, he is held to have undertaken, by the terms of association, to be bound for the debts which it contracts, How. St., § 3174. And the liability of the shareholders is commen surate with that of the corporation and extends to costs and interest on judgments.—Grand Rapids Sav. Bank v. Warren, 52 Mich. 557.

¶ 206. The statute liability of a stockholder "for the benefit of the depositors in the bank" is not that of a surety.—Wedemeyer v. Hindelang, 161 Mich. 600.

¶ 207. Where a bank fails, the receiver is entitled to interest on the statutory liability of the stockholders only from the time when it was determined by the court that it was necessary to enforce such liability, not from the date of the bank's failure.—Wedemeyer v. Hindelang, 161 Mich. 600.

¶ 208. Where, by a general law for the incorporation of banks, the directors and stockholders are made individually liable for all debts, and an assignee of a demand is preparing to enforce it against them, it is immaterial whether he paid full value for it, as they are liable for the whole whether he did or not.—Cook v. Wheeler, H. 443.

¶ 209. Where a bank fails and a receiver, under 2 Comp. L. 1897, §§ 6102, 6135, proceeds to enforce against the stockholders their statutory liability, the stockholders are not entitled to be treated as creditors of the surplus fund so as to have their liability reduced thereby.—Wedemeyer v. Hindelang, 161 Mich. 600.

§ 67. Persons liable as stockholders.

Liability of trustee of stock as stockholder, see post ¶ 219.
In corporations generally, see Corporations, XXIV, B, E.
In illegal or irregular corporations generally, see Corporations, VI, XXIV, E.

¶ 210. Under Comp. L. 1897, § 6135, making stockholders individually liable for the benefit of depositors of a bank, the liability rests on the actual shareholders at the time of the suspension.—May v. McQuillan, 129 Mich. 392.

¶ 211. A stockholder in an insolvent bank is liable on shares of stock which he has purchased and paid for though the stock has not been transferred to his name on the books of the bank and is in its hands as collateral for a debt since paid.—Foster v. Row, 120 Mich. 1.

¶ 212. Under How. St., § 3208e5 (Pub. Acts 1887, No. 205, sec. 46), providing that one holding bank stock as collateral security shall not be liable thereon as a stockholder, a bank which holds stock in an insolvent bank as collateral security for a debt due it, is not liable thereon though the cashier of the insolvent bank upon request to transfer the stock made the transfer absolute in form instead of to the holder as pledgee.—May v. Genesee County Savings. Bank, 120 Mich. 330.

¶ 213. A bona fide gift and transfer of stock in a bank releases the donor from his statutory liability on the stock though the bank is insolvent at the time of the transfer, such fact not being known by the stockholder.—Foster v. Row, 120 Mich. 1.

¶ 214. A stockholder in an insolvent bank is not liable on stock which he has in good faith sold and delivered to the cashier of the bank in his individual capacity, the amount paid for such stock having been credited to such stockholder in his passbook, though the cashier has failed to reim-

burse the bank and no entry of the transfer has been made on the books of the bank.—Foster v. Row, 120 Mich. 1.

§ 68. ——Estoppel of transferee to question liability.

¶ 215. A banking corporation can waive the formality of an assignment by a stockholder of his stock, and, having done so, the purchaser, to whom a certificate is issued cannot, after receiving dividends thereon for several years, escape his statutory liability to depositors on the ground that he never became a legal stockholder for want of such assignment.—Bissell v. Heath, 98 Mich. 472.

¶ 216. A registered stockholder in an insolvent bank who has received and retains dividends and who has permitted depositors to rely upon his ownership of the stock, cannot avoid his statutory liability thereon on the ground that he purchased the stock upon fraudulent representations as to its value by officers of the bank.—Foster v. Row, 120 Mich. 1.

¶ 217. A transferee of stock without formal assignment cannot after receiving and retaining dividends, and permitting depositors to rely upon his apparent ownership of the stock, repudiate his liability on the ground that he was induced to buy the stock by false representations as to the bank's financial conditions.—Bissell v. Heath, 98 Mich. 472.

§ 69. Lien on bank stock for debt of holder.

Estoppel of bank, by admission of officers, to assert lien on stock, see ante § 58.
Liability of stockholders in corporations generally, see Corporations, XXIV, E.
Effect of lien as against bona fide transferee, see also Corporations, XXIV, B.
Payment of tax on holder's stock by bank and lien on stock for reimbursement, see Taxes, IX.

¶ 218. Where defendant bank loans money to one of its stockholders and takes a demand note with certain stock in a mercantile company as collateral security and the stockholder later deposits his bank stock with another bank as security for a loan and in pursuance of the authority given under this loan, the stock is sold to plaintiff plaintiff takes the stock subject to the lien of defendant bank under Comp. L. 1897, § 6098, and is not required to issue a new stock certificate to plaintiff.—Brinen v. Muskegon Sav. Bank, 174 Mich. 414.

¶ 219. A bank has no lien under § 6098 Comp Laws 1897, § 6404, How. St., 2nd Ed., on shares of its stock for a debt due it from a trustee individually, in whose name the bank issued the stock with knowledge of the identity of the legal owner.—Porter v. Marine Sav. Bank, 186 Mich. 355.

¶ 220. A bank's statutory lien on its stock (How. St., § 3208a8) extends to the holder's liability of the bank on a debt of a copartnership of which he is or has been a member, since the statute expressly covers a liability as principal debtor, surety, "or otherwise."—Citizens' State Bank v. Kalamazoo County Bank, 111 Mich. 313.

§ 70. ——As against transferee.

¶ 221. A by-law providing that any stockholder desiring to sell his stock shall give the bank ten days to purchase or find a purchaser, and at the expiration of such time may "sell at pleasure," does not operate as a waiver of the right of the bank to claim a lien, under How. St., § 3208a8, as against a purchaser of the stock, for a debt of the registered holder.—Citizens' State Bank v. Kalamazoo County Bank, 111 Mich. 313.

¶ 222. A bank's lien under How. St., § 3208a8, Comp. L. 1897, § 6098, upon stock issued by it, for any liability of the registered holder, extends to a debt due at the time when a demand for the transfer of such stock is made, is superior to the right of a bona fide purchaser, and the latter cannot compel a transfer of the stock until such liability is discharged.—Michigan Trust Co. v. State Bank, 111 Mich. 306; Citizens' State Bank v. Kalamazoo County Bank, 111 Mich. 313; Oakland County Sav. Bank v. State Bank, 113 Mich. 284.

¶ 223. Under Comp. L. 1897, § 6098, How. St., 2nd Ed., § 6404, providing that the shares of stock of a bank shall be deemed personal property and shall be transferred on the books of the bank in such manner as the by-laws thereof may direct, but no transfer shall be valid against a bank so long as the registered holder thereof shall be liable as principal debtor, surety or otherwise to the bank for any debt which shall be due and unpaid, and no stock shall be transferred on the books of any bank without the consent of the board of directors where the registered holder thereof is indebted to the bank for any matured and unpaid obligations, where the owner of stock in a bank pledges such stock as collateral security for his indebtedness, the bank is not required to transfer the stock on its books unless, before maturity of the bank debt, the pledgee has demanded a transfer or has given a notice, which means that he has elected to claim his full rights, or unless the facts make that election so certain that formal notice is unnecessary.—National City Bank of Chicago v. Kalamazoo City Sav. Bank, 232 Fed. 669.

§ 71. ——Procedure to enforce lien.

Refusal to transfer as evidence of fraud, see Corporations, XXIV, D.

¶ 224. Upon a cross-bill filed to foreclose a lien upon stock by a bank which the purchaser of such stock has sued to compel a transfer thereof on the bank's books, the court has jurisdiction to award foreclosure, even though the registered holder, against whom no personal decree is sought, has not been made a party.—Citizens' State Bank v. Kalamazoo County Bank, 111 Mich. 313.

§ 72. Insolvency and winding up in general.

The general law regulating dissolution, winding up and insolvency of corporations is treated in Corporations, XXIII, and only the provisions that are peculiar to money and banking corporations are kept in this topic.

Injunction and receivership, see also post § 75.

Dissolution of bank or banking corporation, see also § 77.

State Banking Department and its functions in cases of insolvency and winding up, see Comp. L. 1915, chap. 152, § 8005 et seq.

¶ 225. Insolvency of a bank is shown, prima facie, by its closing its doors and suspending its business, which is "an act of insolvency" (How. St., § 3208e6).—Stone v. Dodge, 96 Mich. 514.

¶ 226. Facts held to establish a case of insolvency within the meaning of the statute, and for the appointment of a receiver to wind up its affairs.—Bank Com'rs v. Bank of Brest, H. 106.

¶ 227. The fact that a bank has stopped payment is not of itself conclusive evidence of its inability to pay its debts, but it is prima facie evidence of inability or insolvency, except where the bank is authorized by statute to suspend.—Attorney-General v. Bank of Michigan, H. 315.

¶ 228. The fact that a member of a banking firm borrows money from another bank, and gives security therefor, is no evidence of the firm's insolvency or of bad faith.—Glines v. State Sav. Bank, 132 Mich. 638.

¶ 229. The fact that a banking firm withdraws from the clearing house is no evidence of fraud or of insolvency.—Glines v. State Sav. Bank, 132 Mich. 638.

¶ 230. The provisions of the act of June 21, 1837, and the act of April 12, 1841, in regard to banks and incorporations, commented upon and explained.—Attorney-General v. Bank of Mich., H. 315.

¶ 231. The true construction of the suspension act of April 12, 1841, is that the statements should be made out and transmitted to the secretary of state on the days specified, or as soon thereafter as the same can be made out and stated.—Attorney-General v. Bank of Michigan, H. 315.

§ 73. Method and procedure for winding up.

¶ 232. The directors of a moneyed corporation like that of the bank of Brest have no power to make an assignment without being authorized to do so by the stockholders.—Bank Com'rs v. Bank of Brest, H. 106.

¶ 233. The general banking law of March 15, 1837, prescribed the mode in which the affairs of associations formed under it should be wound up in case of insolvency; and this being designed as a part of the security to the public was one of the conditions upon which they took their corporate powers.—Bank Com'rs v. Bank of Brest, H. 106.

¶ 234. Where the directors of a bank made an assignment of its assets for the benefit of creditors, with a view to evade the provisions of the statute providing how insolvent banks should be wound up, it was held that such assignment was against the policy of the law, and void; and the court of chancery appointed a receiver.—Bank Com'rs v. Bank of Brest, H. 106.

§ 74. ——Of Michigan State Bank and Government Stock Bank.

¶ 235. The commissioners appointed to settle with the Michigan State Bank, under the act of February 1, 1840, had no right to bind the state to pay any debt of the bank.—Hammond v. Michigan State Bank, W. 214.

¶ 236. The Michigan State Bank conveyed to the state certain property on condition subsequent that the state should indemnify and save harmless the bank against certain liabilities. By act of the legislature the auditor-general, state treasurer and secretary of state were made trustees on behalf of the state to take charge of the property assigned, and dispose of it and pay the proceeds into the state treasury. Afterwards the state refused to indemnify the bank, and a judgment was recovered on one of the liabilities, which the bank was compelled to pay. On bill filed by the bank against the state officers to obtain relief from the property in their hands against the failure of the state to indemnify, it was held that the state having failed to perform the condition the property had reverted to the bank, and that the possession thereof by the defendants had ceased to be the possession of the state, and that equity

had jurisdiction to compel the defendants to account as trustees of the bank, and pay any damages the bank had suffered by reason of the failure to indemnify.—Michigan State Bank v. Hammond, 1 D. 527.

¶ 237. It seems that as to any money actually received by the state treasurer as proceeds of property conveyed by the Michigan State Bank to the state on condition that the state should save harmless the bank against certain liabilities, he could not be compelled to account upon breach of the condition, since money paid into the state treasury must be regarded as in possession of the state.—Michigan State Bank v. Hammond, 1 D. 527.

¶ 238. Where the Michigan State Bank conveyed property to the state on condition that the state should save harmless the bank against certain liabilities, and the state sold the property and then refused to indemnify the bank, the bank would only be entitled to the relief prayed on waiving any forfeiture for breach of the condition, and on delivering over to the state a portion of the property which they had neglected and refused to deliver according to the original agreement.—Michigan State Bank v. Hammond, 1 D. 527.

¶ 239. By acting upon an agreement between a bank indebted to the state and commissioners appointed by the state, by exercising acts of ownership over the property conveyed, and also by a legislative act, held, that the state had recognized and affirmed the act of the commissioners in making the agreement, whether the commissioners originally had power to agree to a certain condition therein contained or not.—Michigan State Bank v. Hastings, 1 D. 225.

¶ 240. The state never became responsible to make good the failure of the Government Stock Bank to pay its debts; the only responsibility it assumed was to receive and apply the bonds deposited to pay bills certified by the state treasurer, so far as they would go towards certifying them. Mandamus to compel the state treasurer to pay a balance claimed to be due on bills of the bank denied.—Bresler v. Butler, 60 Mich. 40.

§ 75. Injunctions and receivership.

Fraudulent assignment as ground, see ante ¶ 234.

Right of receiver to question authority of cashier ratified by bank, see ante ¶ 185

Right of receiver to sue on stockholders' liability, see post § 78.

Effect of receivership to dissolve bank, see post § 77.

Equities and liens of receivers as representatives of banking corporations, see also Corporations, XXIII; and see also specific topics treating of the right asserted or the subject matter involved, e. g., Chattel Mortgages; Mortgages; Foreclosure of Mortgages; Liens.

Title and equities of receiver in notes held by corporation, see generally Corporations, XXIII.

Grounds for supplemental bill by receiver to protect equities, see Equity, XI.

Receiver as necessary party to suit for rescission of stock purchase, see also Rescission and Cancellation, VI.

Leave to sue or intervene in receivership proceedings, see Receivers, IV, C.

¶ 241. Except in cases where the bill is filed by a bank commissioner, showing fraud, violation of the charter, or insolvency, notice should be given of an application for an injunction against a bank, and a case should be made out that would warrant the court in winding up the concerns of the bank.—Barnum v. Bank of Pontiac, H. 116.

¶ 242. Injunction will not be granted in the first instance on an allegation alone that the bank has stopped payment; but a rule to show cause will be granted, and notice required to be given to the defendants. If not explained or excused in cases where the banks are not protected from charter forfeiture by reason of failure, the court would be authorized to grant an injunction and appoint a receiver.—Attorney-General v. Bank of Michigan, H. 315.

¶ 243. For statement of the general principles governing the court in granting and refusing to dissolve injunctions against such corporations, on bill filed for their dissolution and for the forfeiture of charter, see Attorney-General v. Oakland County Bank, W. 90.

¶ 244. An injunction against a bank for insolvency goes to prevent all action whatever, and is rather in the nature of a final injunction which is granted at the termination of a cause, than the usual preliminary injunction to prevent some particular mischief, and therefore should be granted with great caution.—Barnum v. Bank of Pontiac, H. 116.

¶ 245. Where a bill alleged merely a demand and refusal by a bank to pay its notes, and contained no allegations of any impending mischief, danger or hazard of complainant's rights, an injunction was refused.—Barnum v. Bank of Pontiac, H. 116.

¶ 246. The provision in the act incorporating the bank of Pontiac, that an injunction might be issued on a failure to pay, was not imperative, but left it to the sound discretion of the court upon a proper case being made.—Barnum v. Bank of Pontiac, H. 116.

¶ 247. Where the proceeding is against the bank as a failing corporation, its primary object is not for the purpose of dissolving the corporation, but to protect the assets for the benefit of creditors. The dissolution of the corporation is merely incidental.—Fay v. Erie & K. Railroad Bank, H. 194.

¶ 248. By the act incorporating a bank a previous act was referred to, and in effect made a part thereof, which provided that, if any bank did not pay its notes on demand, the charter should not for that cause be dissolved, but it gave the bank sixty days within which to redeem its notes. It contained further provisions that the act should not prevent the issuing of an injunction, and that one might be issued when any bank should refuse to pay its debts. Held, that these provisions relative to injunctions did not change the previous law on the subject. —Barnum v. Bank of Pontiac, H. 116.

§ 76. ——Dissolution of injunction and discharge of receiver.

¶ 249. The court may dissolve the injunction, discharge the receiver and permit the party to dismiss his bill, when it is satisfied that the interest of all concerned will be best subserved by permitting the corporation to manage its own affairs.—Fay v. Erie & K. Railroad Bank, H. 194.

¶ 250. It is the duty of the court to look into the condition of the corporation before discharging the receiver, and to make such order, either absolute or conditional, as the case may require.—Fay v. Erie & K. Railroad Bank, H. 194.

§ 77. Dissolution of bank or corporation.

¶ 251. A bank could not be dissolved for forfeiture in an ex parte proceeding, and the appointment of a receiver on an ex parte application could not therefore have that effect.—Montgomery v. Merrill, 18 Mich. 338.

¶ 252. A receiver appointed on an ex parte application would become functus officio if no further proceedings were taken until the demands against the bank became barred by lapse of time, and his appointment could not be set up as a bar to the rights of one who had afterwards purchased property on an execution against the bank.—Montgomery v. Merrill, 18 Mich. 338.

§ 78. Actions on stockholder's liability.

Nature and extent of the liability, see ante §§ 65, 66.

¶ 253. The receiver of an insolvent bank may bring action to enforce the statutory liability of stockholders upon a showing that the assets are insufficient to pay the depositors without first exhausting the assets. —Foster v. Row, 120 Mich. 1.

¶ 254. Under How. St., § 3208e5, governing liability of stockholders in banks, and How. St., § 3208f4, providing for the appointment of receivers of insolvent banks, the circuit court has jurisdiction to direct the receiver to bring action to enforce the statutory liability of the stockholders upon an ex parte showing that the assets are insufficient to pay the depositors.—Foster v. Row, 120 Mich. 1.

§ 79. ——Nonresident stockholders.

¶ 255. It seems that the statutory liability of a stockholder to depositors in a bank being contractual, may be enforced against a nonresident stockholder.—Foster v. Row, 120 Mich. 1.

¶ 256. The estate of a nonresident stockholder in a bank may be held ratably liable for debts of the bank that matured before the passage of Pub. L. 1877; Act No. 141 (How. St., §§ 4886-4899), and to such debts the limitations imposed by that act as to service within the jurisdiction cannot apply. —Grand Rapids Sav. Bank v. Warren, 52 Mich. 557.

§ 80. Transactions and payments after insolvency.

Sufficiency of delivery of money to take it out of bank's general assignment, see Assignments for Creditors, ¶ 141.

¶ 257. Payments to a depositor during a run on a bank, and after the cashier has persuaded some persons not to withdraw their deposits, but when the bank has assets sufficient so that its officers hope and expect to continue business and be able to pay all the debts of the bank, are not made with a view to prevent the application of the assets of the bank in the manner prescribed by statute, or with a view to the preference of that depositor over other creditors, within the meaning of How. St, § 3208e6.—Stone v. Jenison, 111 Mich. 592.

¶ 258. The statute How. St., § 3208e6, declaring void all payments of money made by a bank, either after the commission of an act of insolvency or in contemplation thereof, with a view to prevent the application of its assets in the manner prescribed by law, or with a view to the preference of one creditor over another, does not invalidate a payment to a depositor, although made after an act of insolvency, unless the unlawful view or intent was also present.—Stone v. Jenison, 111 Mich. 592.

§ 81. Proof and payment of claims.

Trust and preferred claims, see post §§ 83-87.

Acceptance of partial payment as waiver of preference, see post § 87.

Right of recourse by depositor on insolvent bank's predecessor, see ante ¶ 30.
Procedure to present and try claims in general, see Corporations, XXIII.
Application for leave to intervene before filing claim, see generally Corporations, XXIII.

¶ 259. A claim against an insolvent bank was payable proportionally out of the assets of the savings and commercial departments of the bank, where both were conducted by the bank.—McGraw v. Union Trust Co., 135 Mich. 609.

¶ 260. Laws 1887, Act No. 205, § 56, providing that upon the appointment of a receiver for an insolvent bank the commissioner of the banking department shall advertise once a week for twelve successive weeks notice calling on all persons who have claims against the bank to present them to the receiver and make proof, does not prevent the receiver from hearing and allowing claims before the expiration of the twelve weeks.—Bissell v. Heath, 98 Mich. 472.

¶ 261. Under the rule of State Saving Bank v. Foster, 118 Mich, 273, a bank which is not a depositor within the meaning of the bank law is not entitled to claim any part of a dividend arising from the fund recovered against stockholders.—American Trust & Sav. Bank of Chicago v. Foster, 118 Mich. 280.

§ 82. ——Setoffs.

Application of deposits by going banks, and rights of lien and setoff, see ante II, C
General rules of setoff, see Setoff.
Setoffs in insolvency generally and setoffs against trustees and the like, see also Bankruptcy. Assignments for Creditors: Corporations, XXIII; Receivers; Trusts.
Proper matters of setoff against insolvent corporation, see Corporations, XXIII.

¶ 262. A depositor may set off a deposit subject to check, standing to his credit at the time a bank becomes insolvent and closes its doors, against his notes to the bank though such notes are not yet due.—Thompson v. Union Trust Co., 130 Mich. 508.

¶ 263. The principle that a claim which is past due, cannot be set off against an assigned claim which was not due and payable at the time of the assignment, applies in the case of an assigned claim for rent against the receiver of a bank, where the latter sought to set off a claim of the bank which was just due at the time of making the assignment.—Henderson v. Michigan Trust Co., 123 Mich. 688.

¶ 264. The petition of a partnership against the receiver of an insolvent bank to have the amount of a note given by one of the partners as an individual, set off against and deducted from the partnership's balance on the ground that the money was borrowed on behalf of the partnership and that the cashier was so informed and that the amount would be paid from partnership deposit, was denied where it appeared that the money was borrowed by the individual as his contribution to the partnership in question which was then not in existence but only contemplated.—Kroll v. Union Trust Co., 133 Mich. 638.

§ 83. Trust and other preferred claims.

Appropriation of trust fund by bank as creditor, see ante § 19.

¶ 265. As the evidence shows that there was on hand an amount in excess of a trust fund each day from the receipt of the money until the bank's doors were closed, it is not presumable that at some time during those days the amount on hand was less, especially as the fact, if true, could be shown from the books.—Sherwood v. Central Michigan Sav. Bank, 103 Mich. 109.

¶ 266. Money paid to a bank for a letter of credit, and entered upon a savings pass book and put in the savings account kept by the bank, to the credit of the purchaser in such a manner that the amount could only be drawn as against the letter of credit, did not constitute a trust fund so as to give priority to bankers who had paid out drafts drawn on the letter of credit, as against other creditors of the insolvent bank in question.—Kuehne v. Union Trust Co., 133 Mich. 602.

§ 84. ——Collections.

¶ 267. Where a draft is deposited in a bank without direction that it shall be treated as a separate fund, and is forwarded for collection to another bank, which fails, and the drafts and deposits between the two banks have been constantly changing, the owner of the draft must share pro rata with other creditors.—Edson v. Angell, 58 Mich. 336.

¶ 268. Where a bank receives for collection a check drawn upon it by a depositor, and, after charging the same to his account, pending payment to the forwarding bank, passes into insolvency, the amount of the check does not constitute a trust fund in the hands of the receiver.—Sunderlin v. Mecosta County Sav. Bank, 116 Mich. 281.

¶ 269. Where money paid to a bank upon mortgages left with the bank by a depositor for collection is, contrary to instructions, passed to his credit after being credited for a time to a fictitious account, the bank acts as agent for the depositor; the relation of debtor and creditor does not exist as to the

money so collected, but the bank holds such money in trust; and if the bank mingles the money with its own funds and becomes insolvent before paying it to the depositor, the latter is entitled to a lien upon the funds in the hands of the bank's receiver, which lien is superior to the claims of general creditors.—Sherwood v. Central Michigan Sav. Bank, 103 Mich. 100.

¶ 270. Where, on the same day that a bank closed its doors, and shortly before, the person entitled to money collected for him by a bank but credited to him contrary to instructions, called for such money, and was informed by the cashier that the bank could not pay it, but finally was paid part by the cashier, receiving a draft for the rest, which draft was never paid, held, that as the draft was received in reliance upon the false representation that the bank could not pay, the person's right to claim the fund was not waived.—Sherwood v. Central Michigan Sav. Bank, 103 Mich. 109.

¶ 271. A general depositor of a bank had a credit on its books for deposits equal to the amount of his note held by the bank for collection on the day he drew a check on the bank for such amount, which the cashier accepted, charging it up against his account, and delivering up the note as paid. The cashier did not forward the sum collected. The bank failed, most of its indebtedness being due to its depositors, while nearly all of it was owing at the time when the note was surrendered. It appeared that no money was realized from the check, and that it was not used to pay the debts or increase the assets of the bank or otherwise to benefit the general depositors. Held, that a trust for the amount in favor of the owners of the note was not created, and that the bank's receiver was not required to pay them in full without regard to the claims of other creditors.—Sherwood v. Milford State Bank, 94 Mich. 78.

¶ 272. Where a note and mortgage were sent to a bank with instructions to collect and remit the interest due and any part of the principal the mortgagor might choose to pay, and the bank collected a part but failed before remitting, the relation of general debtor and creditor does not exist. The owner of the note is a preferred creditor. —Wallace v. Stone, 107 Mich. 190.

¶ 273. The giving and receipt of a draft, drawn by a bank upon its New York correspondent, in the ordinary form, in favor of a bank from whom it has received certain paper for collection, does not constitute an equitable assignment pro tanto of an indebtedness owing by the New York correspondent, so as to entitle the payee, in the event of the drawer's becoming insolvent before presentation of the draft, to priority over general creditors.—Sunderlin v. Mecosta County Sav. Bank, 116 Mich. 281.

§ 85. ——Public moneys and deposits.

¶ 274. Public moneys deposited by an official in his private bank and commingled with its funds, contrary to How. St., §§ 424, 427, are a trust fund preferred in insolvency, if traceable and capable of identification, although the legal title was in the treasurer depositing them.—Board of Fire & Water Com'rs of Marquette v. Wilkinson, 119 Mich. 655.

¶ 275. Where a bank has received deposits under agreement to return all moneys deposited with it by the state treasurer, one of the several sureties on the bank's bond of $50,000, conditioned on the performance of such contract, is not entitled on payment of $50,000 to share in dividends paid by the bank upon its insolvency in reduction of its debt to the state, such debt not being fully secured by other sureties' bonds.—Commissioner of Banking v. Chelsea Sav. Bank, 161 Mich. 691.

¶ 276. Where under 2 Comp. L. 1897, § 6144 et seq., the banking commissioner has closed a bank, and thereby an assignment for the benefit of all creditors has in effect been made, the state has no preference over other creditors for funds deposited by the state treasurer with said bank.—Commissioner of Banking v. Chelsea Sav. Bank, 161 Mich. 691.

§ 86. ——Savings deposits.

¶ 277. Under Comp. L. 1897, § 6118, which provides that a bank doing a savings and a commercial business, shall keep separate books for each kind of business and shall keep investments for the savings department separate and apart, and that investments made with funds from the savings department shall be held solely for the payment of savings deposits, where a bank has intermingled the funds, and has become insolvent, any investments which can be traced as having been made from savings deposits are impressed with a trust in favor of the savings depositors.—Peters v. Union Trust Co., 131 Mich. 322.

§ 87. ——Waiver and estoppel.

¶ 278. By accepting a dividend from the receiver of an insolvent bank one who would otherwise be entitled to have a trust imposed in his favor upon the bank's assets, is not estopped from demanding payment of his claim in full.—Wallace v. Stone, 107 Mich. 190.

B. NATIONAL BANKS.

§ 88. In general.

National bank reorganized as state bank, see ante § 47, ¶ 141.

¶ 279. National banks are creatures of Congress, agencies of the federal government, domesticated in the state.—Attorney General ex rel. Union Trust Co. v. First Nat. Bank of Bay City, 192 Mich. 640, reversed in 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734.

¶ 280. An act of Congress of 1882, § 4 (3 Rev. Stat. 1901, pp. 3457-3460), relating to national banking associations which extend their period of succession and to jurisdiction of suits by or against national banking associations, was not repealed by the act of August 13, 1888, but is still in force.—Levitan v. Houghton Nat. Bank, 174 Mich. 566.

¶ 281. The object of United States Revised Statutes, § 5211, providing that "each such report shall exhibit in detail and under appropriate heads, the resources and liabilities of the association at the close of business on any past day by him specified," is to advise the comptroller of the currency and the public of the condition of each national bank at stated periods.—Smalley v. McGraw, 148 Mich. 384.

§ 89. State laws and jurisdiction of state courts.

Validity of Federal Reserve Act as invading matters of state sovereignty, see Constitutional Law, IV.

¶ 282. The state courts have, in a proper case, authority to compel a national bank to permit the inspection of its books and records by a stockholder.—Woodworth v. Old Second Nat. Bank, 154 Mich. 459; Same v. Maltby Cedar Co., Id.

¶ 283. The powers that shall be possessed by national banks, and matters relating to their control are beyond state authority, except that a national bank may not possess or exercise certain powers in contravention of state laws.—Attorney General ex rel. Union Trust Co. v. First Nat. Bank of Bay City, 192 Mich. 640, reversed in 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734.

¶ 284. No law of Michigan is "contravened," within the meaning of the Federal Reserve Act, § 11 (k), or opposed, or brought into conflict because a national banking corporation with the sanction of the board exercises the power of executing trusts, managing trust funds, and acting as executor and administrator of the estates of deceased persons.—Attorney General ex rel. Union Trust Co. v. First Nat. Bank of Bay City, 192 Mich. 640, reversed in 244 U. S. 416, 61 L. ed. 1233, 37 Sup. Ct. Rep. 734.

¶ 285. The Supreme Court of Michigan may temporarily enjoin a receiver of a national bank from transferring a trust fund beyond the jurisdiction of the court during the pendency of the appeal of a bill seeking to follow the fund into the deposits of said bank.—Patek v. Patek, 166 Mich. 443.

¶ 286. Under an act of Congress of 1882, § 4 (3 Rev. Stat., 1901, pp. 3457-3460), relating to jurisdiction of suits against national banking associations, a bill may be maintained by a complainant in the circuit court of the county in which he resides against a national bank organized under the laws of the United States and doing business in another county.—Levitan v. Houghton Nat. Bank, 174 Mich. 566.

§ 90. Organization and existence.

¶ 287. The certificate of the comptroller to the organization of a national bank is evidence of its legal organization, which cannot be impeached by showing that the notary who took the acknowledgment of the shareholders to their certificate of organization was one of their number.—Thatcher v. West River Nat. Bank of Jamaica, Vermont, 19 Mich. 196.

¶ 288. The fact that a bank is found doing business before the date of its certificate of organization under the act of Congress does not prove that it is a different body from the one named in the certificate, the act of Congress allowing state banks to reorganize under it.—Thatcher v. West River Nat. Bank of Jamaica, Vermont, 19 Mich. 196.

§ 91. Contracts and conveyances.

Power of banking corporations in general, see ante § 52.

Authority of officers, see ante § 54 et seq.

Presumptions as to cashier's knowledge and intent, see also ante ¶ 102.

Indemnity bond as contract of cashier or national bank, see also ante ¶ 102.

¶ 289. National banks have no power to enter into contracts of suretyship in which they have no interest.—Knickerbocker v. Wilcox, 83 Mich. 200.

¶ 290. Under 13 U. S. St. at Large, 110, limiting the liability of national banks to the amount of their capital stock except in certain cases, one of which is for "moneys deposited with or collected by the association," a national bank may contract for the custody of county funds, and give a bond to secure the same, as liability on such contract and bond does not increase the liability of the bank beyond the amount of the deposits which they are given to secure.—Board Sup'rs Gratiot Co. v. Munson, 157 Mich. 505.

¶ 291. Whether a national bank can give a guaranty against liability or loss to sure-

ties on paper discounted by the bank, when the effect of such guaranty would be to make such paper the paper of one party only, secured by mortgages on real estate, quære.—First Nat. Bank of Sturgis v. Bennett, 33 Mich. 520.

§ 92. Taking mortgages and securities.

¶ 292. An extension of credit by a national bank based upon a real estate mortgage does not invalidate the mortgage even if in taking the mortgage the bank violated the provisions of the National Banking Law.—Fifth Nat. Bank v. Pierce, 117 Mich. 376.

¶ 293. Where an original demand had been transferred to a national bank, it was held that the question whether the bank could lawfully take collateral security would not be determined in a case to which the bank was not made a party.—Briggs v. Hannowald, 35 Mich. 474.

§ 93. Loaning and discounting.

Power to take mortgage or other security, see ante § 92.

¶ 294. In an action by an assignor of a bank for fraud and deceit against a director in representing that certain notes presented for discount were good and collectible, whereas they were not, he is not liable for having induced or permitted the bank to extend credit to the maker of the note in excess of the legal limit fixed by U. S. Rev. Stat., § 5200 (National Banking Law), where the evidence shows that at the time of the representations he was not acting as director, but as the agent and representative of the maker of the note.—Hicks v. Steel, 142 Mich. 292.

X. SAFE DEPOSITARIES.

§ 94. In general.

Bailments generally for keeping, see Bailments.

Storage of merchandise other than safe deposit of valuables, see Warehousing.

Bank officer as gratuitous bailee for stock deposited, see Bailments ¶ 50.

General law relating to safety and collateral deposit companies, see Comp. L. 1915, chap. 153, § 8078 et seq.

¶ 295. In trover against a bank for jewelry and coins left with the bank and stolen by burglars, testimony that the plaintiff had rented a safe deposit box in the bank, that the package in question was too large for it, that he asked the cashier to take care of it, and he expected the cashier to put it in the vault and to make no charge for keeping it, and that no representation was made that the value was burglar-proof, shows a gratuitous bailment and negligence insufficient to go to the jury.—Gerrish v. Muskegon Sav. Bank, 138 Mich. 46.

BANKRUPTCY.

TREATS generally of the National Bankruptcy Acts, and rights and liabilities affected thereby or by proceedings thereunder.

Analysis.

§§ 1. Bankruptcy Law and its effect.
§§ 2. Adjudication and appointment of trustee.
§§ 3. Title to and right to possession of bankrupt estate.
§§ 4. Bankrupt assets and estate, administration thereof.
§§ 5. ——Meeting of creditors.
§§ 6. ——Sales of property.
§§ 7. ——Deeds and title to realty.
§§ 8. Transfers and preferences affected by bankruptcy.
§§ 9. ——Dissolution of liens or levies; stay.
§§ 10. Debts of bankrupt, and discharge or composition.
§§ 11. ——Claims allowable; proof of claims.
§§ 12. ——Distribution and composition.
§§ 13. ——Conclusiveness of decree and collateral attack.
§§ 14. Liabilities of trustee for wrong or neglect.

§ 15. Actions and proceedings.
§ 16. ——Jurisdiction.
§ 17. ——Effect of bankruptcy on other proceedings.
§ 18. ——Rights of action by trustee.
§ 19. ——Proceedings before referee.
§ 20. ——Pleading.
§ 21. ——Evidence and proof.
§ 22. Subsequent rights and liabilities.
§ 23. ——Reversion of bankrupt's estate.
§ 24. ——New promise avoiding discharge in bankruptcy.

§ 1. Bankruptcy Law and its effect.

Effect of the law per se on other titles and liens, see post § 38.

¶ 1. The existence of a national bankrupt law does not render a common-law assignment for the benefit of one's creditors ipso facto void.—Cook v. Rogers, 31 Mich. 391.

¶ 2. The Bankruptcy Act, since it is a plain derogation of common right, should be strictly construed, and in order to show that a debt admitted to exist is discharged, the facts should be found showing, at least, a substantial compliance with the law.—Shaw v. Vaughan, 52 Mich. 405.

§ 2. Adjudication and appointment of trustee.

Trustee as representative of all parties in actions, see post § 15.

Adjudication as conclusive of insolvency, see post ¶ 118.

¶ 3. An agreement to withdraw opposition to bankruptcy proceedings, and to consent and submit to an adjudication in bankruptcy, is not in fraud of the bankrupt act.—Sanford v. Huxford, 32 Mich. 313.

§ 3. Title to and right to possession of bankrupt estate.

What are assets and administration of same, see post §§ 4-8.

Title passed by trustee's sale of chattels, see post § 6.

Title and right conveyed by trustee's deed, see post § 7.

Pleading title, see post § 20.

Reversion to bankrupt after payment of debts, see post § 23.

Trustee as "grantee" of debtor and so entitled to administer estate of debtor's father, see Estates of Decedents, III, A.

Estoppel to question chattel mortgage foreclosure as binding on mortgagor's trustee, see also Chattel Mortgages, VII.

¶ 4. A trustee in bankruptcy has no greater rights under the bankrupt's contract than the bankrupt.—Wasey v. Whitcomb, 167 Mich. 58.

¶ 5. The trustee in bankruptcy, under the Bankruptcy Act, takes the property of the bankrupt at the date of adjudication, in cases unaffected by fraud, in the same plight and condition that the bankrupt himself held it, and subject to all the equities impressed upon it in the hands of the bankrupt.—Marine Sav. Bank v. Norton, 160 Mich. 614.

¶ 6. Under § 47 of the Bankruptcy Act of 1898, as amended in 1910, 36 U. S. Stat. L. 838, 840, providing that trustees, as to property coming into custody of the bankruptcy court "shall be deemed vested with all the rights, remedies and powers of a creditor holding a lien by legal or equitable proceedings thereon; and also, as to all property not in the custody of the bankruptcy court, shall be deemed vested with all the rights, remedies and powers of a judgment creditor holding an execution duly returned unsatisfied," and § 70, 30 U. S. Stat. L. 565, providing that the trustee shall be vested by operation of law with the title of the bankrupt to all property of the latter not exempt, as of the date of adjudication, including property transferred by him in fraud of creditors, a trustee has all the rights of the bankrupt in the bankrupt's property and also all the rights of a creditor who has taken all the steps preliminary to filing a creditor's bill.—Grand Rapids Trust Co. v. Nichols, 199 Mich. 126.

¶ 7. An amendment of a petition in bankruptcy related back to the date of the original petition, so as to vest the assignee with the title to land from the filing of the original petition, as against a grantee who obtained title in the interim.—Potter v. Martin, 122 Mich. 542.

¶ 8. The title to property mortgaged by a bankrupt remains in him and passes to his assignee, by whom it may be transferred subject to any valid outstanding incumbrance.—McMaster v. Campbell, 41 Mich. 513.

¶ 9. A party contemplating bankruptcy executed a mortgage to secure a bona fide debt and to release an attachment. It was in time to avoid defeat as a preference and he

then went into bankruptcy, turned his property over to his assignee scheduled as subject to this mortgage, and afterwards bought it from the assignee. Held, that he took subject to the mortgage, and that equity would not permit him, in a suit to foreclose the mortgage, to set up as a defense that the mortgage was void as executed in fraud of the bankrupt act.—Welling v. Marsh, 66 Mich. 671.

¶ 10. A receiver in bankruptcy of the property of a foreign corporation which is engaged in business in the state without compliance with law is estopped to raise the question of the validity of mortgage of chattels of the corporation in an action of replevin to recover such chattels, since he has no greater rights than the corporation itself, and it, if suing, would be estopped to raise the question of the validity of the mortgage.—Goldberg v. Parker, 198 Mich. 396.

¶ 11. An assignee in bankruptcy is entitled to temporary control of exempted property, at least until it can be set apart from the rest.—Sheldon v. Rounds, 40 Mich. 425.

¶ 12. A sheriff has no special interest in attached property as against the debtor's assignee in bankruptcy appointed before execution issued in the attachment case, and as between him and the assignee he should surrender possession to the latter.—Lindner v. Brock, 40 Mich. 618.

¶ 13. Property held and claimed adversely by third parties is not the subject of summary appropriation by the federal court upon the filing of a petition in bankruptcy.—Morning Tel. Pub. Co. v. S. B. Hutchinson Co., 146 Mich. 38.

¶ 14. Where replevin proceedings had been brought against property in the hands of a trustee for the benefit of some of the creditors, and a bankruptcy petition is filed, the federal court does not obtain possession of the property thereby, and inasmuch as the state court was the first to acquire possession, it may retain jurisdiction of the replevin suit, there being no hardship as the trustee in bankruptcy would probably be allowed to intervene and defend the replevin suit.—Morning Tel. Pub. Co. v. S. B. Hutchinson Co., 146 Mich. 38.

§ 4. Bankrupt assets and estate, administration thereof.

Nature of title, equities of trustee, and right to possession, see ante § 3.
Meetings or creditors, sales and titles, see post §§ 5-8.
Transfers and payments impairing assets as preferences, see post §§ 8, 9.
Dissolution of attachments and levies made within statutory period before bankruptcy, see post § 9.
Schedules as a requisite for discharge, see post § 10.
Rights of action to recover assets or their value, see post § 18.
Effect of prior jurisdiction of state court on right to possession, see post ¶ 97.
Liability of trustee for wrong or neglect, see post § 14.
Trust estates and administration of them, see Trusts; and see also assignments for Creditors.

¶ 15. In a bankruptcy proceeding the alleged bankrupt filed an answer and set out to contest. The estate involved was large and complicated. The parties in order to expedite matters signed a stipulation exempting several pieces of property from claims of the trustee upon agreement by the alleged bankrupt to withdraw his answer and admit his bankruptcy. A clause of the stipulation provided that certain life insurance policies signed by the bankrupt should not be claimed by the trustee "unless any of said transactions are voidable under the bankruptcy act." The parties acted on the stipulation, and the trustee and the creditors received the benefit therefrom. Held, said clause with reference to life insurance policies made the same exempt from the claims of creditors, and the trustee was not entitled to reach the same merely upon a decision on his part that the assignments were voidable under the Bankruptcy Act.—Security Trust Co. v. Glazier, 170 Mich. 26.

¶ 16. The interest of a bankrupt father, as next of kin in the possible proceeds of a claim, under Comp. L. 1897, § 10427, How. St., 2nd Ed., § 13702, for the death of his son, is "property," and alienable within subdivision 5 of section 70 of the Federal Bankruptcy Act, and should be scheduled by the bankrupt as part of his estate.—In re Burnstine, 131 F. 828.

§ 5. ——Meeting of creditors.

Liability of trustee for failure to notify creditors, see post § 14.

¶ 17. Notice of meetings of a bankrupt's creditors must be given by the assignee to all known creditors, and he has no discretion to exercise except as to the mode of giving it.—Russell v. Phelps, 42 Mich. 377.

§ 6. ——Sales of property.

Liability for failure to deliver goods, see post § 14.
Estoppel of creditor to attack sale, see post ¶ 124.
Authority of auctioneer employed by assignee or trustee, see Auctions, ¶ 1.

¶ 18. The power of an assignee in bankruptcy to sell and convey the bankrupt's

estate depends wholly upon statute, and a sale in any other manner than as therein prescribed would be a nullity.—Wisner v. Brown, 50 Mich. 553, affirmed 122 U. S. 214, 30 L. ed. 1205.

¶ 19. Notice must be given to adverse claimants before an assignee in bankruptcy can make a valid sale of real property as belonging to the bankrupt's estate.—Russell v. Phelps, 42 Mich. 377.

¶ 20. An assignee in bankruptcy who has sold goods supposed to belong to the bankrupt, and received the money therefor, is not damnified or delayed in the execution of his duty by a judgment in trover against the United States marshal for seizing them, and cannot resist such trover action by injunction.—Hudson v. Detroit Superior Court Judge, 42 Mich. 239.

¶ 21. A purchaser of a chattel at a bankrupt's sale who shows an unassailable title under the bankruptcy proceedings, and who further shows by a written agreement, not questioned, that the bankrupt held the property so purchased in recognition of his ownership, is entitled to the property in the absence of evidence that he parted with his title after he acquired it.—Preston v. Newcomb, 149 Mich. 512.

¶ 22. A sale in bankruptcy by order of the court is binding upon all persons, and in every court, and evidence that the purchaser at such a sale acted as trustee for the bankrupt, and not as a bona fide purchaser, will not be admitted.—Preston v. Newcomb, 149 Mich. 512.

¶ 23. A creditor whose claim accrues after bankruptcy proceedings, and who therefore has no pre-existing rights to be affected by them, cannot call in to question the validity of a sale in such proceedings.—Preston v. Newcomb, 149 Mich. 512.

§ 7. ——Deeds and title to realty.

Title to chattels, see ante § 6.
Title of bankrupt buying back under trustee, see also ante ¶ 9.

¶ 24. The deed of an assignee in bankruptcy containing a copy of the decree declaring the bankruptcy, which decree recites the appointment of the assignee, was sufficient under the act of Congress of 1841, which prescribed what the deed should contain.—Harrington v. Fish, 10 Mich. 415.

¶ 25. A deed from an assignee in bankruptcy, which on its face purports to convey only the "right, title, and interest" of the bankrupt, vests in the grantee the title to the land subject to all of the equities with which it was chargeable in the bankrupt's hands.—DeMey v. Defer, 103 Mich. 239; writ of error dismissed in 168 U. S. 703, 42 L. ed. 1211, 18 Sup. Ct. Rep. 941.

¶ 26. An assignee in bankruptcy can convey such title only as his assignor had at the time he was adjudged a bankrupt.—Lockwood v. Noble, 113 Mich. 418.

¶ 27. A grant by an assignee in bankruptcy of lands previously conveyed by the bankrupt in fraud of creditors conveys no right to the lands unless it has been judicially determined that the bankrupt's conveyance was fraudulent; without such a determination no title would have vested in the assignee himself, and if he could convey anything, which is doubtful, it would at most be the right to apply for such an adjudication, and to have the fraudulent conveyance set aside.—McMaster v. Campbell, 41 Mich. 513.

¶ 28. On the question as to whether or not a sale of land by an assignee in bankruptcy was rendered invalid by a delay of six years after the entry of the order of sale, the court was inclined to the negative view.—Potter v. Martin, 122 Mich. 542.

¶ 29. Confirmation of a sale of land by an assignee in bankruptcy, is not essential to the validity of the sale.—Potter v. Martin, 122 Mich. 542.

¶ 30. Where a deed by a nonresident insolvent recites that it is executed for the benefit of creditors in foreign insolvency proceedings, the Bankruptcy Act of the country where the proceedings were had may be looked to, to ascertain the extent of power granted by the deed to the trustee in bankruptcy.—Chicago Lumbering Co. v. Powell, 120 Mich. 51.

§ 8. Transfers and preferences affected by bankruptcy.

Effect of deed by trustee of lands previously conveyed in fraud by bankrupt, see ante § 7.
Evidence as to preference, see post § 21.
Objection to transfer after composition, see post § 123.
Effect of assignment for creditors on other rights, liens and levies, see Assignments for Creditors.
General law of fraudulent conveyances and transfers, see Fraudulent Conveyances.
Evidences and indicia of fraudulent conveyance, see Fraudulent Conveyances, I, V, B.

¶ 31. A valid lien is not divested by the mere fact that the holder of it subsequently

takes a transfer of the equity of redemption made to him as a preference in violation of the Bankrupt Act, though such transfer is of course void.—Avery v. Hackley, 20 Wall. (87 U. S.) 407, 22 L. ed. 385.

¶ 32. Under the Bankruptcy Act of 1898 (30 U. S. Stats. 544), insolvency exists only when there are insufficient assets, at a fair valuation, to meet the liabilities which then exist, and a payment can only be considered preferential when the person to whom it is made has reasonable cause to believe that insolvency exists at the time the payment is made, it not being sufficient that he has information as to facts which create a suspicion of insolvency.—Harmon v. Walker, 131 Mich. 540.

¶ 33. The question whether a payment was preferential under the Bankruptcy Act (30 U. S. Stats. 544), is for the jury where it appeared that the bank was adjudicated bankrupt three days after making the payment; that the payee was the attorney for the bank, and the payment was for his services, and that he had knowledge that the bank had failed to meet checks drawn upon it on the same day and that he secured his payment after such knowledge, it being a question for the jury whether he had reasonable cause to believe the bank insolvent.—Harmon v. Walker, 131 Mich. 540.

¶ 34. An assignment of commercial paper made by a bank to secure a depositor was sustained though the bank failed two weeks after it was made, where it appeared that the bank did not at the time of the assignment contemplate bankruptcy and the assignees had no information which led them to believe, or should have caused them to believe, that the bank was insolvent.—Harmon v. Feldheim, 131 Mich. 470.

¶ 35. Moneys repaid by a beneficiary into a trust for his benefit are not voluntary payments which may be recovered as assets by his trustee in bankruptcy, where it appears that the repayment was made pursuant to a promise to repay given in consideration of advancing moneys out of the trust. —Perry v. Avery, 148 Mich. 211.

¶ 36. A certain firm paid in full a debt due to defendants. The next day a petition in bankruptcy was filed against said firm. Plaintiff trustee in bankruptcy sued in assumpsit to recover the amount paid Held, that upon proof that the defendants had reasonable grounds to believe the firm was insolvent when it paid them, plaintiff should recover.—Matthews v. Joannes Bros. Co., 156 Mich. 663.

¶ 37. A certain firm owed defendants some $1,800. Defendants called on them and learned that their total assets, including goods, horses, wagons, etc., sold at a fair price, would barely cover their debts. Defendants pressed for payment until the firm mortgaged its aforesaid assets to pay the bill. The next day after payment to defendants a petition in bankruptcy was filed against the firm. Held, in a suit by the trustee to recover the payment to defendants, that there was sufficient evidence to show that defendants knew they were getting a preference from an insolvent.—Matthews v. Joannes Bros. Co., 156 Mich. 663.

¶ 37a. A bank, receiving deposits from another bank without being a party to a fraud by which the depositing bank was purchased from its former owner, and its assets consumed, is not affected by such fraud so as to be responsible for the deposit to the trustee in bankruptcy of the depositing bank.—Knisely v. People's Savings Bank of Saginaw, 199 Mich. 501.

¶ 38. The mere existence of a national bankrupt law does not ipso facto render void a general common-law assignment for the benefit of creditors, so as to authorize the creditors to garnish the assignee because of his possession of the property.—Cook v. Rogers, 31 Mich. 391.

¶ 39. A chattel mortgage was foreclosed on February 6th, and a sale ordered February 13th. On February 8th a petition in bankruptcy was filed against the mortgagor, and on February 19th an adjudication was entered. Held, the adjudication created no specific lien in favor of creditors on the property included in the mortgage, since it is not equivalent to a judgment attachment, or other specific lien upon the assets of the bankrupt.—Marine Sav. Bank v. Norton, 160 Mich. 614.

¶ 40. Under the Bankruptcy Act. § 68a, 30 Stat. L. 565, providing that in all cases of mutual debts or mutual credits between the estate of the bankrupt and a creditor the account shall be stated and one debt shall be set off against the other and the balance only allowed and paid, a bank which receives deposits from an insolvent company within four months of bankruptcy proceedings and receives payments by checks from such deposits on a note owed by the company to it during such four months' period, has no right to set off against such deposits such note where the bank had notice of the insolvency of the debtor and of the fraudulent intent to prefer creditors, as such payments constituted preferences in violation of the Bankruptcy Act, § 60b, 30 Stat. L. 562.—Johnson v. Gratiot County State Bank, 193 Mich. 452.

¶ 41. The payments made void by the Bankrupt Law of 1867, § 35, were such as

reduced the means of the debtor to pay his debts ratably. A change in the form of his own obligation from an account to a note could not have that effect, nor could a mere accommodation indorsement; and the bankruptcy of the maker is no defense to an action thereon against the indorser, though all the parties knew that the note was made to give a preference in anticipation of the bankruptcy.—O'Connor v. Parker, 23 Mich. 22.

¶ 42. A common-law assignment preferring specific creditors is protected from the operation of the Bankrupt Law if made in good faith more than two months before bankruptcy proceedings.—Mathews v. Stewart, 44 Mich. 209.

§ 9. ——Dissolution of liens or levies; stay.

Taking invalid preference or transfer as affecting other valid lien, see ante ¶ 31.

¶ 43. An attachment is dissolved by an adjudication and assignment in bankruptcy within four months of its issue.—Lindner v. Brock, 40 Mich. 618; Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799.

¶ 44. After a garnishment lien has been perfected so that plaintiff is entitled to a judgment on appeal, such lien is not dissolved by subsequent proceedings in bankruptcy against the principal defendant, nor can the assignee in bankruptcy intervene in the appeal.—Krupp v. Tabor, 31 Mich. 174.

¶ 45. Where a justice has given judgment against a principal defendant without appeal, and has afterwards given judgment against the garnishee defendant, and the latter has appealed to the circuit court, giving the usual bond, and the appeal is referred to a referee, who files a report, to which no exception is taken, finding against the garnishee defendant, so that the plaintiff therein is entitled to a judgment, proceedings in bankruptcy instituted against such principal defendant after all these steps had been taken cannot dissolve the lien in garnishment; and the assignee in bankruptcy could assert no right in the suit in garnishment for or against either party.—Krupp v. Tabor, 31 Mich. 174.

¶ 46. Where, between the argument of a cause in error and the decision of the court affirming the judgment, the debtor has been discharged in baukruptcy, the court, on motion, will grant a perpetual stay of execution. —Parks v. Goodwin, 1 Mich. 35.

¶ 47. Where the defendant, pending a suit against him, applied for and obtained his discharge in bankruptcy, but neglected to avail himself of it in the suit, the court, the neglect being satisfactorily explained, granted a perpetual stay of execution on the judgment rendered in the suit against him.—Bostwick v. Dodge, 2 D. 331.

§ 10. Debts of bankrupt, and discharge or composition.

Strict construction of provisions as to discharge, see ante § 1.

Discharge as defense to subsequent action, see also post § 22.

Pleading discharge, see post § 20.

As to schedules, see also post ¶ 67.

Making and certifying the composition, see post § 12.

Necessity of recording composition, see post § 12.

Liability of trustee for wrong to creditors, see post § 14.

Effect as discharging liability of surety on appeal bond, see Appeal and Error, ¶ 2413.

¶ 48. A discharge in bankruptcy would be a defense to a personal decree for a deficiency in a foreclosure proceeding, although it would not be a defense to a proceeding to foreclose the mortgage.—Prentis v. Richardson's Estate, 118 Mich. 259.

¶ 49. A claim for conversion of wood sold to a bankrupt on a term of credit under condition of title remaining in the seller until paid for, is a provable claim in bankruptcy not excepted from a discharge as a debt "created by fraud, embezzlement, misappropriation or defalcation while acting as an officer or in any fiduciary capacity" within the meaning of section 17 of the Bankruptcy Act.—Bryant v. Kinyon, 127 Mich. 152.

¶ 50. A decree for alimony is not such a debt as will make an adjudication in bankruptcy a discharge.—Nixon v. Wright, 146 Mich. 231.

¶ 51. One who holds property under a conveyance in trust for creditors or as receiver under an assignment for the benefit of creditors, receives and holds the funds in a fiduciary capacity and hence his discharge in bankruptcy does not relieve him from liability for such funds, under the Bankruptcy Law of 1898, § 17 (U. S. Comp. St. 1901, p. 3428), which provides that there shall be no discharge in such case.—Field v. Howry, 132 Mich. 687.

¶ 52. A discharge in bankruptcy does not discharge a receiver from liability for the misappropriation of a trust fund.—Field v. Howry, 132 Mich. 687.

¶ 53. A receiver under a trust for the benefit of creditors, who loans the trust

funds to a firm of which he is a partner, is guilty of a "misappropriation" of the funds within the meaning of the Bankruptcy Act, § 17 (U. S. Comp. St. 1901, p. 3428), though he takes a note for the amount which provides for interest thereon, but the firm is in fact bankrupt and repays neither interest nor principal.—Field v. Howry, 132 Mich. 687.

¶ 54. In a proceeding for a deficiency after a foreclosure sale, a receiver who has misappropriated trust funds, cannot set up his discharge in bankruptcy as a defense since such defense is specially excepted by the Bankruptcy Act, § 17.—Field v. Howry, 132 Mich. 687.

¶ 55. The fact that a debt resulting from the misappropriation of trust funds was presented as a claim in bankruptcy proceedings, does not bar proceedings to recover the debt after the discharge, since the act provides that the discharge shall not be effective in case of misappropriation of trust funds. —Field v. Howry, 132 Mich. 687.

¶ 56. The defendant gave a note to plaintiff for money loaned to defendant to complete his medical education. After defendant had been in practice for a time, plaintiff sued on the note. Defendant then represented to plaintiff that he was getting large sums from his practice, and if plaintiff would drop the suit and give him the note, he would soon pay him. Plaintiff did this and defendant then went into voluntary bankruptcy. Plaintiff sues in case for fraud and deceit. Held, that his claim was provable, and was discharged by the bankruptcy.—Jenkins v. Pilcher, 160 Mich. 349.

¶ 57. A judgment creditor which ignores the subsequent bankruptcy proceedings against its debtor, who secures a composition with his creditors and pays the fund into court, scheduling the claim of the judgment creditor as a judgment, may proceed against the sureties on the appeal bond given by the debtor prior to the bankruptcy proceedings, such sureties having ample means of protecting themselves by virtue of section 57l of the Bankruptcy Act, which provides that "whenever a creditor, whose claim against a bankrupt estate is secured by the individual undertaking of any person, fails to prove such claim, such person may do so in the creditor's name, and if he discharge such undertaking in whole or in part he shall be subrogated to that extent to the rights of the creditor," and thus gives them the right to prove the judgment creditor's claim.—Sprague, Warner & Co. v. Fischer, 199 Mich. 601.

¶ 58. Under section 17 of the National Bankruptcy Law, providing that a discharge shall release a bankrupt from all his provable debts except such as were not duly scheduled, with the name of the creditor, if known to the bankrupt, unless such creditor had actual notice or knowledge of the proceedings; the burden of proving that plaintiff in an action in which the defendant pleaded a discharge in proceedings in which plaintiff's claim was not scheduled, had such notice or knowledge, was upon the defendant. —Wineman v. Fisher, 135 Mich. 604.

¶ 59. A discharge in bankruptcy of a land-contract vendee whose assignment did not mention the contract as assets or schedule the vendor as creditor does not release his liability to the vendor.—Peters v. Canfield, 74 Mich. 498.

¶ 60. A judgment against a principal defendant was rendered after his adjudication in bankruptcy, but before his discharge. The defendant executed a cognovit and took a stay of proceedings, knowing the judgment was to be used against a garnishee defendant. Held, the principal defendant thereby waived his personal defense of bankruptcy.—Taber v. Wayne Circuit Judge, 156 Mich. 652.

¶ 61. A judgment against a principal defendant was rendered and the clerk entered on his blotter or "short book" the following: "Judgment for plaintiff entered. Fee paid $2.00." The defendant executed a cognovit, and took a stay of proceedings, but by a mistake of the clerk the judgment was not entered on the docket. A suit was proceeding against a garnishee defendant when this mistake was discovered. The principal defendant then filed a petition to have the cognovit and judgment set aside and the proceedings perpetually stayed, and the lower court entered the order. Relator brings mandamus to vacate this order. It appeared that at the time of the judgment the principal defendant had been adjudicated a bankrupt, but had not been discharged. Plaintiff had filed a claim in bankruptcy, and agreed with the principal defendant not to object to a belated application for a discharge; and the latter knew when he executed the cognovit that the judgment was to be used against a garnishee. Held, that the order of the lower court was erroneously entered on the ground that the debt had been discharged in bankruptcy, and the writ of mandamus should issue.—Taber v. Wayne Circuit Judge, 156 Mich. 652.

¶ 62. The rights of an assignee of a mechanic's lien, who had done nothing to estop himself from asserting his rights under the assignment, were not affected by a settlement made in subsequent bankruptcy proceedings against the assignor, between the owner and the trustee in bankruptcy.—Kudner v. Bath, 135 Mich. 241.

§ 11. ——Claims allowable; proof of claims.

Necessity of scheduling claims in order to have discharge, see ante § 10.

Right to prove unpaid balance on secured claim after sale of security, see also post ¶ 65.

¶ 63. In an action between complainant, trustee in bankruptcy of a co-partnership, and defendant, the testimony of the defendant showed that prior to the failure of the co-partnership, defendant had paid to expert accountants $3,000 for auditing the co-partnership books, the sole object of which was to satisfy defendant of the correctness of its impression that the co-partnership was carrying too many low priced stocks. Held, that in the absence of an express agreement the estate of the co-partnership should not defray such expenses.—Austin v. Hayden, 171 Mich. 38.

¶ 64. A decree in a suit by a trustee in bankruptcy setting aside a sale of a bankrupt partnership's property as fraudulent against creditors need not provide for the payment of the debts due the purchaser, as, if he or any other person has a claim, they should go into the bankruptcy court for a determination of their rights.—Rennells v. Potter, 198 Mich. 49.

§ 12. ——Distribution and composition.

Alleging composition, see post § 20.

Composition as cutting off attack on transfers, see post ¶ 123.

New promise as fraud on composition, see post ¶ 131.

¶ 65. Trustees for bondholders who at an assignee's sale in bankruptcy of the obligor's property purchase property securing their bonds, and afterwards sell at an advance, are not bound to credit such profit upon the bonds, but the obligation of the bonds remains over and above the sum discharged by the proceeds of the assignee's sale.—Owen v. Potter, 115 Mich. 556.

¶ 66. The Bankrupt Law (Rev. Stat. U. S., § 5092) provides that at the second meeting of creditors it shall be determined what part of the net proceeds of the estate shall be divided after reserving a sum to provide for all known undetermined claims. Held, that the assignee cannot divide all the proceeds then in his hands, but only so much as remains after reserving the fund for undetermined claims.—Russell v. Phelps, 42 Mich. 377.

¶ 67. A composition of creditors is not effective, under the Bankrupt Act, to discharge any portion of a debt unless the creditor's name and address and the amount of his claim were set forth in the statement made by the debtor at the meeting of creditors at which the resolution of composition was adopted, nor unless such resolution was recorded by order of the court which confirmed the composition.—Shaw v. Vaughan, 52 Mich. 405; Harrison v. Gamble, 69 Mich. 96.

¶ 68. A judge in bankruptcy has no authority to give a debtor a certificate that he has been adjudged to have performed a composition with his creditors and that the proceedings taken entitle him to a discharge; and such a certificate, if given, could not properly be pleaded as an estoppel against the plaintiff in an action against the debtor for a debt. The debtor is not released from liability unless he actually performs the composition, and the question whether he has done so is open to trial, with or without a jury, in any court which the debt might be sued for.—Whittemore v. Stephens, 48 Mich. 573.

¶ 69. A promise by a bankrupt to a creditor before a composition is consummated to pay the creditor's claim in full provided he will advance the money necessary to effect the composition is fraudulent and void as to other creditors.—Lieblein v. George, 193 Mich. 462.

¶ 70. Comp. L. 1897, § 9675, How. St., 2nd Ed., § 14301, relating to the powers, duties and obligations of insolvent debtors, and providing that in making distribution the assignee shall first pay all debts that may be owing by the debtor as guardian, executor, administrator, or trustee, and if there be not sufficient to pay all debts of the character specified, then the distribution shall be made among them in proportion to their amounts respectively, is not a "law of the state" so as to give a debt owed by a guardian priority within section 64 of the Federal Bankruptcy Act as a debt "owing to any person who by the laws of the States or the United States is entitled to priority."—In re Jones, 151 F. 108.

§ 13. ——Conclusiveness of decree and collateral attack.

Of findings of referee, see post § 19.

¶ 71. A discharge in bankruptcy is conclusive on a creditor who unsuccessfully opposed its being granted; and he cannot afterwards, in a suit brought to recover his debt, show that it was fraudulently obtained.—Wales v. Lyon, 2 Mich. 276.

¶ 72. A decree in bankruptcy, if rendered by a court which has jurisdiction over the estate, is conclusive upon claims; unless attacked in the bankrupt court for fraud, it cannot be collaterally attacked in other courts.—Benedict v. Smith, 48 Mich. 593.

¶ 73. A decree in bankruptcy is conclusive of nonliability unless something has been done to remove its effect.—Craig v. Seits, 63 Mich. 727.

¶ 74. A discharge in bankruptcy cannot be treated by another court as void as to any particular creditor of whose person the bankruptcy court did not obtain jurisdiction by service of notice; bankruptcy proceedings are not strictly in personam.—Benedict v. Smith, 48 Mich. 593.

§ 14. Liabilities of trustee for wrong or neglect.

Pleading, see post § 20.
Evidence in action for neglect or wrong, see post § 21.

¶ 75. In an action against an assignee in bankruptcy for wilful neglect to give notice by mail of creditor's meetings, it is for the jury to determine whether notice had been mailed; if so, it is unimportant whether it was received.—Russell v. Phelps, 42 Mich. 377.

¶ 76. In an action against a bankrupt's assignee for wilful neglect to notify creditors of meetings in bankruptcy, it was shown that the second meeting of creditors had been adjourned. Held, that although the Bankrupt Law does not provide for such adjournment it was not error to call the jury's attention to the want of any notice of the adjourned meeting in connection with the evidence as to whether notice was given of the regular meeting.—Russell v. Phelps, 42 Mich. 377.

¶ 77. When an assignee in bankruptcy has sold property his authority as assignee ceases, and his neglect to deliver it is a personal breach of duty, not official.—Sheldon v. Rounds, 40 Mich. 425.

¶ 77a. Where an assignee in bankruptcy as officer of court has authority to make a sale, he is liable in trover if he actually makes a sale and subsequently refuses to deliver the property sold.—Ives v. Tregent, 29 Mich. 390.

¶ 78. An assignee in bankruptcy is liable in damages to creditors of the bankrupt if he wilfully omits or improperly performs official duties that are clearly prescribed and do not involve the exercise of discretion or judicial powers, and does so with intent to injure such creditors.—Russell v. Phelps, 42 Mich. 377.

§ 15. Actions and proceedings.

State or federal court as forum for suit, see post § 16.
Summary appropriation of property adversely claimed, see also ante ¶ 13.
Procedure to sell property, see ante § 6.
Notice to and meetings of creditors, see ante § 5.
Pleading and evidence, see post §§ 20, 21.
Proceedings before referee, see post §§ 19-21.
Necessity of leave to foreclose mortgage on bankrupt's land, see also post ¶ 98.
Jury question as to mailing notice of meeting of creditors, see ante ¶ 75.
Requisites of decree setting aside transfers, see ante ¶ 64.
Appealable orders in bankruptcy cases, see Appeal §§ 57-59.
Effect of death of assignee to abate suit, see Abatement and Error, ¶ 3.

¶ 79. An assignee in bankruptcy, as representative of all the bankrupt's creditors, is the proper person to take proceedings in their behalf to set aside conveyances made by the bankrupt in fraud of their rights; if he refuses, their remedy is by application to the court which appointed the assignee.—McMaster v. Campbell, 41 Mich. 513.

¶ 80. An assignee appointed for a corporation under the Bankrupt Laws of the United States represents both the corporation and its creditors, and the defense of irregular organization cannot be urged against him.—Chubb v. Upton, 95 U. S. 665, 24 L. ed. 523.

¶ 80a. Whether an assignee in bankruptcy who has begun proceedings in the federal court to foreclose a mortgage held by the bankrupt can, without the consent of the federal court, be made defendant in proceedings taken in a state court so to foreclose a prior mortgage as to affect rights under the first mentioned mortgage, quære.—Avery v. Ryerson, 34 Mich. 362.

¶ 81. A trustee in bankruptcy, intervening in a suit involving the rights of the bankrupt, as allowed by the bankruptcy court, and by the trial court, becomes a party for all the purposes of the suit, and thus carries with him his character as trustee in bankruptcy.—Rennells v. Potter, 198 Mich. 49.

¶ 82. Whether, under the bankrupt law which requires suits between assignees and adverse claimants to be brought within two years from the time when the cause of action accrued, a person claiming as purchaser at an assignee's sale can bring such action where the assignee himself has allowed two years to pass without doing so after the adverse claimant's assertion of title, quære.—Wisner v. Brown, 50 Mich. 553, affirmed 122 U. S. 214, 30 L. ed. 1205, 7 Sup. Ct. Rep. 1156.

¶ 83. A trustee in bankruptcy having elected to sue in a state court for recovery of money paid by the bankrupt as a preference, his suit is governed by the practice in that court.—Detroit Trust Co. v. Old Nat. Bank of Grand Rapids, 155 Mich. 61.

¶ 84. Goods sold and removed before bankruptcy cannot be seized by a United States marshal outside of his own district for the

protection of the rights of the assignee.—Carr v. Phillips, 39 Mich. 319.

§ 16. ——Jurisdiction.

Necessity of leave to sue, see ante § 15, ¶ 80a.
Ouster of state suits or jurisdiction, see post § 17.
Right to sue in equity, see post § 18.

¶ 85. In suits that can only be maintained under the Bankrupt Act the United States courts have exclusive jurisdiction.—Voorhies v. Frisbie, 25 Mich. 476.

¶ 86. Whether an issue could be framed and trial had in the federal courts in an action for damages against a bankrupt's assignee for wilful neglect of duty to the injury of creditors, quære.—Russell v. Phelps, 42 Mich. 377.

¶ 87. The bankruptcy court has exclusive jurisdiction of suits to determine an assignee's right to property, where the right is disputed under the exemption clause of the Bankrupt Law. This is so, at least, where a selection or valuation is necessary for setting apart the exempted property.—Sheldon v. Rounds, 40 Mich. 425.

¶ 88. An assignee in bankruptcy may maintain a suit in equity in the United States circuit court to remove the cloud on his title caused by a levy under an attachment issued by a state court, and antedating the bankruptcy proceedings less than four months.—Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799.

¶ 89. The holder of a title adverse to that of a purchaser at a sale made by an assignee in bankruptcy pursuant to order of court, has no right to assert title as against the assignee or his grantee, on the ground that failure to confirm the sale rendered the deed invalid; as in such case the property is still in the control of the federal court.—Potter v. Martin, 122 Mich. 542.

¶ 90. It seems that the state courts have jurisdiction of a creditor's action against an assignee for damages from wilful omission or improper performance of his official duties.—Russell v. Phelps, 42 Mich. 377.

¶ 91. State courts have jurisdiction of proceedings by a trustee in bankruptcy to set aside conveyances of property alleged to have been made in fraud of the Bankruptcy Law.—Lyon v. Clark, 124 Mich. 100.

¶ 92. A state court has no jurisdiction of a bill in equity, filed by an assignee in bankruptcy, to set aside a conveyance made by a bankruptcy in fraud of the Bankrupt Act.—Voorhies v. Frisbie, 25 Mich. 476.

¶ 93. A trustee in bankruptcy may sue for the recovery of money paid as a preference, either in the federal or state courts, but if he chooses the state courts, he must sue in that court which would have had jurisdiction if bankruptcy had not intervened.—Detroit Trust Co. v. Old Nat. Bank of Grand Rapids, 155 Mich. 61.

¶ 94. The United States circuit court has power to issue an injunction in a suit by an assignee in bankruptcy brought in such court to remove the cloud on his title caused by a levy under an attachment issued by a state court, antedating the bankruptcy proceedings less than four months.—Chapman v. Brewer, 114 U. S. 158, 29 L. ed. 83, 5 Sup. Ct. Rep. 799.

¶ 95. Where assignees in bankruptcy have sold the bankrupt's effects, but have refused to deliver, the purchaser may bring trover in the state court if the bankrupt court has not been invoked in the matter, and has taken no action towards setting aside the sale.—Ives v. Tregent, 29 Mich. 390.

§ 17. ——Effect of bankruptcy on other proceedings.

See also ante ¶ 14.
Other prior action pending or brought as ground for abatement, see Abatement, §§ 10-14.

¶ 96. Where a state court has already acquired jurisdiction of litigation in regard to property in its custody, it is not necessarily divested of jurisdiction thereof by bankruptcy proceedings in the federal courts.—Austin v. Hayden, 171 Mich. 38.

¶ 97. Where pending foreclosure and before decree the mortgagor was declared a bankrupt, the bankruptcy court does not have absolute and exclusive jurisdiction, and is not entitled to the entire administration of the bankrupt's property.—Jerome v. McCarter, 94 U. S. 734, 24 L. ed. 136.

¶ 98. Proceedings in a state court to foreclose a mortgage upon property in the custody of the federal court in bankruptcy are not to be taken without leave of the latter court.—Owen v. Potter, 115 Mich. 556.

¶ 99. On an appeal from the justice's court the appearance of the defendant before the circuit court opposing the entry of judgment on the ground that the defendant had in the interim from the appeal been adjudged a bankrupt, and that such bankruptcy proceedings had the effect of staying the proceedings under act of July 1, 1898 (30 U. S. Rev. Stat., chap. 541), cannot prevent the circuit court from entering judgment when no proof as to the truth of the assertions

has been made, and it did not appear that plaintiff admitted it.—Charles Bakrow & Co. v. Totten, 146 Mich. 57.

§ 18. ——Rights of action by trustee.

What constitute assets, see ante § 4.

Right to enjoin interference after sale, see also ante ¶ 20.

Right to institute contempt proceedings, effect of bankruptcy and assignment of assets to reduce claim to debt enforceable by execution, see also Contempt, I.

¶ 100. Under the National Bankruptcy Act, § 67e, prohibiting preferences, and section 70, providing that the trustee shall have the title of the bankrupt, an action of trover will lie since the transfer is void, but assumpsit will not lie to recover the value of goods sold to a third person and still in the tort feasor's possession.—Lyon v. Clark, 129 Mich. 381.

¶¶ 101, 102. A trustee in bankruptcy of a husband who had been awarded in a divorce suit the proceeds of a trust fund held by the wife may join with the husband in an application to the court for a contempt proceeding to enforce the payment of the claim against the wife.—Carnahan v. Carnahan, 143 Mich. 390.

¶ 103. A bill filed by a trustee in bankruptcy to recover money paid by the bankrupt as a preference will not be sustained where it appears that the intervention of a court of equity is not necessary to do justice, there being no indication that a judgment against defendant will not be perfectly good.—Detroit Trust Co. v. Old Nat. Bank of Grand Rapids, 155 Mich. 61.

¶ 104. The trustee in bankruptcy of a corporation has a right to sue for and collect valid stock subscriptions.—Foote v. Grellick, 166 Mich. 636.

¶ 105. A trustee in bankruptcy, because of the absence of an adequate remedy at law, may maintain a bill in equity to reach property fraudulently conveyed and for an accounting where officers and directors of the bankrupt have fraudulently conspired with a bank to have notes due the bank of which they were accommodation makers, sureties or indorsers, canceled and paid in preference to the claims of other creditors, since complainant could only recover sufficient to satisfy the claim, and in equity alone such an amount can be reached and marshaled in liquidation of claims.—Johnson v. Harrison, 199 Mich. 221.

¶ 106. Under a contract for the sale of machinery to the bankrupt company of which complainant is trustee, the vendor reclaimed the property for failure to make certain payments. On complainant's bill for an accounting against the vendor, held, that whatever rights complainant might have as to the part of the purchase price paid by the bankrupt under the contract, they were enforceable in an action at law, equity being without jurisdiction.—Detroit Trust Co. v. Wormer Machinery Co., 177 Mich. 156.

¶ 107. A trustee in bankruptcy, under § 47 of the Bankruptcy Act of 1898, as amended in 1910, 36 U. S. Stat. L. 838, 840, giving him all the rights of a creditor who has taken all the steps preliminary to filing a creditor's bill, may file a creditor's bill against the promoters, managers and directors of a corporation to reach assets fraudulently conveyed.—Grand Rapids Trust Co. v. Nichols, 199 Mich. 126.

¶ 108. The fact that a creditor's suit pending and undisposed of would be suspended by § 11a of the Bankruptcy Act of 1898, 30 U. S. Stat. L. 549, and the discharge of the bankrupt would release him from the debt does not affect the right of a trustee to maintain a creditor's bill to reach property fraudulently conveyed, under § 70 of the act as amended in 1910, 36 U. S. Stat. L. 838, 840.—Grand Rapids Trust Co. v. Nichols, 199 Mich. 126.

¶ 109. The fact that all the creditors do not participate in a fund does not prevent a trustee in bankruptcy from reducing a fund to his possession in an equitable suit to reach assets of a corporation fraudulently conveyed, since the court can guard the rights of all parties.—Grand Rapids Trust Co. v. Nichols, 199 Mich. 126.

¶ 110. A trustee in bankruptcy is entitled to mandamus to compel the treasurer of the state board of education to pay over money due the bankrupt upon a contract, notwithstanding subcontractors and laborers have filed claims to the money so held, where such claimants have also filed claims in bankruptcy.—Ford v. State Board of Education, 166 Mich. 658.

¶ 111. A trustee in bankruptcy who, before the rendition of a judgment in favor of a creditor of the bankrupt in a garnishment suit brought within four months prior to the filing of an involuntary petition in bankruptcy, obtains an order from the federal court requiring the garnished fund to be paid to him, is not guilty of laches sufficient to defeat his right to such fund by reason of his failure to intervene in the garnishment proceeding.—Wilson v. Van Buren Co. Farmers' Mut. Ins. Co., 184 Mich. 530.

§ 19. ——Proceedings before referee.

¶ 112. The finding of the referee in involuntary contested bankruptcy proceedings that

the bankrupt company was insolvent and had been so for four months prior to the date of the filing of the petition and had created preferences in behalf of certain creditors is conclusive in any collateral inquiry, and is binding on the creditors, whether they appear or not, upon the ground that the proceedings are in a sense in rem, and the law makes all creditors parties to the proceedings.—Johnson v. Gratiot County State Bank, 193 Mich. 452.

§ 20. ——Pleading.

Pleading new promise, see post § 24.
General law of pleading, see Pleading; Equity, VII.
Effect of several plea of discharge as abandoning former joint plea by defendant bankrupt, see Pleading, VII, IX.

¶ 113. An allegation that W. was declared a bankrupt, and that "by virtue thereof all the property, effects and rights of property of W. became divested out of him and vested in H., the official or general assignee in bankruptcy, appointed and designated under the act of congress by the said district court," is a sufficient allegation that H. was the assignee in the bankruptcy of W.—Williams v. Hubbard, 1 Mich. 446.

¶ 114. Where a declaration against an assignee in bankruptcy set forth facts constituting a breach of duty, and alleged that plaintiffs as creditors of the bankrupt were thereby deprived of their claim against his estate, and that by means thereof the estate had been exhausted and the plaintiffs wholly deprived of their rights therein, the allegation of damage was held to be sufficiently specific to admit evidence showing whether the entire claim, and, if not, what part of it, was lost because of the facts of which complaint was made.—Russell v. Phelps, 42 Mich. 377.

¶ 115. In pleading a discharge in bankruptcy the notice need not set up facts necessary to show jurisdiction of the bankruptcy court including an allegation of residence in the district where said court is situate.—Bryant v. Kinyon, 127 Mich. 152.

¶ 116. Composition proceedings under the Bankruptcy Act are in the nature of accord and satisfaction. In an action after the time for performance has expired, if plaintiff can make out his case without relying upon or showing the composition, defendant must not only set up the composition proceedings in bar, but must aver performance on his part or sufficient excuse for nonpayment.—Harrison v. Gamble, 69 Mich. 96.

§ 21. ——Evidence and proof.

Burden of proof as to discharge, see also ante ¶ 58.
Preference as jury question, see also ante ¶ 33.
General law of evidence, see Evidence.

¶ 117. In an action by a trustee in bankruptcy against a preferred creditor to recover preferences, the bankruptcy proceedings are admissible for the purpose of showing that on the day of the filing of the petition the bankrupt company was insolvent and had been so for four months prior thereto, and that the directors had knowledge thereof.—Johnson v. Gratiot County State Bank, 193 Mich. 452.

¶ 118. In an action by a trustee in bankruptcy against a preferred creditor to recover a preference, where the schedules annexed to the petition of bankruptcy were received in evidence to show the assets of the company and not on the question of solvency, held that evidence tending to show that the assets were materially reduced as the result of a cyclone which passed over the bankrupt's plant a few months prior to the adjudication, was properly refused, as the question of insolvency of the bankrupt was foreclosed by the bankruptcy proceedings.—Johnson v. Gratiot County State Bank, 193 Mich. 452.

¶ 119. Unpleasant relations between a bankrupt's assignee and the attorney of a creditor may be shown in an action by the latter against the assignee for damages arising from his wilful omission to notify the creditor of meetings in bankruptcy or to secure his claim as required by the Bankrupt Act.—Russell v. Phelps, 42 Mich. 377.

¶ 120. In an action against an assignee in bankruptcy for wilful negligence, it is admissible to show the custom in respect to those proceedings wherein he was at fault, if it tends to show that a uniform practice existed in conformity with the legal construction of the Bankrupt Law.—Russell v. Phelps, 42 Mich. 377.

¶ 121. In an action against a bankrupt's assignee for wilful injury to creditors from his omission or improper performance of his duties as to notifying them of meetings, or retaining sufficient funds to provide for their known but undetermined claims, the plaintiffs must prove the bankruptcy proceeding and the appointment and qualification of the assignee and his entry on the discharge of his duties, and show that plaintiffs were creditors and that defendant knew it, and wilfully and with intent to injure them omitted or improperly performed the duties referred to as alleged.—Russell v. Phelps, 42 Mich. 377.

§ 22. Subsequent rights and liabilities.

Discharge of debts or composition of them, see ante §§ 10-13.

Effect of composition, see ante § 12.
Conclusiveness of discharge, see ante § 13.
Evidence to impress trust on purchase as trustee's sale, see also ante ¶ 22.
Validity of sale by trustee as against subsequent creditor of bankrupt, see ante ¶ 23.

¶ 122. A discharge in bankruptcy is a complete defense in an action in some other court upon a claim which the bankrupt omitted by mistake from his schedule of debts.—Graves v. Wright, 53 Mich. 425.

¶ 123. After a composition with creditors and the bankrupt's discharge, it is too late for the creditors to claim that a conveyance made by the bankrupt before the bankruptcy was fraudulent as against them.—McMaster v. Campbell, 41 Mich. 513.

¶ 124. A creditor of a bankrupt who was a party to the bankruptcy proceedings and recognized their validity, and who took a note to revive his discharged claim after the sale in bankruptcy of the property claimed in satisfaction of his debt, cannot avoid the effect of the sale by showing that the purchaser's title was obtained by fraud.—Preston v. Newcomb, 149 Mich. 512.

§ 23. ——Reversion of bankrupt's estate.

¶ 125. Where no debts are proved against a bankrupt, and all possible claims have outlawed and all expenses are paid, the trust of the assignee is terminated, and all property undisposed of reverts to the bankrupt or to his estate.—Steevens v. Earles, 25 Mich. 40.

¶ 126. A discharge in bankruptcy does not reinvest the bankrupt with the property transferred to his assignee.—Oliver v. Sanborn, 60 Mich. 346.

¶ 127. A bankrupt has a right to the residue of his property that is left after all debts proved and all expenses of the bankruptcy proceedings are paid in full.—Steevens v. Earles, 25 Mich. 40.

§ 24. ——New promise avoiding discharge in bankruptcy.

New promise to pay barred debt, see Limitations of Actions, VI, A.

¶ 128. A new promise to avoid discharge in bankruptcy must be express and unqualified but need not be in writing.—Craig v. Seitz, 63 Mich. 727.

¶ 129. The moral obligation forms a sufficient consideration for a promise to pay a debt barred by a bankruptcy discharge.—Edwards v. Nelson, 51 Mich. 121; Craig v. Seitz, 63 Mich. 727.

¶ 130. The discharged bankrupt's telling his creditor that he is going to pay the claim, and that the creditor shall never lose a cent of it, does not, though taken in connection with his statement to the creditor's agent that he will pay all his old matters in a short time, amount to a new promise.—Brewer v. Boynton, 71 Mich. 254.

¶ 131. Where a creditor, in consideration of a bankrupt agreeing to pay his claim in full, advances the money necessary to effect a composition with creditors, and such creditor also receives his share of the proceeds of the composition, and the bankrupt is discharged, and, at the time when the bankrupt is about to renew his note, which the creditor had indorsed so that the bankrupt might obtain money to effect the composition, upon being asked by the creditor if he would include therein the amount coming to him, refused, but promised that he would pay it after he paid the note, such latter promise must be deemed to be a mere attempt to renew or revive the former void agreement, and to be likewise fraudulent and void as to the creditors.—Lieblein v. George, 103 Mich. 462.

¶ 132. A new promise need not be specially counted on in declaring upon a claim otherwise barred by bankruptcy discharge, but may be proved when defendant sets up the discharge.—Craig v. Seitz, 63 Mich. 727.

BANKS OF STREAMS to BASIS OF OPINION.

Cross-References.

Banks of Stream—
As boundary or call for boundary, see Boundaries.
Of navigable waters, see Navigable Waters.
Of waters generally, riparian rights, see Waters.
Baptismal Records—
As documentary evidence, see Evidence, VIII; Indictment, VIII, B.
Baptist Church—
See Religious Societies.
Bar—
Of title by possession or prescription, see Adverse Possession; Easements.
Of dower, see Dower.
Of actions by time or laches, see Limitations of Actions; Equity, IV.
Of claim against estate, see Estates of Decedents, VI, C.
Of rights by judgment, see Former Adjudication.
Of rights by estoppel, see Estoppel.
Of rights by agreement or release, see Accord and Satisfaction; Releases; Composition with Creditors.
Of rights or remedies by election, see Election and Waiver.
Set-off as affected by bar of one claim, see Set-off.
Pleas in bar, see Pleadings; Equity, VII.

Admission to the bar, see Attorneys, I.
Bar Association—
Standing in disbarment proceedings, see Attorneys § 7.
Barbed Wire—
Fences, see Fences; Railroads, IV, VIII, F; Animals (injuries to).
Barbers—
Municipal regulation, see Municipal Corporations, IX.
Bargain and Sale—
See generally, Sales; Vendors and Purchasers; Contracts, III.
Negotiation by broker, see Brokers and Factors.
Fraud in bargains, see Fraud; Rescission.
Deeds of bargain and sale, see Deeds.
Barns—
Arson of, see Crimes, II; Indictment.
Burglary of, see Crimes, II; Indictment.
As nuisances, see Nuisances.
Barred Claims—
New promise to revive, see Bankruptcy § 24; Limitations of Actions, VI, A.
See also references, ante, under "Bar."
Barriers—
On bridges and highways to protect travelers, see Bridges, III; Highways, XII.
Barter—
See Exchange of Property.
Baseball—
Games played on Sunday, see Crimes, II; and see also Sunday.
Base Fee—
See Real Property; and see also Deeds.
Basis of Opinion—
In evidence, see Evidence, VI; Indictment, VIII, B.

BASTARDS.

TREATS of the legitimacy of children as an issue, of the rights, duties and liabilities incident to the status of an illegitimate, and of proceedings to ascertain paternity and compel support, excluding matters depending on infancy rather than on the legitimacy of the infant (see Infants; Incompetents and Delinquents; Guardianship; Parent and Child).

Analysis.

§ 1. The fact and proofs of illegitimacy.
§ 2. Status, custody and disabilities.
§ 3. Legitimation and adoption.
§ 4. Bastardy proceedings.
§ 5. ——Abatement of proceeding.
§ 6. ——Before justice; complaint, process and recognizance to appear.
§ 7. ——Pleadings and issues.
§ 8. ——Burden of proof and evidence.
§ 9. ——Admissibility of other acts or of character.
§ 10. ——Weight and sufficiency of evidence.
§ 11. ——Trial and instructions.
§ 12. ——Questions of law and fact.
§ 13. ——Judgment and costs.
§ 14. ——Bond or commitment.
§ 15. Discharge or compromise.
§ 16. Review of proceedings.

§ 1. The fact and proofs of illegitimacy.

On issues made in bastardy proceedings, see also post §§ 8-10.

Sufficiency of proof to overcome presumption of legitimacy, see also post § 10.

¶ 1. Legitimacy is presumed; and where there has been opportunity for intercourse between husband and wife within such a period that a child born of the wife may be legitimate, there must be strong evidence

to overcome the presumption and disprove the fact of their intercourse.—Egbert v. Greenwalt, 44 Mich. 245.

¶ 2. The rule that a child born in lawful wedlock will be presumed to be legitimate is as old as the common law and one of the strongest presumptions in the law.—People v. Case, 171 Mich. 282.

¶ 3. The ancient rule that a child born in lawful wedlock is presumed to be legitimate made the presumption of legitimacy conclusive, if the husband was within the four seas; but the modern rule permits the presumption to be overcome when the proof is very convincing.—People v. Case, 171 Mich. 282.

¶ 4. In absence of proof the law presumes that the husband had access to his wife during the period in which he might have become the father of her child, and that he is the father of the child. This presumption is not rebutted by the fact that the wife had intercourse with another.—People v. Case, 171 Mich. 282.

¶ 5. The presumption of legitimacy of a child born in lawful wedlock is so strong that it cannot be overcome by admissions by the wife of her adultery while cohabiting with her husband.—People v. Case, 171 Mich. 282.

¶ 6. Presumption of legitimacy of a child born in lawful wedlock cannot be overcome by testimony of either husband or wife that sexual intercourse did not take place between them during the period when such child must have been begotten.—People v. Case, 171 Mich. 282.

¶ 7. Illegitimacy of children is not to be proved by hearsay and by the gossip of old women.—Watson v. Lion Brewing Co., 61 Mich. 595.

¶ 8. The marriage of parties and the legitimacy and sole heirship of a child are prima facie established, so as to render a deed from the child admissible in evidence, by the testimony of witnesses that they knew the parties for many years, that they lived together, and held themselves out as husband and wife, and were so regarded in the community, that such child grew up in the family of the parties, and was always recognized as their daughter, and that the parties had no other children to the knowledge of the witnesses.—Hoffman v. Simpson, 110 Mich. 133.

¶ 9. The law being liberal in the admission of evidence of pedigree and legitimacy, it was sufficient to prove the legitimacy of a grantor, claimed to have been the sole heir of a decedent, by testimony of the co-grantor and his own that she was widow and he the only child, their testimony being also supported by that of neighbors who knew them to the same effect.—Shotwell v. Harrison, 22 Mich. 410.

§ 2. Status, custody and disabilities.

Name of bastard, see Names.
Statutes of descent, see Comp. L. 1915, §§ 11796-11798, 13913, ¶ 6.

¶ 10. Illegitimate children are entitled under How. St., § 5773a, to share as heirs-at-law in their mother's estate.—Watson v. Lion Brewing Co., 61 Mich. 595.

¶ 11. Under Comp. Laws 1897, § 9065, providing that every illegitimate child shall be considered as an heir of his mother, and shall inherit her estate in like manner as if born in lawful wedlock, but shall not be allowed to claim as representing his mother any part of the estate of any of her kindred, either lineal or collateral, the child of an illegitimate son, the latter dying before the death of his mother, will inherit the estate of the grandmother.—Goodell v. Yeserski, 170 Mich. 578.

§ 3. Legitimation and adoption.

Adoption of children, see Adoption.
Statutes regulating adoption, see Comp. L. 1915, § 14139.
Legitimation of, see Comp. L. 1915, § 11798.

§ 4. Bastardy proceedings.

Further as to nature of the proceeding, see post § 6.

¶ 12. Bastardy proceedings are special, statutory, and neither strictly criminal nor strictly civil in their nature. They are quasi-criminal so far as they aim to protect the public, but they involve only civil consequences.—Cross v. People, 8 Mich. 113; Semon v. People, 42 Mich. 141; In re Cannon, 47 Mich. 481; People v. Harty, 49 Mich. 490; People v. Phalen, 49 Mich. 492; People ex rel. Pangborn v. Smith, 65 Mich. 1.

¶ 13. The remedy in bastardy cases is purely statutory, and the proceeding is in its nature criminal.—People v. Hamilton, 95 Mich. 210.

¶ 13a. The guardian of minor complainant in bastardy proceedings was entitled to employ counsel to protect her interests, since such proceedings are not strictly criminal, and the statute (Comp. L. 1897, §§ 2556, 2561, 2569) prescribing the qualifications and duties of prosecuting attorneys does not apply.—Harley v. Ionia Circuit Judge, 140 Mich. 642.

¶ 14. The object of prosecutions for bastardy is the protection of the public from the support of bastards by requiring the putative father to contribute, and to furnish indemnity to the authorities and assistance to the mother.—People v. Hamilton, 95 Mich. 210.

¶ 15. The main purpose of the bastardy act is to indemnify the public for the support of the child, and it does not apply to cases where the child lives out of the state, even though it was begotten within the state.—Sutfin v. People, 43 Mich. 37.

¶ 16. Whether bastardy proceedings can be instituted in any court outside of the county in which the child was born and is living, quære.—People v. Harty, 49 Mich. 490.

¶ 17. Where a mother and child are actual residents of a county in Michigan at the time a bastardy complaint is made, the fact that the child is born outside the state is unimportant in determining whether the proceeding is properly brought in said county of Michigan.—People v. Oppenheimer, 170 Mich. 505.

§ 5. ——Abatement of proceeding.

Abatement of actions generally, see Abatement and Revival.

¶ 18. In a prosecution for bastardy the pendency of prior proceedings in behalf of the same complainant, and for the same cause, is not a bar to an examination upon a second complaint.—People v. Hamilton, 95 Mich. 210.

¶ 19. Where a respondent in bastardy proceedings dies after conviction, the judgment, under chapter 153, 2 Comp. L. 1897, abates, and his administrator cannot be held thereunder.—People v. Kemppainen, 163 Mich. 186.

¶ 20. The death of an illegitimate child does not abate a pending bastardy proceeding; since the father is liable for its support until the time of death.—People v. Grunland, 187 Mich. 52.

§ 6. ——Before justice; complaint, process and recognizance to appear.

Bond to comply with judgment, see post § 14.

Making and reception of complaint by woman, see Comp. L. 1915, § 7753.

Issuance of warrant and hearing and recognizance to appear, see Comp. L. 1915, § 7754.

Information by superintendent of the poor to justice to make inquiry, see Comp. L. 1915, § 7760.

Examination of woman on information by poor superintendent, see Comp. L. 1915, § 7761.

Place where warrant for arrest may be executed, see Comp. L. 1915, § 7762.

¶ 21. The proceedings before the justice are merely preliminary to the trial of the issue in the circuit court.—People ex rel. Pangborn v. Smith, 65 Mich. 1.

¶ 22. In a proceeding to compel the support of a bastard child by its father, no complaint distinct from the "accusation and examination" of the mother in writing, under oath, is required. And where such accusation and examination appear, preceded by a formal complaint made by another person, the latter may be treated as surplusage.—Cross v. People, 10 Mich. 24.

¶ 23. Where the complaint showed in the body of it that it was sworn to before the proper justice, the words "before me" in the jurat were held unnecessary.—Cross v. People, 10 Mich. 24.

¶ 24. Bastardy proceedings are not civil to the extent that one under arrest under a capias ad respondendum or attending in response thereto, being a nonresident, is privileged from arrest on a bastardy charge.—Cady v. St. Clair Circuit Judge, 139 Mich. 618.

¶ 25. Proceedings for bastardy are not criminal in their character, but are so far civil in nature that they come within the general statute of amendments, and the averments of the complaint may be amended as to time and place provided respondent has an opportunity to meet them.—People v. Cole, 113 Mich. 83.

¶ 26. A complaint for bastardy made the 20th of March, 1880, setting forth the pregnancy and mentioning that it arose from three acts of intercourse had Sept. 15, Oct. 1 and Oct. 15, 1879, but which of these the complainant was unable to state, is sufficient, where the child was born June 26, 1880.—Hamilton v. People, 46 Mich. 186.

¶ 27. Where a recognizance binding a person to appear and answer a complaint in bastardy proceedings requires him to appear day by day and not depart from court without leave, it remains in force, though the cause be continued as permitted by Comp. L. 1871, § 1975, How St., § 2006, and it is not discharged by the respondent's appearance on the first day of the next term of court after it is given.—People v. Phalen, 49 Mich. 492.

¶ 28. The liability of a surety on a recognizance for the appearance and answer of

a respondent charged with bastardy under How. St., chap. 53, § 2005, cannot exceed that of his principal.—People v. Morrison, 75 Mich. 30.

§ 7. ——Pleadings and issues.

Relevancy of evidence to prove other offenses, see post § 8.
Admissions by others as evidence against defendant, see Evidence VII, C.
Issues to be tried, see Comp. L. 1915, § 7756.

¶ 29. No formal issue is necessary in bastardy cases. The complaint stands in lieu of a declaration, and no plea need be entered; but if defendant does not admit the charge it is to be left to the jury.—Cross v. People, 10 Mich. 24; People ex rel. Pangborn v. Smith, 65 Mich. 1.

¶ 30. Plea in abatement is inadmissible in a bastardy case after respondent has recognized to appear in circuit court and answer complaint.—People ex rel. Pangborn v. Smith, 65 Mich. 1.

¶ 31. If a plea in abatement is admissible at all in bastardy proceedings it is not after the defendant has recognized to appear in the circuit court and answered to the complaint.—People ex rel. Pangborn v. Smith, 65 Mich. 1.

¶ 32. A conviction in bastardy proceedings was not warranted, where the time of begetting was fixed in the testimony at an earlier date than stated in the complaint, and there was no testimony to show that the child was begotten at the time charged.—People v. Wilson, 136 Mich. 298.

§ 8. ——Burden of proof and evidence.

On issues in other than bastardy proceedings, see also ante § 1.
Competency of woman as witness, see Comp. L. 1915, § 7756.

¶ 33. A woman suing for seduction, who was married to another man after the time of the alleged seduction and was thereby rendered incompetent to testify as to the nonintercourse with her husband (in order to impute to defendant paternity) may testify to acts of intercourse with defendant, since conception is not an essential element of the cause of action.—Rabeke v. Baer, 115 Mich. 328.

¶ 34. Plaintiff in an action for seduction, who was married to a third person in April following the acts complained of, and gave birth to a child in September, cannot testify that she first met her husband in February of the year they were married, as the tendency of such testimony would be to rebut the presumption of legitimacy which obtains as to children born in lawful wedlock, and which public policy requires to be preserved.—Rabeke v. Baer, 115 Mich. 328.

¶ 35. The physician who attended the mother may testify that she told him who was the father of her child.—People v. Cole, 113 Mich. 83.

¶ 36. Resemblance of a bastard as evidencing paternity, may be noted by the jury where the child is in court.—People v. White, 53 Mich. 537.

¶ 37. A conviction of bastardy was not reversed because the prosecution asked the jury to consider the alleged resemblance between respondent and the child.—People v. Wing, 115 Mich. 698.

¶ 38. In bastardy proceedings it is error to admit evidence that the offense was committed at a time and place other than those specified in the complaint.—Hull v. People, 41 Mich. 167.

¶ 39. A complaint in a bastardy case may properly be read to the jury, and the effect it might have by itself in evidence need not be considered where the complainant was thoroughly examined and cross-examined as was also the defendant, and the examination of the complainant covered all the matters set out in the complaint and the jury acted on the evidence.—Hamilton v. People, 46 Mich. 186.

¶ 40. Where the preliminary deposition of the complaining witness in a bastardy case is admitted in evidence, it is unnecessary to have her detail its contents, or to ask her if she remembers the same, and the court exercises a proper discretion in rejecting the question.—People v. Keefer, 103 Mich. 83.

§ 9. ——Admissibility of other acts or of character.

Instructions as to other acts, see post § 11.

¶ 41. A party charged with bastardy has a right to show that others have had sexual intercourse with the complaining witness about the time the child was begotten, and he may show this by the testimony of such persons themselves, their credibility being wholly for the jury.—People v. Kaminsky, 73 Mich. 637.

¶ 42. In bastardy proceedings, testimony as to acts of intercourse and undue familiarity both before and after the alleged act resulting in conception, are admissible as bearing upon the probability of the intercourse at the time stated in the complaint.—People v. Jamieson, 124 Mich. 164.

¶ 43. In a prosecution for bastardy, testimony establishing other acts of intercourse,

had a legitimate tendency to prove the defendant guilty of the ocense for which he was being tried, and therefore to contradict his testimony on direct examination in denial of the charge.—People v. Dupounce, 133 Mich. 1.

¶ 44. In a bastardy prosecution evidence of acts of intercourse other than the one charged in the complaint is admissible as bearing upon the probability of the particular act having occurred as charged.—People v. Schilling, 110 Mich. 412.

¶ 45. In a bastardy case evidence of previous acts of intimacy and sexual intercourse between the parties is competent.—People v. Keefer, 103 Mich. 83.

¶ 46. In bastardy proceedings, testimony that at about the time the child was begotten the reputation of the prosecutrix for chastity was bad, was not competent.—People v. Wilson, 136 Mich. 298.

§ 10. ——Weight and sufficiency of evidence.

On issues in other than bastardy proceedings, see also ante § 1.

¶ 47. The rules as to weight of testimony are the same as in civil cases. The jury need not be satisfied beyond a reasonable doubt of the defendant's guilt before they can convict—Semon v. People, 42 Mich. 141; People v. Phalen, 49 Mich. 492.

¶ 48. In proceedings for bastardy the jury need not be satisfied beyond a reasonable doubt of the defendant's guilt before they can convict.—Semon v. People, 42 Mich. 141; People v. Phalen, 49 Mich. 492.

¶ 49. The rules of evidence applying to criminal cases as to the proof required to find against defendant are not applied to bastardy proceedings, since they are not strictly criminal in their nature—Harley v. Ionia Circuit Judge, 140 Mich. 642.

¶ 50. In bastardy proceedings complainant testified that defendant got her with child in May, 1907, at Detroit, where she had lived with her parents all of her life; that four months thereafter she went to Cincinnati, Ohio, for the purpose of concealing the situation; that the child was born January 20, 1908, at Cincinnati, where complainant remained for two years more, supporting herself and the child by her own labor; that she then returned to Detroit and remained two years working for her living; and that she again went twice to Cincinnati, one visit being for the purpose of placing the child in a home and returning to Detroit to marry defendant. Complaint was filed June 18, 1910, at which time complainant had been living six or seven months in Detroit. She spoke in her testimony of Detroit as her home and stated that when she went away the second time it was with the intention of returning to Detroit to make her home there. Held, the evidence was sufficient to warrant submitting to the jury the question of her residence in Detroit.—People v. Oppenheimer, 170 Mich. 595.

¶ 51. In a statutory proceeding to determine whether or not the husband was the father of the child of a married woman, the testimony of the mother that she had connection with one not her husband was admitted, and the case was submitted to the jury. Held, that whatever force such testimony had in showing that respondent was father of the child was outweighed by the presumption of legitimacy, and that there was not sufficient testimony tending to rebut the presumption of legitimacy to make a question of fact for the jury.—People v. Case, 171 Mich. 282.

¶ 52. An order requiring a father to pay a sum of money for the support of an illegitimate child prior to its death, cannot be sustained when not supported by evidence as to the amount expended or the liability incurred therefor.—People v. Grunland, 187 Mich. 52.

¶ 53. In a bastardy case where the evidence clearly established the act of intercourse and the time when the child was begotten, it was immaterial that the precise place was on the way from one party rather than another in the vicinity.—People v. Keefer, 103 Mich. 83.

§ 11. ——Trial and instructions.

Continuance and extension of recognizance or taking new recognizance, see Comp. L. 1915, § 7755.

¶ 54. A conviction of bastardy was not reversed because the people's counsel asked the jury to consider the alleged resemblance between respondent and the child.—People v. Wing, 115 Mich. 698.

¶ 55. It is not clearly error to permit argument in a bastardy case upon the resemblance between the child and the respondent, as the child may properly enough be in the court room, and the jury cannot be prevented from noticing it.—People v. White, 53 Mich. 537.

¶ 56. In a bastardy case in preserving an exception to a ruling refusing to strike out part of the testimony, the court's remark, "Exceptions don't amount to anything in

this case, I suppose you understand," was technically correct, and its tendency was not to prejudice respondent's rights with the jury.—People v. Keefer, 108 Mich. 83.

¶ 57. Where evidence of acts of intercourse other than the one charged in the complaint for bastardy has been properly admitted, an instruction so framed as to justify the inference that respondent may be convicted upon proof of some act other than the one so charged is erroneous.—People v. Schilling, 110 Mich. 412.

¶ 58. The judge's reference to the time of intercourse in a bastardy case as "on or about" the alleged date cannot be regarded as having misled the jury into believing they might find that it took place on another date than the one alleged, where in six other places in the charge the proof was specifically confined to that date and one of them emphatically limited the question to that time.—People v. Keefer, 103 Mich. 83.

¶ 59. An instruction in a bastardy proceeding as to the respondent's conduct generally towards women and children held sufficient.—People v. Hansen, 183 Mich. 565.

§ 12. ——Questions of law and fact.

¶ 60. A jury cannot pass on objections to the sufficiency of a complaint for bastardy nor decide whether evidence has been improperly received under it.—Hamilton v. People, 46 Mich. 186.

¶ 61. Whether the respondent in a bastardy proceeding was the parent of the complaining witness' child is a question for the jury, where she has made conflicting statements with reference thereto.—People v. Hansen, 183 Mich. 565.

§ 13. ——Judgment and costs.

General law of judgments, see Judgments.
Judgment as bar of other actions or as estoppel of facts decided, see Former Adjudication.
Form of judgment, see Comp. L. 1915, § 7756.

¶ 62. No judgment known to the common law follows the verdict. Defendant, if found guilty, is adjudged to be the father of the child.—Cross v. People, 8 Mich. 113.

¶ 63. Order for imprisonment of the putative father in Detroit house of correction until he shall give bond for support of child is illegal, since that prison is for punishments alone.—In re Kaminsky, 70 Mich. 653.

¶ 64. An order of maintenance which provides that the father shall pay a specified sum per week towards the support of the child, "until the further order of the court," is erroneous, since such order should be definite, fixing a limit to the liability of the father, and not leaving the matter open for subsequent application.—People v. Wing, 115 Mich. 698.

¶ 65. An order in a bastardy case that the respondent pay a certain amount per month until the further order of the court is void under People v. Wing, 115 Mich 698; People v. Jamieson, 124 Mich. 164.

¶ 66. An order of maintenance which provides that unless the proper bond, conditioned for the performance of the terms of the order be executed by a certain date, the father shall be committed to jail until he shall execute and deliver such bond, "and until the further order of the court," is erroneous, in that it permits the restraint of the father after the required bond is furnished and approved.—People v. Wing, 115 Mich. 698.

¶ 67. Comp. L. 1871, § 1979; How. St., § 2010, provides that the amount of a judgment in bastardy proceedings on the part of a woman should be paid to her or to the county superintendent of the poor, or to both in specified proportions. Held, that the omission to direct that the mother shall provide some part of the child's maintenance is not error where the judgment provides to what extent the father shall assist her.—Hull v. People, 41 Mich. 167.

¶ 68. An order which, after adjudging defendant to be the father of a bastard child, directs him to pay towards the support of the child a specified sum, "with the assistance of the mother," is bad for uncertainty. It should definitely fix the liability of the defendant.—Cross v. People, 10 Mich. 24.

¶ 69. The bastardy act is to secure the public against the necessity of supporting bastard children; and the expense of enforcing it against the father of such a child falls on the public and not on the child's mother.—Waite v. Washington, 44 Mich. 388; People v. Phalen, 49 Mich. 492.

¶ 70. In a prosecution for bastardy no costs can be awarded against defendant, the statute providing for none.—Booth v. McQueen, 1 D. 41; Cross v. People, 8 Mich. 113.

§ 14. ——Bond or commitment.

Recognizance to appear for trial, see ante § 6.
Provisions in judgment or order as to bond, see ante § 13.
Requisites and form of bond, see Comp. L. 1915, § 7757.

¶ 71. A judgment in a bastardy case requiring respondent to file a bond without sureties as an alternative to imprisonment does him no legal injury unless imprisonment itself would be unlawful.—People v. White, 53 Mich. 537.

¶ 72. Imprisonment of the person adjudged to be the father of a bastard child is provided for not as a punishment but only as a detention until the proper bond is given; hence, such person cannot be imprisoned in the Detroit house of correction, which is a prison provided for the confinement of persons convicted of criminal offenses.—In re Kaminsky, 70 Mich. 653.

¶ 73. The putative father of bastard child cannot be ordered to be imprisoned in Detroit house of correction, which is a punitive prison.—In re Kaminsky, 70 Mich. 653.

§ 15. Discharge or compromise.

General mode of obtaining discharge from imprisonment of poor debtors, see Civil Arrest.

Provisions for discharge of person imprisoned for noncompliance with judgment, see Comp. L. 1915, § 7758.

Subsequent action on the bond, see Comp. L. 1915, § 7759.

Power of superintendent of the poor to compromise with putative father, see Comp. L. 1915, § 7763.

§ 16. Review of proceedings.

Certiorari to review bastardy proceedings, see Certiorari.

Reviewability on appeal or error, see Appeal and Error, III.

Stay bond on proceedings for review, and liability on such bond, see Stay of Proceedings, II.

Harmless error in rulings, see generally Harmless Error.

¶ 74. Bastardy proceedings are purely statutory and the only method of review is by certiorari.—People v. Brannen, 173 Mich. 411.

¶ 75. Proceedings in the circuit court under the bastardy act cannot be removed into the Supreme Court by writ of error.—Cross v. People, 8 Mich. 113.

¶ 76. Where the record of a bastardy case on certiorari does not indicate that there was any dispute as to the identity of the child, the statement of counsel in his argument to the jury that the child was present in the court room within the jury's view will be taken as true.—People v. Wing, 115 Mich. 698.

BATTERY to BILLS.

Cross-References.

Battery—
See Assault and Battery.

Bawdy Houses—
Crime of keeping or frequenting, see Crimes, II.
Letting for use as, see Contracts, IV; Landlord and Tenant.

Bay Windows—
Projection on street as encroachment, see Highways, XI.

Beach—
As boundary, see Boundaries.
Riparian and public rights, see Navigable Waters; Waters.

Beam Support—
Rights in party walls, see Party Walls.

Bearer—
Negotiable instruments payable to, see Negotiable Instruments.

Bearing Arms—
See Constitutional Law; Crimes, II (carrying weapons).

Bed of River or Lake—
Rights of public and riparian owners, see Navigable Waters; Waters, IV, A; Boundaries (line of ownership).

Beer—
See Intoxicating Liquors.

Before Maturity—
See Negotiable Instruments, XIII.

Beggars—
As disorderly persons or vagrants, see Crimes, II.

Belief—
As element of defense or mitigation, see Libel and Slander; Malicious Prosecution; False Imprisonment.
As element of intent characterizing act, see specific topics treating of torts, e. g., Conversion; Libel; Malicious Prosecution; Trespass.
As element of intent in crime, see Crimes, II; and see Homicide.
Evidence of belief, see Evidence, III; Indictment, VIII, B.
Opinion as to belief entertained by another, see Evidence, VI; Indictment, VIII, B.

Belligerents—
Validity of contracts with, see War; Contracts, IV.

Belts and Gears—
Injuries to servants, see Master and Servant, III; Workmen's Compensation Law.

Bench Warrants—
For contempt, see Contempt; Witnesses.

Beneficial Associations—
See Associations; Fraternal Associations; Insurance (mutual companies); Corporations.

Beneficial Powers—
In lands, see Powers; Wills, VI.

Beneficiaries—
See generally Trusts.
Persons entitled to insurance benefits, see Insurance, IX; Fraternal Associations, IV.
Of gift or devise for charitable purpose, see Charities; Wills, VI.

Benefits—
Under insurance policies, see Insurance. XIV-XVII; Fraternal Associations, VI.
Appraisal and allowance in laying local assessments, see Local Improvements and Assessments; Drains.
Setting off in awarding damages for taking for public use, see Eminent Domain, IV, V; Highways, II, B.
Mitigation of damages, see Damages, V.
Moving to promisor as consideration, see Contracts, V.
Implied promise to pay for benefits received, see Implied Contracts, II.
Restitution on rescinding contract, see Rescission, III.

Benevolent Associations—
See Associations; Fraternal Associations.

Benevolent Gifts and Bequests—
See Charities; Wills, VI; Trusts.

Bequests—
See Wills; Estates of Decedents.

Bertillion Records—
Admissibility as evidence of identity, see Indictment, VIII, B.

Best Bidder—
For public contract, see Public Contracts.
For private contracts let on competitive bids, see Contracts, III.

Best Evidence—
See Evidence, IV; Indictment, VIII, B.

Bestiality—
See Crimes, II; Indictment.

Betterments—
Accessions of material or labor enhancing value of another's property generally, see Accession and Confusion.
Recovery by defendant in ejectment, see Ejectment, VI.
Decree for compensation as condition of quieting title, see Quieting Title, III.

Betting and Gaming—
As an offense, see Crimes, II; Indictment.
Wagering contracts, see Gambling Contracts; Contracts, IV.

Beverages—
See Intoxicating Liquors.

Bias—
As disqualification, see Judges, III; Jury, III; Justice of the Peace, II, III; and see specific topics treating of other officers or functionaries required to be impartial, or topics treating of the matters in which they are to act, e. g, Eminent Domain, V; Highways, II, B; Reference; Local Improvements.
As ground for change of venue or transfer of cause, see Venue, II; Justices of the Peace, III; Indictment, III.
As ground for objection to or setting aside of decision or judgment, see specific topics treating of the action affected, e. g., Verdicts and Findings; Arbitration and Award, § 17; also as to what constitutes such bias, see preceding references under "Bias."
As matter impeaching or discrediting witness, see Witnesses, VI, C.

Bible—
Reading or teaching in schools, see Schools, VI.
Religious freedom, see Constitutional Law, VII.
Entries as pedigree evidence, see Evidence, VIII, A; Indictment, VIII, B.

Bicycles—
Injuries in use of on highways and streets, see Highways, XII, XIII.
Motor-bicycle regulations, see Highways, XIV.

Bids—
For contracts, see Contracts, III; Public Contracts.
On sale of property, see Auctions; Judicial Sales, II; Executions, VII; Foreclosure, II, C, III, E; Partition, IV; Estates of Decedents, VII, A.

Bigamy—
As crime, see Crimes, II; Indictment.
As ground for divorce, see Divorce, II.
Invalidity of marriage, see Marriage.

Bill, Bills—
In equity, see Equity; and see also specific topics treating of the various equitable remedies, e. g., Accounting Suits; Creditors' Suits; Foreclosure, III; Injunctions; Specific Performance; Quieting Title; Rescission and Cancellation.
Of exceptions, see Appeal and Error; Indictment, XVI, C.
Of exchange, see Negotiable Instruments.
Of lading, see Bills of Lading; Carriers, II, B.
Of peace, see Equity, XII.
Of particulars, see Pleading, V; Justices of the Peace, IV, D; Indictment, I.
Quia timet, see Quieting Title; and as applied to other bills for prevention of threatened injury, see Injunctions; Equity, XII.
Of review, see Equity, XI.
Of revivor, see Equity, XI.
Of sale, see Sales, I, XII; Frauds, Statute of.
Supplemental, see Equity, XI.

Bill of Rights—
See Constitutional Law.

BILLS OF LADING.

TREATS of formal written acknowledgments of receipt of goods for carriage under contract of affreightment of which the bill is the evidence, excluding mere shipping receipts and way bills, etc., as to which see Carriers, II, B.

Analysis.

§ 1. In general.
§ 2. Negotiation and transfer.
§ 3. ——As incident of draft or bill of exchange.
§ 4. As contract of carriage.
§ 5. As representing goods sold.

§ 1. In general.

Parol evidence to vary bill of lading, see Evidence, V, A.

Uniform Bills of Lading Act, see Comp. L. 1915, §§ 8174-8229.

For the earlier statute, see Comp. L. 1915, §§ 8165-8173.

[Note. The Carmack Amendment to the Federal Interstate Commerce Act has superseded state laws with respect to interstate matters.]

¶ 1. A bill of lading constitutes a contract between the parties thereto, and is evidence of the receipt of the goods, of their condition when received, of the contract of carriage, and to whom they are to be delivered; but it is not, as between the owner and the shipper, conclusive evidence of such receipt and condition.—Gibbons v. Robinson, 63 Mich. 146.

¶ 2. A bill of lading fixes the rights and liabilities of the parties when its terms have been agreed upon, and its acceptance without objection by the consignor is evidence of assent, which cannot be rebutted, in the absence of fraud or imposition, by showing that the consignor received it without reading or being aware of its conditions.—McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 3 In the absence of fraud or mistake a bill of lading free from ambiguity cannot be explained.—Perkett v. Manistee & N. E. R. Co., 175 Mich. 253.

§ 2. Negotiation and transfer.

As affecting delivery by carrier, see Carriers, II.

Sale by delivery and transfer of bill of lading, see Sales.

Pledges involving bills of lading, see Pledges.

¶ 4. An indorsement of a bill of lading does no more than assign the shipper's obligations and the property called for by the bill; it does not bind the indorser to do anything toward forwarding the property, or impose upon him any duty.—Maybee v. Tregent, 47 Mich. 495.

¶ 5. The transferee of a fictitious bill of lading, or of one fraudulently transferred, has no remedy against an indorser unless for the special wrong.—Maybee v. Tregent, 47 Mich. 495.

¶ 6. In an action by a bank as holder of a bill of lading, upon assignment from the consignor of a carload of potatoes, against a railroad company to recover damages for negligence in transportation and in making delivery to a stranger without requiring surrender to it of the original bill of lading properly indorsed, evidence held sufficient to sustain a finding that plaintiff was a bona fide owner of the bill of lading.—First Nat. Bank of Allegan v. Grand Rapids & I. Ry. Co., 195 Mich. 1.

§ 3. ——As incident of draft or bill of exchange.

Right of bank receiving draft to wait until shipment arrives to collect, see also Banking, ¶ 105.

Liabilities of collecting banks on drafts with bill attached, see Banking § 37.

¶ 7. Where plaintiff, a shipper, delivers a bill of lading, with draft attached, to a bank for collection, and after a diversion of the shipment, the bank being unable to collect returns the bill of lading, plaintiff is entitled to maintain an action for conversion of the goods.—Perkett v. Manistee & N. E. R. Co., 175 Mich. 253.

§ 4. As contract of carriage.

Duty and liability of carrier under bill of lading, Carriers, II.

¶ 8. The Carmack Amendment has superseded all inconsistent state laws affecting bills for interstate transportation.—Harrison Granite Co. v. Grand Trunk Ry. System, 175 Mich. 144.

§ 5. As representing goods sold.

Bill of lading as token or symbol of the goods for purposes of sale of the goods, and title to such goods by transfer, see Sales, V, B.

BINDING OUT to BONA FIDES.

Cross-References.

Binding out—
See Apprentices; and see also Parent and Child.

Binding over for trial—
For crime, see Arrest, Commitment and Bail.
On bastardy charge, see Bastards, § 6.

Binding slips—
See Insurance, V.

Birds—
See Animals; Fish and Game.

Birth—
Presumption as to legitimacy, see Bastards, § 1.
Admissibility of evidence as to, see Evidence, VIII, A (private records); Indictment, VIII, B.
Registration and records, see Census and Statistics; Health.
Concealing birth as crime, see Crimes, II.
Estates or descent dependent on birth, see Descent; Wills, VI.
Proof of birth as element of proof of age, see Indictment, VIII, B; Rape; and see specific topics in which age is the issue in question.

Bishops—
Status in religious societies, see Religious Societies.

Black list—
See Conspiracy; Combinations and Monopolies.

Blackmail—
See Crimes, II; Indictment.

Blank indorsement—
See Negotiable Instruments, VII.

Blanket policies—
See Insurance.

Blanks—
Execution of instruments in blank, see generally Execution of Instruments.
Writs or process in blank, see Arrest; Process, and specific topics treating of the writ or process.
Filling blanks, see Alteration of Instruments; Negotiable Instruments; Mistake.

Blasphemy—
As crime, see Crimes, II; Indictment.

Blasting—
See generally Explosives.
Injuries to servants, liability of master, see Master and Servant, III; Workmen's Compensation Law.
Requirements in building contract, see Building Contracts, § 16.

Blind persons—
Negligence by or towards, see Negligence; Highways, XII; Carriers, IV; and see other like specific topics.

Blocks, block plan—
Description of land according to, see Deeds; Boundaries.
Assessments for improvements according to, see Local Improvements.

Blood of descent—
See Descent; Aliens; Wills, VI.

Blood stains—
As evidence, see Indictment, VIII, B; Homicide, VII.

Blowing off steam—
Liability of railroad for injury due to frightening horses, see Railroads, VIII, E.

Blue Sky Law—
Constitutionality, see Constitutional Law; Commerce.
Application to banks or brokers, see Brokers; Banking.
Application to the corporation or the issuance of its stocks or bonds, see Corporations, VI, VII, XII, C, XXV.
Validity of contracts affected by, see Contracts, IV.
[Note. There being as yet only a few decisions under the law, these references are mainly indicative of the topics where treatment will be found in the digests supplementary of this in the future.]

Board and lodging—
See Inns, Restaurants and Lodging Houses.
Contracts for support or for board and lodging, see Contracts, VI, VII; and see Parent and Child.
Claims against estates, see Estates of Decedents, VI.
Implied promise to pay for, see Implied Contracts, II.
As necessaries, see Husband and Wife, III; Infants; Insane persons.

Boards—
See generally Officers; and see also Counties; Municipal Corporations; Townships; Health; Taxes; Schools.
Constitutional power over, see Constitutional Law, II.
Judicial review or control, see Certiorari; Mandamus; Injunctions.

Boards of trade—
See Exchanges and Boards of Trade.

Boats—
See Admiralty; Shipping.

Bodily conditions—
Opinion evidence as to, see Evidence, VI; Indictment, VIII; Damages, XI.

Bodily fear—
Element in crimes, see Crimes, II (robbery, rape, etc.)
Element in duress, see Duress.

Bodily harm—
Element in crime, see Assault and Battery; Homicide; Crimes, II.
Tort liability, see Assault and Battery; Damages; Negligence.

Boilers—
As fixtures, see Fixtures.
Agreements to sell and install, see Sales; Contracts.
Injuries to servants by explosions, see Master and Servant, III; Workmen's Compensation Law.

Bona fide holders and indorsees—

See generally Negotiable Instruments, XIII; Bonds; Municipal and Public Bonds; Bills of Lading.

Bona fide purchasers and takers—

See generally Notice and Record of Title; Sales; Vendors and Purchasers; Assignments; Assignments for Creditors; Bankruptcy; Chattel Mortgages; Fraudulent Conveyances; and see specific topics dealing with the thing taken or transferred.

Bona fides—

As to rights claimed by reason of a taking in good faith, see foregoing references.

As to what constitutes good faith, and conversely bad faith, see foregoing references; and see also Fraud, II; Trusts; Estates of Decedents; Agency; Brokers; Corporations, VI (promoters), XVII (officers), XXIV (stockholders); Partnership.

Rights and liabilities affected by honest belief in given facts, see cross-references under "Belief."

BONDS.

TREATS of obligations under seal for the payment of money absolutely or on a condition, and of the rights of parties thereto and the construction of such bonds and remedies thereon. Bonds incident to particular remedies or made by the state or its subdivisions are excluded. (See Appeal and Error, VI, XVI; Injunction, IV, VII; Attachment, IV, B; Replevin, II, V; and the like; Municipal and Public Bonds.)

Analysis.

§ 1. General nature, requisites and execution.
§ 2. Construction, validity and effect.
§ 3. Statutory and common law bonds.
§ 4. Obligation, penalty and conditions.
§ 5. Parties, transfer and privity.
§ 6. Actions and pleading.
§ 7. ——Evidence.
§ 8. ——Trial, judgment and assessment of damages.

Rights and liabilities of sureties, and discharge of sureties, see Suretyship.

For the statutes relating to bonds and to the practice in actions to enforce them, see indexes to the published statutes, and especially those portions relating to the proceeding or transaction to which the bond in question was incident.

§ 1. General nature, requisites and execution.

In so far as the bond is merely a contract, its general contract requisites and incidents will be treated under Contracts.

Requisites of seal and signature, or of delivery and acceptance, see Execution of Instruments.

Alteration of the instrument and effect thereof, see Alteration of Instruments.

Bonds incident to action, proceeding or process to secure or indemnify interested parties, see specific topics treating of the action, proceeding or process involved. e. g., Attachment; Replevin; Arrest (bail bonds); Civil Arrest (civil recognizance); Appeal; Estates of Decedents; Guardianship.

For appeal or error, see Appeal, VI, C.

For stay or supersedeas on appeal or error, see Stay of Proceedings, II.

For security for costs, see Security for Costs.

Amount and conditions requisite for appeal bonds, see Appeal, § 83.

Of assignees for creditors, see Assignments for Creditors, § 17.

For attachment, see Attachment, IV, B.

For release of attached goods, see Attachment, VI, D.

For securing deposits of public moneys in banks, see Banking, § 25.

Indemnity and fidelity bonds, see Indemnity.

liquor dealers' bonds, see Intoxicating Liquors, II, B.

Bonds by the public for repayment of money, see Municipal and Public Bonds.

Official bonds and liability thereon, see Officers, VII; Municipal Corporations, XV; Counties, VII.

Bonds by public contractors to protect lienors and subcontractors, see Public Contracts, VII.

¶ 1. A bond is not vitiated by the omission in the body of it of the Christian name

of the principal obligor, he having executed the same by his full name.—Walbridge v. Spalding, 1 D. 451.

¶ 2. The fact that the obligors in a bond indorse it on the back and under the form of a property justification does not alter the essential character of their undertaking nor relieve them of liability.—Cunningham v. Hawkins, 163 Mich. 317.

§ 2. Construction, validity and effect.

Validity as common law bond when insufficient as statutory one, see post § 3.
Statute as read into statutory bond, see post § 3.
Of the obligation, penalty and conditions, see post § 4.
Appeal and supersedeas bonds, see Appeal and Error, VI, C, XVI.
Indemnity and fidelity bonds, see Indemnity and Contribution.
Bonds to secure landlord or tenant in their respective rights, see Landlord and Tenant, IV.
Mortgage bonds and rights under them, see Mortgages; Foreclosure of Mortgages.
Bonds of officers and public employees, see Municipal Corporations, XV; Officers, VII.
Bonds as contracts obnoxious to public policy, see Contracts, IV, B.
Mistake affecting liability, see Mistake and Accident.
Relative and mutual rights of principals and sureties, and contribution among them, see Indemnity and Contribution; Suretyship.
Rights of one party holding pledge from other as security for indemnity, see Pledges.

¶ 3. Bonds are contracts between the parties.—Webster v. Jossman, 199 Mich. 98.

¶ 4. The obligees in a bond are presumed to have notice of its form and the reasonable import thereof.—Hall v. Parker, 37 Mich. 590.

¶ 5. A bond under seal imports a consideration.—Healey v. Newton, 96 Mich. 228.

¶ 6. A bond, especially a negotiable one, is a prima facie obligation of the obligor, if he has capacity to make it; and is binding on its face until the contrary be shown.—Township of Lincoln v. Cambria Iron Co., 103 U. S. 412, 26 L. ed. 518.

¶ 7. A joint and several bond under seal to refund at a given time future advances expressed to be for the benefit of one of the obligors is not void on its face as against the other for want of consideration.—Lee v. Wisner, 38 Mich. 82.

¶ 8. A sealed bond, signed by the obligors to pay a fixed sum of money into the bridge fund of the township where the obligors resided in case a certain bridge should be ordered built by the board of supervisors and given solely to induce them to build it, is a mere voluntary, gratuitous promise by them, and cannot be sustained as a gift and cannot be sustained and enforced as a subscription to an object of public utility or necessity, since under the law a seal may be impeached as to consideration.—Township of Danby v. Beebe, 147 Mich. 312.

¶ 9. On a bond conditioned to pay certain notes given by principals to their sureties on said notes by which bond they agree to pay the notes secured within thirty days after maturity, the sureties may recover the amount of the notes whether they have paid them or not.—Hall v. Nash, 10 Mich. 303.

¶ 10. A bond in these words: "Know all men by these presents, that I, A. B., principal, and C. D., E. F. and G. H., sureties, are held," etc., "for the payment of which sum well and truly to be made we bind ourselves, our heirs, executors and administrators, severally, firmly by these presents." is a joint as well as several bond.—St. Joseph County Sup'rs v. Coffenbury, 1 Mich. 355.

¶ 11. The addition of figures indicating a fraction to each signature to a bond does not limit or change the liability of the obligors to the obligee, whatever may be the effect in a suit for contribution.—Fourth Nat. Bank v. Olney, 63 Mich. 58.

¶ 12. A bond for money to be void upon the doing of a certain thing is in legal effect a contract to do that thing.—Healey v. Newton, 96 Mich. 228.

¶ 13. A bond given to secure the performance of a written contract is to be construed as if the contract were copied into the preamble of the condition of the bond.—Locke v. McVean, 33 Mich. 473.

¶ 14. The liability of sureties on a bond for faithful performance of a contract is determined by the bond and not by such written contract.—Stauber v. Ellett, 140 Mich. 271.

¶ 15. In an action on the bond of a sewing-machine agent it was held that all the papers connected with it and the material circumstances surrounding the parties, and which might be supposed to have been contemplated by them, should be considered together in determining the liability upon the bond where the contract secured by it was not otherwise clear.—White Sewing Machine Co. v. Mullins, 41 Mich. 339.

¶ 16. A bond, reciting possession of certain goods under a bill of sale and the obligor's desire to regain possession of them, and conditioned that the obligor should take possession of said goods "an inventory of which is hereto attached" and sell them, accounting to the obligees for the proceeds to a stated amount, is to be construed as referring to the bill of sale for a description of the goods and to the inventory merely as a more specific description but not as a description covering goods not covered by the bill of sale.—Wheeler v. Meyer, 95 Mich. 36.

¶ 17. A bond, conditioned for the sale and accounting to obligees of certain goods held for security "at the best price obtainable. at not less than manufacturer's prices," cannot be construed as requiring that "scrap" and second-hand goods included in the lot must be sold at manufacturer's prices, where a right of repossession was reserved to the obligees should they feel insecure and where the obligor was allowed to keep possession for three years afterwards and make sales from the stock of goods in the course of trade.—Wheeler v. Meyer, 95 Mich. 36.

¶ 18. A bond given by the defendant in foreclosure to the complainant, and conditioned to pay any decree that might be obtained if complainant would consent to the dissolution of a preliminary injunction issued in the case, is valid, for there is sufficient consideration to support it and, although not required by statute or practice of the courts, no rule of law or public policy forbids it.—Rynearson v. Fredenburg, 42 Mich. 412.

¶ 19. A bond does not take effect from the signing, but only from delivery or filing.—Hall v. Parker, 37 Mich. 590.

20. An antedated bond does not bind the sureties for the period preceding the date of its delivery if its language is not retrospective.—Hyatt v. Grover & Baker Sewing Mach. Co., 41 Mich. 225.

§ 3. Statutory and common law bonds.

Treating appeal bond as common law bond when appeal is abandoned, see Appeal, ¶ 2401.

Imperfect statutory bond to secure public deposit as good common law bond, see also Banking, ¶ 79.

Irregular public contractor's bond as good common law bond, see also Public Contracts, VII.

¶ 21. A bond may be valid although the obligee named is not the one designated by the statute which requires it; as where a bond given by one who contracts to build a school house runs to the board of education instead of to the people of the state of Michigan.—Detroit Board of Education v. Grant, 107 Mich. 151.

¶ 21a. Where the statute providing for the giving of a bond does not prescribe its form, and expressly declare that bonds not in accordance therewith shall be void, a bond with a condition in part prescribed by the statute, and in part not so prescribed, will be sustained, if it be clearly divisible, so far as it conforms to the statute, and the rest will be rejected as surplusage.—Detroit Board of Education v. Grant, 107 Mich. 151.

¶ 22. A bond delivered and filed in legal proceedings and acquiesced in by the obligee may be enforceable as a common-law obligation, though its condition does not conform to the statute.—Healey v. Newton, 96 Mich. 228.

¶ 23. A statutory bond must be interpreted according to the intent and meaning of the legislative enactment.—Brockway v. Petted, 79 Mich. 620.

¶ 24. Where a statute fixes conditions and consequences to an undertaking in a legal proceeding, all of its terms are as much a part of the agreement as if expressly incorporated in its language.—People ex rel. Loh v. Wayne Circuit Judge, 26 Mich. 186.

§ 4. Obligation, penalty and conditions.

Obligation as contract, see ante § 2.

Validity as common law obligation of bond deviating from statute, see ante § 3.

Evidence to fasten parol conditions on bond, see post § 7.

Liabilities on appeal bonds, see Appeal, XVI.

Liability of parties on arbitration bond, see Arbitration, § 18.

Liability of obligors on attachment bond or on bond for release from attachment, see Attachment, XIV.

¶ 25. Recovery on a bond can in no case exceed the amount of the penalty, so the insertion of the clause "10% attorney fees to be paid in addition" has no legal effect.—White Sewing Machine Co. v. Dakin, 86 Mich. 581.

¶ 26. Recovery in debt on a penal bond cannot exceed the penalty and costs.—Fraser v. Little, 13 Mich. 195.

¶ 27. In an action on a bond to insure the payment of money, recovery is limited to the penalty, and interest beyond it cannot be recovered.—People's Sav. Bank v. Campau, 124 Mich. 106.

¶ 28. A private bond may properly limit the time within which action may be com-

menced.—Township of Forest v. American Bonding Co. of Baltimore, 187 Mich. 657.

¶ 29. Conditions against a surety in a bond must be construed with reasonable strictness.—Hoffman v. Fidelity & Deposit Co. of Maryland, 184 Mich. 210.

¶ 30. On a bond conditioned that an award be made on or before a certain day at a certain hour, there can be no recovery if the submission, hearing and award were all had after that hour.—Elliot v. Hanson, 39 Mich. 157.

¶ 31. A bond conditioned to pay any decree obtained in a specified suit applies to the final decree obtained in the appellate court, and is not avoided by an appeal, nor is it superseded by an appeal bond designed merely to cover costs.—Rynearson v. Fredenburg, 42 Mich. 412.

¶ 32. The obligor on a bond to pay any decree that might be obtained on a foreclosure cannot be released on the ground that a prior incumbrance remained undischarged and that the obligee refused to indemnify him if he should bid in on the foreclosure sale.—Rynearson v. Fredenburg, 42 Mich. 412.

¶ 33. Where a bond conditioned to pay all the debts of a certain firm is given under a penalty, and the obligor makes payments to the amount of the penalty, he is not liable further upon the bond, notwithstanding some of the debts remain unpaid. If he chooses voluntarily to perform his obligation to the full extent of his legal liability it is equally meritorious and effectual as though done under legal compulsion.—Spencer v. Perry, 18 Mich. 394.

¶ 34. Where a bond is conditioned for the payment of a sum of money "in five years" from date, the natural acceptation is that it may be paid inside of the five years, and must be paid at the expiration thereof; but this will not warrant payment in instalments without the consent of the obligee.—Verdine v. Olney, 77 Mich. 310.

¶ 35. In a suit to foreclose a mortgage given to secure performance of a bond made by a son to his father in consideration of the father's deeding to him his farm, an undertaking in such bond to furnish the father a horse and buggy whenever required for his own use, is held not to warrant the latter in arbitrarily demanding that a horse and buggy should be furnished him regularly upon certain days for an indefinite period, without any reference to the necessities likely to exist at such times requiring him to use the same, or in demanding compensation on that basis; and the undertaking in such bond that the father should have the possession and use of a certain house, and that in case it should be destroyed another suitable house should be provided, will not support a claim for compensation for repairs to the house.—Tucker v. Tucker, 35 Mich. 365.

¶ 36. A bond given by a son conditioned for his keeping his aged parents provided with specified conveniences during their lives is to be read as obligating him to act in that connection as occasion therefor may require.—Tucker v. Tucker, 35 Mich. 365; and see Tucker v. Tucker, 24 Mich. 426; Tucker v. Tucker, 27 Mich. 204.

¶ 37. The court will construe the penalty of a bond given by a street railway company to secure the construction of a railway as provided for in its franchise as intended by the parties as liquidated damages, where there was a substantial failure to perform the entire contract, rather than as a penalty to secure the exact performance of each separate provision for construction.—Township of Springwells v. Detroit, P. & N. R., 140 Mich. 277.

¶ 38. A bond given by a prior guardian who had converted his ward's funds conditioned upon the payment of a sum of money to the succeeding guardian, as trustee, his successors, executors, administrators or assigns, is in default upon failure to keep up the payments to a trust company appointed next succeeding trustee and guardian although there was also an administrator of the estate of the deceased guardian where some payments had been made by the debtor to the trust company after the guardian's death.—Union Trust Co. v. Conus, 129 Mich. 156.

§ 5. Parties, transfer and privity.

Effect of nonjoinder, see post § 6.

Evidence as to bona fide ownership, see post § 7.

Principals and sureties and guarantors, and their relative rights, see Suretyship; Guaranty.

Transfer of negotiable bonds, in so far as involving general law of negotiable instruments, and the doctrine of bona fide holders, see Negotiable Instruments; and see also Municipal and Public Bonds.

Rights of transferees of corporate bonds, see Corporations, XII, C, XIII, D; Railroads, VI.

Actionable fraud in transfer of bonds, see Fraud and Deceit, I.

Right and capacity of personal representative to sue or defend, see Estates of Decedents, V, VI, XI.

Estoppel of obligee to claim under bond running in trade name, see also Attachment, ¶ 418.

Bond to county treasurer as bond running to county, see Counties, IV.

¶ 39. Under an agreement whereby a son was to furnish his parents the use of a horse and buggy on their reasonable demand, on default by the son either parent may enforce the right to damages.—Tucker v. Tucker, 24 Mich. 426.

¶ 40. Act No. 266, Pub. Acts 1895, declaring that any bond required by law to be given with surety or sureties may be executed by a surety company and that in those cases where by the laws of the state more than one surety is required, it shall be lawful to approve and accept a bond with but one surety, provided the surety is a corporation duly qualified does not operate to compel those charged with the duty of accepting and approving bonds of saloon keepers under Act No. 313, Pub. Acts 1887, to accept a bond with a foreign corporation as sole surety, where their refusal is based on an honest doubt as to the sufficiency of the surety proposed.—Schmitt v. Clinton Common Council, 111 Mich. 99.

¶ 41. A general guaranty of payment to a specified person or to bearer, indorsed upon a bond is transferable by delivery.—Owen v. Potter, 115 Mich. 556.

§ 6. Actions and pleading.

Parties to the bond, see ante § 5.
General law of contract actions, see Contracts, X; and see also Pleading.
Declaration on appeal bond, necessary allegation, see Appeal, § 572.
Actions to enforce bail or recognizance, see Arrest, XII.
Assumpsit on bonds, see also Assumpsit, § 2.

¶ 42. In a declaration upon a bond, it is not necessary to aver delivery, especially if profert is made.—Boyer v. Sowles, 109 Mich. 481.

¶ 43. A declaration upon a bond need not aver the consideration for which the bond was given.—Robson v. Dayton, 111 Mich. 440.

¶ 44. Where one declares upon a covenant alleged to be contained in a replevin bond he need not set forth the penal part of the bond; only so much of an instrument need be set forth as constitutes the foundation of the action.—Prentiss v. Spalding, 2 D. 84.

¶ 45. A declaration in an action on a bond conditioned for the payment of such sum as might be decreed against the principal in a suit for a partnership accounting then pending in chancery, which alleges that no part of the amount decreed in the suit, in favor of a receiver, has been paid, and that plaintiff is damaged thereby, sufficiently shows the relation of the receiver to the chancery suit, and the interest of plaintiff in the payment of the sum decreed, where the decree, which is set out in the declaration, contains a recital of the appointment of a receiver, and directs the receiver, out of the sum decreed, to pay the plaintiff a specified amount.—Robson v. Dayton, 111 Mich. 440.

¶ 46. Suit on a bond against one of two obligors is good if the non-joinder of the other is not pleaded in abatement.—Porter v. Leache, 56 Mich 40.

¶ 47. The defense, in an action upon a bond, that the instrument was without sufficient consideration, is unavailable under How. St., § 7521, unless notice thereof is given with the plea of the general issue.—Boyer v. Sowles, 109 Mich. 481; Robson v. Dayton, 111 Mich. 440.

¶ 48. In a suit on a bond, the failure of the defendants to deny the execution of the bond under oath admits a legal execution of the bond.—Cunningham v. Hawkins, 163 Mich. 317.

¶ 49. In an action on an indemnity bond that does not attempt to describe fully the bond secured, the identity of which has been proven, it is no variance that the latter contains the name of a surety not mentioned in the former.—Lee v. Wisner, 38 Mich. 82.

¶ 50. In suit on a bond without covenant conditioned otherwise than for money payment, a declaration following a summons in debt, containing the common counts, assigning breaches and claiming damages, is in debt, not in assumpsit or covenant, and the bond's penalty must be treated as the debt to be sued for.—Bishop v. Freeman, 42 Mich. 533.

¶ 51. A declaration assigning breach in terms of the condition of the bond and not specifying particular breaches is good, if not demurred to.—Van Middlesworth v. Van Middlesworth, 32 Mich. 183.

¶ 52. A declaration on a sealed bond will not permit evidence of one without seal, and an amendment would be necessary to avoid the effect of the variance.—McCormick v. Bay City, 23 Mich. 457.

¶ 53. An allegation that defendants acknowledged themselves held and firmly bound unto "the board of supervisors of the county of St. Joseph" is not sustained by a bond to "the supervisors of the county of St. Joseph," the declaration not alleging that the bond was made to the plaintiffs by the name mentioned in the bond.—St. Joseph County Sup'rs v. Coffenbury, 1 Mich. 355.

¶ 54. A joint action on an official bond fails if it appears that any one of the defendants is not liable.—City of Detroit v. Houghton, 42 Mich. 459.

§ 7. ——Evidence.

Seal as importing consideration, see ante § 2.

¶ 55. Where a bond other than for the payment of money is sued upon, and the plaintiff assigns a breach as the statute requires, the burden of proving the breach rests upon him, notwithstanding it may involve the proving of a negative. But the same clear proof is not necessary in such case as where proof of an affirmative is required.—Young v. Stephens, 9 Mich. 500.

¶ 56. Under a bond containing an absolute promise to make good the defaults of the principal, testimony to the effect that the bond did not contain all of the contract and that a portion of it resting in parol, made the obligation dependable upon immediate notice to the surety by the obligee, of the principal's default, was properly stricken, as there was no unperformed condition precedent when the bond was delivered.—Mason & Hamlin Co. v. Gage, 119 Mich. 361.

¶ 57. Evidence tending to show that the owners of an issue of bonds, claiming to hold the entire issue, destroyed those in their hands, is insufficient to overcome the presumption that the holder on one of bonds of the issue was a bona fide holder, there being evidence that only part of the issue of bonds was in the owners' hands and destroyed and the bond in question also being produced.—Toledo, Saginaw & M. Ry. Co. v. Peters, 177 Mich. 76.

§ 8. ——Trial, judgment and assessment of damages.

General law of procedure, see Trial; Instructions; Verdicts; Judgments; etc.

Measure of recovery on bail bond, see Arrest, § 56.

Measure of recovery on attachment or release bond, see Attachment, §§ 145, 146.

¶ 58. The statute, like the common law, treats the penalty of a bond given to secure anything but the payment of money as the debt to be sued for in an action of debt on the bond. It requires the plaintiff to assign breaches, and allows a recovery of the debt, but permits execution for only the damages and costs, the judgment standing as security for the satisfaction of further breaches which further damages are recoverable on scire facias, the breaches being alleged according to the facts (Comp. L. 1871, §§ 6155-61; How. St., §§ 7737-45).—Bishop v. Freeman, 42 Mich. 533.

¶ 59. The penalty of a bond is disregarded and only the damages actually sustained are given.—Jaquith v. Hudson, 5 Mich. 123.

¶ 60. Recovery on a bond penal in form is limited to the amount of the penalty.—Fraser v. Little, 13 Mich. 195; Spencer v. Perry, 18 Mich. 394.

¶ 61. Breach of the condition of a bond given by a son to support his parents during their natural lives does not necessarily entitle them to the full penalty of the bond as damages, especially if the condition has been satisfactorily carried out for some years, and no evidence is given of the actual injury resulting from the breach.—Wright v. Wright, 49 Mich. 624.

¶ 62. It is impossible to determine in advance, where the instruments furnish no means of computation, the measure of damages for future breaches of the condition in a son's bond and mortgage to furnish the use of a horse and buggy to his parents whenever they, or either of them, may desire; each complaint must stand on its own merits.—Tucker v. Tucker, 27 Mich. 204.

¶ 63. In a transaction of mortgage between rural parties, where a son has promised to furnish his parents the use of a horse and buggy on reasonable demand and has given a mortgage as security, on default in the promise, the amount due as compensation may be estimated at $1.50 per week.—Tucker v. Tucker, 27 Mich. 204.

¶ 64. A finding in an action on a bond that defendants are liable for a sum greater than the penalty of the bond is not invalid because of the excess, but will support a judgment in debt for the penalty, and up to that amount as damages found by the referee.—Odd Fellows v. Morrison, 42 Mich. 521.

¶ 65. Where a bond given on the transfer of goods, some of them "scrap" and some second hand, binds defendant to sell such goods for "the best price obtainable at not less than manufacturers' prices" and to pay the proceeds to plaintiffs, and further provides that plaintiffs may take possession of it any time they feel insecure, and where defendant, after using some of the goods and selling others, has refused to give possession on plaintiffs' demand three years afterwards, the measure of damages to plaintiffs on such bond is, as to the articles sold in good faith, the proceeds of such sales; as to the articles on hand at the time of the demand, their value at such time; and as to the articles converted and not accounted for, the value at the time of conversion.—Wheeler v. Meyer, 95 Mich. 36.

§ 8

¶ 66. The measure of recovery on a recognizance of bail is the whole amount of the obligation without reference to the merits. —Courtright v. Attorney General, 43 Mich. 411.

BONUS to BOUGHT AND SOLD NOTES.

Cross-References.

Bonus—
Stocks issued as bonus, see Corporations, VII, XXIV, A.
Directors voting bonus to themselves, see Corporations, XVII.
As cloak or cover for usury, see Usury.
Bookkeeper—
As agent, see Agency, § 35.
Admissions by as evidence against employer, see Evidence, VII, C.
Admissibility of entries by, see Evidence, VIII, A.
Bookmaking—
As public offense, see Crimes, II; Indictment.
Books and papers—
Property rights in manuscript, see Literary Property.
Right to, as incident of office, see Officers, III.
Of science or art as basis for expert testimony, see Evidence, VI, B; Indictment, VIII, B.
As documentary evidence, see Evidence, VIII; Indictment, VIII, B.
As constituting admissions by maker or person in privity, see Evidence, VII, C; Indictment, VIII, B.
Best and secondary evidence of, see Evidence, IV; Indictment, VIII, B.
Summarizing and stating result as opinion evidence, see Evidence, VI, B; Indictment, VIII, B.
Public records and files, see generally, Records; Notice and Record of Title.
Right to have discovery and inspection, see Discovery and Inspection.
Corporate books and records, see Corporations, XVIII.
See further specific topics treating of the particular kind of books or papers, or of the particular right or proceeding involving them.
Booms and booming—
See Forestry and Lumbering; Navigable Waters, II, III.
Booths—
For elections, see Elections.
Borders of street—
Liability for injuries on or near, see Highways, XII.
Liability of building owner for endangering by unsafe building, see Buildings.
Boundaries, see Boundaries; Highways, III.
Public control and improvement, see Highways; Local Improvements; Municipal Corporations, IX, D.
Borrowing money—
Powers of corporations, see Corporations, XII.
Powers of public, see Constitutional Law, XIV; Counties, IV; Municipal Corporations, XI, XIII; Townships, III; Schools, IV; Municipal and Public Bonds.
Authority of agents and officers, see Agency, II, A; Corporations, XVII.
Authority of partners, see Partnership, IV, VII.
Power of personal representative, receiver or trustee, see Estates of Decedents, IV, B; Receivers, IV; Trusts, VI, D.
Obligations to repay borrowed money, see Negotiable Instruments; Contracts; Implied Contracts, II.
Rate of interest on, see Interest; Usury.
Bottomry—
Loans and liens on shipping in general, see Shipping.
Bought and sold notes—
See generally Frauds, Statute of; Sales.

BOUNDARIES AND SURVEYS.

TREATS of lines of separation which mark the confines of private estates in land, and of the legal ascertainment and identification of such lines, excluding public boundaries of highways (see Highways, III) and political regions (see Counties; Municipal Corporations; Townships).

Analysis.

§ 1. In general; how established and ascertained.
§ 2. By parol agreement and occupation.
§ 3. ——Existence of dispute or doubt.
§ 4. ——Length of time occupied.
§ 5. By practical location and acquiescence.
§ 6. ——Permanent fences or improvements.
§ 7. ——Temporary or convenient divisions.

§ 8. ——Fence by one party alone.
§ 9. Estoppel by deed or purchase.
§ 10. Location and application of description and calls.
§ 11. ——By resurvey.
§ 12. ——Monuments, marks and corners and adjoinments.
§ 13. ——Highways and waters.
§ 14. ——Courses and distances.
§ 15. ——Calls for quantity or portions.
§ 16. Conflicts and repugnancies in calls and description.
§ 17. Parol evidence in aid of description.
§ 18. Line or point denoted by call for stream.
§ 19. ——By call for highway.
§ 20. ——By calls for side line or shore line.
§ 21. ——By conveyance according to dedication or plat.
§ 22. Apportionment of submerged land among adjoiners.
§ 23. Adjustment of surplus or deficiency among adjoiners.
§ 24. Actions or suits to settle boundaries.
§ 25. ——Relief incident to other suit.
§ 26. Burden of proof, presumptions and evidence as to location.
§ 27. ——Agreements or conveyances.
§ 28. ——Fencing, improving or use of land.
§ 29. ——Location of roads.
§ 30. ——Surveys and field notes.
§ 31. ——Erroneous datum for survey.
§ 32. Weight and sufficiency of evidence.
§ 33. ——Early or old fences, roads, etc.
§ 34. ——Official or recorded surveys.
§ 35. ——Surveyor's testimony or conclusions.
§ 36. ——Early and recent surveys.
§ 37. ——As to acquiescence or agreement.
§ 38. ——As to water boundaries.
§ 39. Questions of law and fact.
§ 40. Instructions.
§ 41. Destruction or disturbance of marks of boundary.
§ 42. Political and public boundaries.

Rights of adjoining owners, see Adjoining Owners.

§ 1. In general; how established and ascertained.

Estoppel by deed, see post § 9.
Conveyance according to plat as calling for lines shown thereby, see post § 21.
Adjustment and apportionment of lands under water or where there is a shortage or surplus of area in divided tract, see post §§ 22, 23.
Actions or suits to settle boundaries, see post §§ 24, 25.
Effect and conclusiveness of recorded official survey, see post § 34.
Weight of evidence of government survey, see post § 34.
Lien for cost of official survey, see Surveyors.
Description in deed as limits of title taken, see Deeds.
Arbitration of boundary disputes, see Arbitration, § 2.
Petition for resurvey by landowners and cost of survey, see Comp. L. 1915, §§ 2488, 2489.
Mode of relocating on survey by county surveyor, see Comp. L. 1915, § 2487.
Recording surveys made by county surveyor, see Comp. L. 1915, § 2484.

§ 2. By parol agreement and occupation.

See also post § 19.
Necessity and sufficiency of dispute as to line, see post § 3.
Admissibility of evidence as to agreement, see post §§ 27 et seq.
Sufficiency of evidence as to location by agreement, see post § 37.
Operation of the statute of frauds on parol agreements, see Frauds, Statute of.
Effect of oral waiver of established boundary made good by adverse possession, see Adverse Possession, § 42, §§ 197, 198, 199.

¶ 1. An agreement between adjoining landowners establishing a boundary line, acquiesced in by the parties is binding, although the line established is not the original one. —Breakey v. Woolsey, 149 Mich. 86.

¶ 2. To avoid How. St., § 6179, prohibiting a conveyance of land by parol, an agreement establishing a boundary line must not only be express and monuments be erected, but there must also have been a controversy as to the line to be settled by the agreement. —Olin v. Henderson, 120 Mich. 149.

¶ 3. An oral agreement to set over a boundary fence eight feet, conveys no title to the eight-foot strip, where there has been no occupancy and acquiescence under the agreement.—Hooper v. Herald, 154 Mich. 529.

¶ 4. Where the owners of adjoining lots 2 and 3 had agreed on a fence as a boundary line for more than the period of the statute of limitations, and had occupied the land in accordance with this boundary, a purchaser of the west forty-one feet of lot 2, adjoining lot 3, cannot dispute this boundary, and attempt to set up a new one, in an attempt to move the east line of his forty-one-foot strip farther east.—Cullen v. Ksiaszkiewicz, 154 Mich. 627.

¶ 5. A voluntary adjustment of boundary lines in the bed of a meandered lake is not an "alienation of lands" by a corporate party, which by How. St., § 4052, must be upon a vote of three-fifths of the stockholders.—Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109. Writ of error dismissed in 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

¶ 6. The defendant and his grantors for over fifty years treated a certain fence as the boundary between his land and that of the plaintiff and his grantors. After more than twenty years had elapsed, he consented, with the plaintiff's grantors, to join in a new survey, and to straighten out the fence. Defendant refused to recognize the new survey line as the true boundary, and continued to treat the old fence as the correct boundary. Held, that by joining in the new survey, and consenting to straighten the fence, the defendant did not agree upon a new boundary so as to lose his title to the land up to the old fence.—Ebel v. Hulce, 154 Mich. 230.

¶ 7. Where a mutual adjustment of a disputed boundary has been followed by the building of a line fence and by long occupancy and acquiescence, it fixes the confines of the land.—Husted v. Willoughby, 117 Mich. 56.

¶ 8. The rule that a boundary line, long treated and acquiesced in as the true line, becomes the legal boundary of the premises, regardless of the result of new surveys, is applicable to a case where the owners of premises divided by a township line, agreeing that the government surveyed line was crooked and incorrect, established by parol, and marked by a fence, a different line, in which they acquiesced for upwards of 30 years.—Tritt v. Hoover, 116 Mich. 4.

¶ 9. The boundaries of a town lot, when in dispute, will be determined from the lines actually established upon the ground, agreed upon by the adjacent owners, and long acquiesced in by them, rather than from a recent survey, dependent upon a different construction of the plat.—White v. Peabody, 106 Mich. 144.

§ 3. ——Existence of dispute or doubt.

See also ante ¶ 2.

Acquiescence where there is no dispute or doubt, see post § 5.

¶ 10. There is a dispute supporting an adjustment of boundaries by agreement, where it appears that one of the owners on a meandered lake asked the other for a deed to land beyond a section line which was refused on the ground that ownership extended beyond it.—Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109. Writ of error dismissed in 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

¶ 11. A railroad company bought a 100-foot strip of land and built a fence some thirty feet from the center of the strip. There was no dispute as to the true boundary between the company and the grantor. Held, the building of the fence could not be treated as the location of a boundary line by the parties so as to deprive the company of title to the unfenced portion.—Sheldon v. Michigan Cent. R. Co., 101 Mich. 503.

¶ 12. Where the boundary line of premises conveyed is clearly located by the deed, the fact that during prior negotiations for the purchase it was agreed between the parties that the boundary should be marked by a certain cistern, and the further fact that the grantor acquiesced therein during the time that he continued to own the adjoining parcel, it being about 20 inches over the line, do not amount to a mutual adjustment of a disputed boundary such as will estop a subsequent purchaser of the parcel adjoining from setting up the statute of frauds against a claim based upon the parol agreement.—De Long v. Baldwin, 111 Mich. 466.

§ 4. ——Length of time occupied.

Acquiescence in line for more than statutory period, see post §§ 5-8.

¶ 13. A parol agreement long acquiesced in to settle the boundary between adjoining proprietors, being the result of an honest attempt to fix the true boundary, and according to which they have actually occupied, will be held good in an action at law, although the time has not been sufficient to establish title by adverse possession.—Smith v. Hamilton, 20 Mich. 433; Jones v. Pashby, 67 Mich. 450.

¶ 14. Acquiescence in a boundary line fixed by agreement need not, to be effectual, have continued for a period equal to that prescribed by the statute of limitations.—White v. Peabody, 106 Mich. 144.

¶ 15. It is a settled rule that where disputed boundary lines have been established by express agreement, or under such circumstances that an agreement will be implied, and the parties have for any considerable time recognized them, they will be upheld, though title by adverse possession could not be maintained.—Pittsburgh & L. A. Iron Co. v. Lake Superior Iron Co., 118 Mich. 109. Writ of error dismissed in 178 U. S. 270, 44 L. ed. 1065, 20 Sup. Ct. Rep. 931.

¶ 16. To make an arrangement as to a boundary binding, where such arrangement is less than fifteen years old, it must have been made with the understanding that it should be so regarded.—Bird v. Stark, 66 Mich. 654.

¶ 17. Where parties by mutual agreement and for that express purpose meet and fix a boundary line, and thereafter acquiesce in the line so established between them, such line will be considered the true line between them, notwithstanding the period of such acquiescence falls short of the time fixed by the statute of limitations for gaining title by adverse possession.—Veltmans v. Kurtz, 167 Mich. 412.

§ 5. By practical location and acquiescence.

Agreement for resurvey after practical location, see also ante ¶ 6.
Agreement as to line followed by occupation, see ante §§ 2-4.
Time of occupation necessary to establish boundary by agreement, see ante § 4.
Permanent fencing or improving of land as basis of acquiescence, see post § 6.
Temporary fencing, effect of, see post § 7.
Quality of land as evidence bearing on acquiescence, see post ¶ 137.
Burden of proof as to acquiescent location, see post § 26.
Acquiescence as evidence against later survey, see post § 32.
Sufficiency of evidence as to, see post § 37
Adverse possession of disputed strips, see Adverse Possession, § 20.
Inclusion of strip in adverse possession taken under color of title, see Adverse Possession, § 38.

¶ 18. A boundary long treated and acquiesced in as the true line, or fixed by adverse possession, should not be disturbed on new surveys.—Dupont v. Starring, 42 Mich. 492; Bunce v. Bidwell, 43 Mich. 542; Wilmarth v. Woodcock, 66 Mich. 331.

¶ 19. Where two parties who have bought a lot together have it surveyed in order to establish its boundaries and divide it in halves, and thus make a practical and actual division of it, and both occupy and improve their respective halves with reference to this division, a long acquiescence in the division line so fixed, even though insufficient to create a bar under the statute of limitations, will estop the parties and their grantees from disputing it.—Joyce v. Williams, 26 Mich. 332.

¶ 20. Unless the attempt to settle a boundary is honestly made in view of a question about it, mere acquiescence in the boundary does not operate as an estoppel.—Cronin v. Gore, 38 Mich. 381.

¶ 21. Long practical acquiescence in a boundary, between the parties concerned, may constitute such an agreement regarding it as to be conclusive, even if it has been erroneously located.—Diehl v. Zanger, 39 Mich. 601.

¶ 22. Resurveys cannot be allowed to unsettle the lines of town lots after the lot-owners have established such lines in accordance with the stakes which they have found planted or recognized by authority, and in reliance on which they have purchased.—Flynn v. Glenny, 51 Mich. 580.

¶ 23. The acquirement of title through the settlement of a boundary line by consent and acquiescence, does not appear, where the evidence does not justify such a conclusion, but shows a dispute as to the boundary.—Brudin v. Inglis, 121 Mich. 410.

¶ 24. A line of possession adhered to for more than twenty years in the supposition that it is the true line becomes fixed thereby, though the true line is afterwards discovered to be elsewhere; otherwise where it is a line of occupancy continued in the expectation of settling it when finally ascertained.—Bunce v. Bidwell, 43 Mich. 542.

¶ 25. A boundary line fixed by user cannot be disturbed by survey when such line has been established for more than the statutory period.—Seitz v. Peoples' Sav. Bank, 140 Mich. 106.

¶ 26. A boundary line treated for fifteen years as the true line, and acquiesced in by persons concerned, ought not be disturbed by new surveys.—Gildea v. Warren, 173 Mich. 28.

¶ 27. Acquiescence by landowners for a period of more than thirty years in accepting fences along a lane as a boundary line of the properties must be deemed conclusive against them where the use of such lane has been open, notorious, adverse and continuous as a means of ingress and egress from the respective properties adjoining thereon.—Marion v. Balsley, 195 Mich. 51.

¶ 28. A boundary line by agreement and acquiescence is not established where the party building a fence intended to put it on the correct line, and the adjoining owner and his grantees simply assumed that the fence was upon the line.—Lake Shore & M. S. Ry, Co. v. Sterling, 189 Mich. 366.

§ 6. ——Permanent fences or improvements.

See also ante ¶ 24.
Temporary fencing, see post § 7.
Fence by only one party, see post § 8.
Fences as evidence of location, see post §§ 28, 33, 37.
Superior weight of evidence of old fences, see post § 33.

¶ 29. The mere building of a division fence by adjacent landowners does not preclude their contesting the boundary so fixed; nor does their occupancy to the line of the fence unless it is adverse for the full period required by the statute of limitations.—Chapman v. Crooks, 41 Mich. 595.

¶ 30. Where evidence clearly establishes that a fence has been located and recognized for more than 20 years as being on the true line between adjoining owners, the question whether it was originally established on the true line is foreclosed by the acquiescence of the parties.—F. H. Wolf Brick Co. v. Lonyo, 132 Mich. 162.

¶ 31. Where adjoining landowners joined in the erection of a building, with a party wall on what was supposed to be the true line, but before the wall had been completed they were led to doubt its accuracy, but acting upon the fact that the building, consisting of three stores, was partly erected and to save the cost of tearing down and changing the location they agreed to let the wall stand and go on and complete the building such facts do not constitute the establishment of a disputed boundary between the premises of the landowners which should be held to apply to the entire length of the line, but merely an agreement to disregard the true line for the purpose of erecting the building of the parties.—Thoman v. Gross, 148 Mich. 505.

¶ 32. Land was so partitioned by mutual conveyance as to make it uncertain where the dividing line lay. A subsequent grantee of one portion built a house on the doubtful strip and mortgaged it, and the mortgagee went into possession. On foreclosure certain persons impleaded as subsequent incumbrancers made it part of their defense that the mortgagee should account for rents and profits, and decree was rendered on that basis. Held, that they were thereafter estopped from bringing ejectment for the disputed strip as grantees from the adverse claimant.—Jones v. Pashby, 48 Mich. 634.

¶ 33. Where one who by adverse possession has acquired title to a strip of land beyond the true boundary expressly disclaims title thereto and for nearly fourteen years acquiesces in a fence placed along the true line, his subsequent grantee cannot claim title to such strip.—Mowers v. Evers, 117 Mich. 93.

§ 7. ——Temporary or convenient divisions.

Permanent fencing, see ante § 6.
Admissibility in evidence, see post § 27.

¶ 34. A dividing line of contiguous properties established by the owners for mutual convenience, rather than in agreement upon any official plan, was held no evidence of line originally surveyed.—Dondero v. Frumveller, 61 Mich. 440.

¶ 35. If a fence is laid provisionally with the understanding that it shall not supplant the true line, that understanding may prevent its becoming conclusive even after fifteen years.—Bird v. Stark, 66 Mich. 654.

¶ 36. A boundary cannot be established by acquiescence in a fence which extends but a portion of the distance upon the line in dispute, and which was not continuously maintained but was permitted to fall into decay.—Conner v. Detroit Terminal R. Co., 183 Mich. 241.

§ 8. ——Fence by one party alone.

See also ante ¶ 28.

¶ 37. A plaintiff in ejectment is not estopped by having put up a fence which he afterwards claims is wrongly located, unless it was built with the deliberate purpose, on both sides, of fixing the boundary, or unless its location is so acquiesced in by the other side as to bind the latter not to dispute the line so drawn.—Van Den Brooks v. Correon, 48 Mich. 283.

¶ 38. Two adjacent owners, one of whom was the other's grantee, set a fence and planted trees on the grantee's side of it. Held, that the latter might afterwards remove them, and that grantees of the other were estopped from denying his right to do so.—Reed v. Drake, 29 Mich. 222.

¶ 39. One who, not knowing where the boundary of his land is, puts up a fence inside of the true line, is not thereby estopped from moving the fence to the true line unless the adjoining owner has in the meantime acquired title by adverse possession.—Beecher v. Ferris, 112 Mich. 584.

¶ 40. The mere fact that a line fence has existed forty years and a complainant has cultivated the land up to the fence for that time, does not give him title by adverse possession where there is no evidence that the fence was built pursuant to a dispute and an agreement.—Parsons v. Bills, 163 Mich. 415.

¶ 41. A boundary by agreement or estoppel is not shown by the fact of its adoption by heirs, to be satisfied by conveyance on their coming of age, followed by erection on such line of a division fence built by both parties, but soon after repudiated by the heirs because they found out that the other party had no title to the land claimed by him.—Wilson v. Hoffman, 70 Mich. 552.

¶ 42. No estoppel from disputing a boundary arises merely from allowing the adjacent owner to make improvements, so long as neither has supposed the boundary to be wrong.—Cronin v. Gore, 38 Mich. 381.

¶ 43. The fact that a landowner puts up a fence inside of his boundary line, without knowing where the line is, will not estop him from subsequently removing it to the true line, unless the adjoining owner has in the meantime acquired title by adverse possession.—Beecher v. Ferris, 112 Mich. 584.

§ 9. Estoppel by deed or purchase.

See also ante ¶ 4.

Estoppel by asserting rights based on line, see ante ¶ 32.

Acquiescence in line as established, see ante §§ 5-8.

Sufficiency of evidence as to estoppel, see post § 37.

¶ 44. While it is true that title to land cannot be established by estoppel in this state, the fixing of a boundary line may be so established inasmuch as the establishment of a boundary line is not supposed to affect title.—Cleveland-Cliffs Iron Co. v. Gauthier, 143 Mich. 206.

¶ 45. Where a fence has been acquiesced in for fifteen years as the correct boundary line between adjacent owners, the boundary ought not to be disturbed even if it somewhat varies from the true line; and where the fence was the line actually agreed on, and a deed giving distances had been accepted under assurances that it did not vary such boundary line, the grantor and all claiming under him, except a bona fide purchaser without notice, would be estopped from setting up a different boundary.—Stewart v. Carleton, 31 Mich. 270.

¶ 46. Where parties claiming under the same grantor recognize a boundary between them, and one of them afterwards conveys with reference to that boundary and without encroaching upon any rights existing in third parties, he and those who claim under him are bound by the description as against his grantee, and a change of the recognized boundary by a resurvey will not affect the grantee's rights.—Fahey v. Marsh, 40 Mich. 236.

¶ 47. The pointing out by a vendor to the purchaser of a lot of a boundary line of such property which was not correct, according to the description in the deeds, will not operate, under the statute of frauds, as against the purchaser of the adjoining land, to convey to the purchaser more land than is covered by the deed; even though the line so pointed out was located at the time by an actual survey, where there is no disputed boundary at the time of such sale.—Turner v. Angus, 145 Mich. 679.

¶ 48. The description in a deed by the last grantor of a lot, as regards its boundaries, must be construed, as against subsequent grantees, in accordance with the oral declaration of such grantor to his grantee, where, in such declaration, the grantor recognized as determining the new boundaries of such lot certain changes in the lines of the highway which it fronts, which changes had been acquiesced in for many years by the owners of lands adjacent thereto and with reference to which the lines of buildings had been located.—Rix v. Smith, 145 Mich. 208.

¶ 49. In an action to quiet title to land where the vendors of adjoining tracts of land had sold them with the intention to convey all the land occupied by them, and it was known to them that complainant intended to develop the properties as one mine, and the purchase was made for that purpose, and the lands had been conveyed by metes and bounds according to a fence that had existed for about forty years, but it was afterwards learned through a new survey that the fence was not upon the true line, the vendor of that portion of the land claimed under the true boundary is estopped to deny that the

fence marked the real boundary where he made no claim to the disputed tract until after the complainants with his knowledge had expended large sums in the development of the disputed strip.—Cleveland-Cliffs Iron Co. v. Gauthier, 143 Mich. 296.

¶ 50. Where a grantee of land, prior to the purchase thereof, is informed by the grantor that a certain fence constitutes the boundary line thereof, he is bound as between himself and the grantor to accept such fence as the boundary despite the fact that the legal description contained in the deed indicates a different boundary line.—Veltmans v. Kurtz, 167 Mich. 412.

§ 10. Location and application of description and calls.

Assumption of points, see post § 11.
Monuments, marks, adjoinments, courses and distances as indicia of location, see post §§ 12-14.
Division line where conveyance is of "half" or fractional portion, see post § 15.
Line denoted by call for plat, see post § 21.
Location as question of law or fact, see post § 39.
Uncertainty or mistake as affecting validity of deed, see Deeds, III, C.

¶ 51. In relocating lost monuments, the question is not how an entirely accurate survey would have located the lots, but how the original stakes located them.—Diehl v. Zanger, 39 Mich. 601.

¶ 52. In fixing upon the point of beginning in a description of land, in a deed, not definitely expressed in that respect, it is well to compare the whole description with the lines claimed by the respective parties and determine upon a point that from the comparison seems to be the only reasonable and intelligent one.—Anderson v. Scott, 75 Mich. 300.

¶ 53. The only practical way of ascertaining the true line is by a survey made from some fixed starting point,—some monument placed under the original government survey,—and, if such monuments are no longer discoverable, the question is, where were they located.—Carpenter v. Monks, 81 Mich. 103.

§ 11. ——By resurvey.

Conflict between calls, which control, see post § 16.
Admissibility of resurvey in evidence, see post § 30.

¶ 54. Old surveyed lines which have become uncertain are not to be superseded by new ones, but are to be ascertained by a resurvey, if rights have become fixed and regulated in reliance upon the common understanding as to where they lie.—Baker v. McArthur, 54 Mich. 139.

¶ 55. Test surveys based upon speculative starting points cannot be used to fix a disputed boundary between lots which can be settled by a proper construction of a plat.—Reimers v. Quinnin, 49 Mich. 449.

¶ 56. Boundaries are not to be disturbed and moved upon a survey made from an assumed starting point, without some proof of its being a true line, located and fixed by the original survey.—Carpenter v. Monks, 81 Mich. 103.

¶ 57. The method laid down by the federal department of the interior for the restoration of lost corners of government surveys on base and correction lines is not conclusive, and is not to be preferred to a survey of the township line between two established monuments upon such line.—Hess v. Meyer, 88 Mich. 339.

¶ 58. A boundary line between adjoining proprietors, unless fixed by agreement, acquiescence, or adverse possession, is to be determined in accordance with the original government survey on which it depends for location.—Woodbury v. Venia, 114 Mich. 251.

§ 12. ——Monuments, marks and corners and adjoinments.

Impropriety of assuming points without evidence, see ante § 11.
Calls for monuments or adjoinments as prevailing over course and distance, see post § 16.

¶ 59. As a general rule a boundary line marked part of the way will be continued in the same direction for the full distance.—Seitz v. People's Sav. Bank, 140 Mich. 106.

¶ 60. In determining the location of original lot lines of platted property, where the plat does not contain any monument or starting place of any character, it is proper to use an iron pin as a starting point, where such pin has been located at the intersection of streets which have been opened for a long time in supposed conformity with the plat.—Pere Marquette R. Co. v. Graham, 150 Mich. 219.

¶ 61. Where the description in a deed calls for lands owned and occupied, the actual line of occupation is a material call to be considered in locating the boundaries.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 62. A deed conveying land described as bounded on the north by the land of W. & N.

and on the east and west by lands of others, does not include a small strip of land protruding between the land of W. & N. and bounded on the north by the end of a public street.—Gogle v. Dreger, 127 Mich. 679.

¶ 63. A description in a deed which gives a part of the boundary as "thence running to the rear of the said" land does not necessarily mean that the granted parcel is bounded by the rear line of the land referred to, but may simply indicate the direction of the boundary, as if the word "towards" were used instead of "to."—Moran v. Lezotte, 54 Mich. 83.

¶ 64. Under How. St., § 622, a section corner on a town line should be relocated by running lines from the nearest known government monuments east and west on the township line, and not by measuring from a known quarter section corner north of the line to one south of the line, and dividing the distance.—Hess v. Meyer, 73 Mich. 259.

§ 13. ——Highways and waters.

Call for stream or highway as controlling course and distance, see post § 16.
Stream line as superior to call for meander line, see post § 16.
Border or thread of stream as line denoted, see post § 18.
Line denoted by call for side line or shore line, see post § 20.
Call for highway as denoting center or side line, see post § 19.
Line denoted by call for description in plat, see post § 21.
Evidence as to location and change of roadway, see post § 29.
Sufficiency of evidence where location of stream called for is uncertain, see post § 38.

¶ 65. Where the question involved in construing the description in a deed was whether the term "public road," referred to as a boundary, meant a mere paper street as laid down on a plat, or an actual highway, so known, and not by any name appearing on the plat, it was construed to mean the latter rather than the former.—Purkiss v. Benson, 28 Mich. 538.

¶ 66. A description referring to a highway as a boundary presumably refers to the highway as it existed upon the ground at the time the deed was executed and not to the line indicated in the record of its survey.—Atwood v. Canrike, 86 Mich. 99.

¶ 67. The location of a street that has been established and recognized for more than ten years cannot be shifted about by surveyors.—Pratt v. Lewis, 39 Mich. 7.

¶ 68. As between the record of a highway survey by the proper authorities and a shifting way of travel on a margin from ten to thirty rods in width along the shore of a lake, the former must prevail because the most certain; although ordinarily actual location controls.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 69. Where streets have been opened, used and acquiesced in by the parties interested, or by the public authorities, they become permanent boundaries and form new starting points for later surveys.—Twogood v. Hoyt, 42 Mich. 609.

¶ 70. Streets that have been opened and acquiesced in by the parties interested, or by the public authorities, become permanent boundaries and form new starting points for later surveys.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 71. Streets that have been opened in supposed conformity to a plat, and have been long acquiesced in, should be accepted as fixed monuments in locating lots or blocks contiguous thereto or fronting thereon.—Van Den Brooks v. Correon, 48 Mich. 283.

¶ 72. A call for a highway must be taken as referring to a surveyed continuation of one defined by reference in adjoining conveyances, where at the time there was no actual location by fixed use and no dispute as to the location of the road.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 73. The deed of a city lot, and the plat with reference to which it was made, called for the south line of a certain street as the boundary of the lot, the lot to be fifty feet in width. The said south line, as marked and built to by improvers of lots, and the division lines of the lots thereon in conformity therewith, were treated for more than thirty years as the true lines of boundary. To move it three feet, as shown by a later survey, would shift numerous accepted lines. Held, that the true width of the lots must be measured from the located present line of the street.—Wilmarth v. Woodcock, 66 Mich. 331.

¶ 74. A boundary stated in a deed as "a line forty feet above the border of the river at high-water mark" is not ambiguous, and if disputed is to be fixed, like any other fact, by testimony and an examination of the ground.—Bresler v. Pitts, 58 Mich. 347.

¶ 75. Where the initial point in the description of premises in a deed was the S. E. corner of the N. half of the S. E. quarter, fractional, of a section, and the quarter-section was made fractional by a meandered

lake, so situated as to cover the eastern and central portions of it, and the parcel described had been carved out of the N. half within a year after it was patented, it was held that the S. E. corner in question should be construed to be the point which constituted the S. E. corner of the land under the government survey and patent, which located it on the meandered line of the lake, and that the fact that the waters of the lake have since receded cannot change the boundaries of the lands described as previously located. —Verplank v. Hall, 27 Mich. 79.

¶ 76. A permanent county drain is a sufficiently known boundary or monument to be used in describing land in an action of trespass.—Husted v. Willoughby, 117 Mich. 56.

§ 14. ——Courses and distances.

Assumption that highway continues in same course, see also ante § 13.
Courses and distances yielding to monuments, see post § 16.
Course as superior to distance in case of conflict, see post § 16.
Parol to supply omitted description, see post § 17.

¶ 77. A correct survey of lots conveyed by deed with reference to a plat, which calls the points of the compass with reference to the lines and angles of the lots, must follow the plat though its lines are not conformable to the true meridian.—Bower v. Earl, 18 Mich. 367.

§ 15. ——Calls for quantity or portions.

Calls for quantity as inferior to calls for monuments, see post § 16.

¶ 78. A sale of "the north half" of a tract bordering on a river, does not call for such a division as will carry one-half of the river frontage, where the claim as made by the bill is simply for one-half of the tract.—Au Gres Boom Co. v. Whitney, 26 Mich. 42.

¶ 79. The median line between portions of a tract conveyed by "half" should be laid according to quantity unless the context or surrounding facts and circumstances show a contrary intention, and not at a point midway between the side lines.—Hartford Iron Mining Co. v. Cambria Mining Co., 80 Mich. 491.

¶ 80. In an action of quare clausum fregit, where two parties own respectively the E. one-half and the W. one-half of a fractional one-fourth, the north end of which is occupied by a lake, the dividing line will be fixed equidistant from the E. and the W. sides of a one-fourth rather than by an equal division of the quantity of land.—Edinger v. Woodke, 127 Mich. 41.

§ 16. Conflicts and repugnancies in calls and description.

Between plat and magnetic courses, see also ante ¶ 77.
Sufficiency of evidence to resolve conflict, see post §§ 32-38.
Questions of law and fact, see post § 39.

¶ 81. In the construction of grants, courses and distances must give way to natural or artificial monuments or objects.—Bruckner's Lessee v. Lawrence, 1 D. 19; Gilman v. Riopelle, 18 Mich. 145; Turner v. Holland, 65 Mich. 453.

¶ 82. In private as in public surveys monuments control course and distance.—Diehl v. Zanger, 39 Mich. 601.

¶ 83. Courses must be varied, and distances lengthened or shortened, so as to conform to the natural or ascertained objects or bounds called for in the grant; but where there is nothing in a conveyance to control the call for course or distance the land must be run according to the course and distance given in the description.—Bruckner's Lessee v. Lawrence, 1 D. 19.

¶ 84. Where the description of land conveyed is bounded by a specified course and distance from a given point to lands of a third person named, the line of the third person's land will not necessarily control the distance given, as in the case of a known fixed monument, like a lake, river, ledge of rocks, or even a specified tree, if extrinsic evidence shows that the line is obscure, and therefore likely to be considered by the parties as less certain than the measurement given. But as a matter of interpretation or construction alone, without reference to any intrinsic or extrinsic facts, the line will govern and not the specified distance.—Howell v. Merrill, 30 Mich. 282.

¶ 85. The original monuments established by the government surveyor to mark section-corners must control the courses and distances indicated by the field-notes.—Brown v. Morrill, 91 Mich. 29.

¶ 86. The rule that monuments control courses and distances, and that, when monuments and measurements vary, the monuments always control, applies only to monuments and measurements made by the original survey.—Woodbury v. Venia, 114 Mich. 251.

¶ 87. The rule in all cases of disputed boundaries of land is, that stakes rather than surveyed lines must prevail.—Turner v. Angus, 145 Mich. 679.

¶ 88. A call for a natural object, such as a stream, in a government survey will prevail over courses and distances.—Brown v. Milliman, 119 Mich. 606.

¶ 89. Where definite and permanent boundaries are given, a deed must be considered to convey all the land within those boundaries, notwithstanding the quantity is much greater than that mentioned.—Gilman v. Riopelle, 18 Mich. 145.

¶ 90. Quantity in a description must generally give way to fixed lines and monuments. —Keyser v. Sutherland, 59 Mich. 455.

¶ 91. The statement of quantity in the descriptive clause of a deed may properly be taken as controlling where the circumstances show that it is the particular least likely to be wrong, and where the description is ambiguous or indefinite in respect to fixed lines and monuments.—Moran v. Lezotte, 54 Mich. 88.

¶ 92. Where two surveyors materially disagree as to the course, quantity becomes a material consideration.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 93. If courses and distances in a plat do not agree courses will, as a general rule, govern.—Bird v. Stimson, 197 Mich. 582.

¶ 94. Where the meander lines and a stream do not coincide, the stream controls as a boundary.—Arnold v. Brechtel, 174 Mich. 147.

§ 17. Parol evidence in aid of description.

Parol evidence to control or vary terms of description in deed, see Evidence, V, A
Parol to alter dimensions fixed by plat, see Evidence, V, A.

¶ 95. Where a suit is pending in ejectment, in which the recovery depends on the construction of a deed which presents a case of latent ambiguity in the description, susceptible of being cleared up by the extrinsic proof, a resort to equity for reformation and to fix the boundary is unnecessary, for the explanation can be made as readily in the ejectment suit as in equity.—Dart v. Barbour, 32 Mich. 267.

¶ 96. Resort to deeds conveying excepted parcels is proper and essential where an uncertain description calls for such deeds.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 97. In order to supply an omitted course in a description, left by a careless scrivener in a deed prepared by him in a transaction in which one party had, for a consideration, agreed to convey an acre of land to the other, the court may, if the dimensions are satisfied thereby, consider the land itself as found staked by the surveyor employed by these parties at the time, and for the purposes of the transaction.—Burke v. Clixby, 75 Mich. 311.

¶ 98. Declarations of grantor of a lot contemporaneous with the making of the deed admitted in evidence in determining the boundaries of such lot, is not varying the description in such deed by parol; where the lot in question is 132 feet deep, and the description in the deed calls for 75 feet of this depth, and not for a specified fraction of the lot, and such declarations are admitted merely to locate the east line of the street shown by the plat referred to in such deed as the boundary of the lot.—Rix v. Smith, 145 Mich. 203.

§ 18. Line or point denoted by call for stream.

By call for side line or shore line, see post § 20.
Effect of recession of waters on point located by line of same, see also ante ¶ 75.
Apportionment of submerged land among adjoining riparian owners, see post § 22.
Effect of meander line on right to land on water side thereof, see post § 22, ¶ 118.
Presumption as to lake being meandered, see post § 26.
As question for jury, see post § 39.
Relative rights of public and riparian owners in navigable waters, see Navigable Waters, II.
Ownership of bed of stream or lake, see Waters, IV, A.

¶ 99. The common law principle, that title to the soil under tideless public rivers is in the owner of the adjacent bank, prevails in Michigan, and applies to the Detroit river. —Lorman v. Benson, 8 Mich. 18.

¶ 100. It is settled law of Michigan that the title of the riparian owner extends to the middle line of inland waters.—Webber v. Pere Marquette Boom Co., 62 Mich. 626.

¶ 101. The rule in Lorman v. Benson, 8 Mich. 18, applies to Muskegon lake as far out as the submerged land is susceptible of beneficial private use, but subordinate to the paramount rights of the public to navigation and other public rights, and unless by the presence of islands apparently reserved by the government survey, the line is drawn at the center between the island and the main land.—Rice v. Ruddiman, 10 Mich. 125, per Christiancy, J.

¶ 102. The owner of land abutting on a water course owns to the middle of the stream.—Hartz v. Detroit, P. & N. Ry., 153 Mich. 337.

¶ 103. Where an artificial pond is created by damming a stream, the same rule applies to the pond as to the stream before the dam was built.—Hartz v. Detroit, P. & N. Ry., 153 Mich. 337, Dictum.

¶ 104. Where the boundaries of a stream have been changed by artificial means so as to create a pond, and the description in a conveyance describes land as running along the bank of such pond, such description conveys the right to the water front and for the use of the stream in its natural state should the artificial pond be discontinued. —Hartz v. Detroit, P. & N. Ry., 153 Mich. 337.

§ 19. ——By call for highway.

What road or way is meant by call for highway as boundary, see ante § 13.

Ownership of land within highway limits, see Highways, X.

¶ 105. Where a boundary is expressly made by a public road, it indicates an intent to convey, according to the rules governing boundaries on highways, and extends the ownership to the center.—Purkiss v. Benson, 28 Mich. 538.

¶ 106. The doctrine that the grantee of a lot bounded upon a street or other highway takes to the center of such street, subjects only to the public easement, unless something appears upon the plat or in the terms of the conveyance excluding the title from passing under a boundary so described, applies to actual highways, not to paper ones. —Plumer v. Johnston, 63 Mich. 165.

§ 20. ——By calls for side line or shore line.

Location of line by reference to high water, see ante ¶ 74.

¶ 107. A deed of land lying east of a certain street, and explicitly described as bounded by the east line of the street, conveys no title to the soil in the street.—Grand Rapids & I. R. Co. v. Heisel, 38 Mich. 62.

§ 21. ——By conveyance according to dedication or plat.

Agreement fixing boundary variant from plat, see ante § 2.

Plat as prevailing over magnetic course, see also ante ¶ 77.

Adjustment of shortage or surplus area among owners, see post § 23.

Questions for jury as to location of line, see post § 39.

¶ 108. Where a deed conveys lots in a town, and refers to a plat to identify them, and in describing their lines calls the points of the compass as designated on the plat by its lines and angles, a correct survey cannot be based on any other system; and, although the lines delineated are not conformable to the true meridian, the plat, and not the compass, must govern.—Bower v. Earl, 18 Mich. 367.

¶ 109. Streets opened, used and acquiesced in form new starting points in subsequent surveys of premises conveyed with reference to a recorded plat.—Twogood v. Hoyt, 42 Mich. 609; Wilmarth v. Woodcock, 66 Mich. 331.

¶ 110. Purchasers of town lots have the right to locate their lot lines according to the stakes set by the platter of the lots, and no subsequent survey can be alleged to unsettle such lines.—LeCompte v. Lueders, 90 Mich. 495.

¶ 110a. Where lands are platted into lots, with shore boundaries marked, conveyances with reference thereto carry the submerged land to the center of the stream.—Watson v. Peters, 26 Mich. 508; Fletcher v. Thunder Bay, etc. Boom Co., 51 Mich. 277.

§ 22. Apportionment of submerged land among adjoiners.

¶ 111. The submerged land is not necessarily to be divided by extensions of the side lines of the fronting tract; this might depend on the shape of the lake and the relative rights of adjoining owners.—Rice v. Ruddiman, 10 Mich. 125, per Christiancy, J.

¶ 112. The boundary between adjoining owners on a river is to be determined by extending a line from the boundary at the shore perpendicularly to the general course of the river opposite that point.—Clark v. Campau, 19 Mich. 324.

¶ 113. The land in the bed of the Saginaw river is to be divided among riparian owners according to right lines from the thread to the intersection of the side lines with the shore, though the side lines intersect the shore at a different angle.—Bay City Gas Light Co. v. Industrial Works, 28 Mich. 182.

¶ 114. The submerged lands belong to the riparian owners as divided by lines extended from their side lines to the thread of the river.—Maxwell v. Bay City Bridge Co., 41 Mich. 453.

¶ 115. The boundary line between two adjoining riparian owners as to the land covered by water, is not in any way dependent upon the direction of the lines on land, but the lines from the shore should run, as near as may be, perpendicularly to the course of the stream.—A. M. Campau Realty Co. v. City of Detroit, 162 Mich. 243.

¶ 116. The rule for division of the lands submerged under waters of the Great

Lakes or indentations thereof among the riparian owners is: (1) To measure the whole extent of the ancient bank or line of the cove or bay and compute the linear frontage of each owner; (2) To divide the newly formed line into as many equal portions as those contained in the shore line, and then draw straight lines from the points at which the proprietors bounded on the old line to the points of division of the new line. This rule is to be modified under particular circumstances to secure justice, and a general line ought to be taken rather than a shore line following deep indentations.—Blodgett & Davis Lumber Co. v. Peters, 87 Mich. 498.

¶ 117. The dictum in Clute v. Fisher, 65 Mich. 48, that, in small inland lakes having meandered lines the shore owners take the submerged land within the extended lines of a fractional division, is inconsistent with the rule that the shore owner takes to the thread or center of the stream and also with the rule that the submerged land is divided by right angle lines from the center thread of the stream. The correct rule is that the submerged area belonging to the shore owner depends on his frontage on the stream and on the form, length and breadth of the water. On the authority of Jones v. Lee, 77 Mich. 35, where the division of lands under a lake cannot be accomplished by reference to any middle thread, it should be done by some rule of proportion, which probably could only be got at by some partition proceeding.—Grand Rapids Ice & Coal Co. v. South Grand Rapids Ice & Coal Co., 102 Mich. 227.

¶ 118. Meanders in a government survey are not to be regarded as boundaries of a fractional subdivision bordering a lake, but the title cannot be carried over upon another legal subdivision by projecting lines from the intersection with the meander line of the subdivision lines to the center of the lake or marsh so meandered.—Palmer v. Dodd, 64 Mich. 474.

§ 23. Adjustment of surplus or deficiency among adjoiners.

Weight of evidence of excess of land to impeach survey, see post ¶ 157.

¶ 119. Where there is a shortage in land platted into lots, blocks and streets, each block should, if possible, be treated as distinct, and the shortage distributed among the lot owners of the block except so far as possession has fixed the limits.—Anderson v. Wirth, 131 Mich. 183.

§ 24. Actions or suits to settle boundaries.

Power of equity to adjudicate on disputed boundary where involved incidentally to its proper jurisdiction, see post § 25.

Burden of proof and evidence as to location, see post §§ 26-38.

Questions of fact and instructions, see post §§ 39, 40.

Bills to quiet title, see Quieting Title.

Ejectment for strip, see Ejectment.

¶ 120. The remedy to settle a disputed boundary line is at law, and not in equity, it appearing that each party claims a legal right, and that the land has never been adjudged to belong to the complainant.—Andries v. Detroit, G. H. & M. R. Co., 105 Mich. 557.

¶ 121. A bill alleging that plaintiff and defendant owned adjoining blocks of land abutting on a lake, and that defendant had taken possession of a part of plaintiff's land, prayed a determination that title to such land belonged to plaintiff, and a determination of the boundaries and riparian rights of the parties. Held, that ejectment was the proper remedy and that equity had no jurisdiction.—Nicholls v. Boyne City Lumber Co., 157 Mich. 234.

¶ 122. Equity will not entertain a suit for the purpose of determining the boundary between properties, where the possession has been in the defendant, and ejectment is open to try the title.—Cullen v. Ksiaszkiewicz, 154 Mich. 627.

¶ 123. A court of equity has no inherent jurisdiction to determine a boundary line and will not restrain the interference with complainant's purpose to build a sidewalk over a disputed strip along a boundary line where it is not shown that the complainant was at the time of the filing of the bill in possession of the disputed strip.—Dolan v. Smith, 147 Mich. 276.

¶ 124. The settlement of boundaries that are disputed and difficult of ascertainment is not on that account within the jurisdiction of a court of equity.—Bresler v. Pitts, 58 Mich. 347.

¶ 125. Equity cannot take cognizance of a dispute as to the true location of the boundary between the premises of parties, if the settlement of such dispute leaves no question as to the title to the property on either side; the remedy is at law.—Kilgannon v. Jenkinson, 51 Mich. 240.

¶ 126. The comparative means of the parties to a boundary dispute are immaterial to the question whether the case should fall within the jurisdiction of law or of equity.—Kilgannon v. Jenkinson, 51 Mich. 240.

§ 25. ——Relief incident to other suit.

Adequacy of ejectment to ascertain location, see also ante ¶ 95.

¶ 127. A court of equity has no inherent jurisdiction to determine boundary lines, but it may determine such a question when encountered while administering a remedy which properly belongs to some recognized head of equity jurisprudence.—Dolan v. Smith, 147 Mich. 276.

¶ 128. Courts of equity may pass upon a disputed boundary when incidental to and connected with other issues properly coming under some recognized head of equity jurisprudence, but they have no inherent and independent jurisdiction for such purpose.—Weissert v. Fuller, 188 Mich. 327.

¶ 129. Where the fundamental question in a controversy over the removal of lateral support is the true line between the parties and the legal title to a disputed strip of land, the case is properly cognizable at law and not in equity.—Wykes v. Ringleberg, 49 Mich. 567.

130. Where there is stated some ground for equity jurisdiction, the mere fact that there is involved in the case a controversy as to the boundary line between two properties will not oust the court of jurisdiction. —Cullen v. Ksiaszkiewicz, 154 Mich. 627.

§ 26. Burden of proof, presumptions and evidence as to location.

Burden to show that starting point was correct, see also post § 30.
Admissible evidence, see also post ¶ 188.
Admission as to location, see Evidence, VII, C.
Hearsay evidence as to location, see Evidence, VII, A.
Admissibility of parol in aid of description, see ante § 17.
Burden to show nonperformance of duty by county surveyor, see Evidence, II.
Presumption on appeal that survey and plat were correct, see Appeal, ¶ 1596.

¶ 131. The burden of proving that a government survey line was not direct between two points, is on the party alleging such fact.—Smith v. Rich, 37 Mich. 549.

¶ 132. The burden of proof is upon one who claims that the boundary between him and an opposing party has been fixed by actual location and acquiescence upon a line different from that required by the legal construction of the deeds under which both parties claim.—Jones v. Pashby, 67 Mich. 459.

¶ 133. In a case of trespass where the questions as to the location of the north line of a plat and whether a certain fence was on that line were in issue, and the question of a line established by acquiescence was not in issue, nor of a line by agreement between the parties, nor of adverse possession by plaintiff, the burden of proof is upon the plaintiff to establish by a preponderance of evidence that the trespass charged was committed upon the land owned by him, that is he must show the true boundary line. —Clarke v. Case, 144 Mich. 148.

¶ 134. No presumption arises that a lake surrounded by one's land is meandered, merely from its size, location or relation to other waters.—Giddings v. Rogalewski, 192 Mich. 319.

¶ 134a. Where the true location of a boundary was involved, the deeds under which the parties claimed title were held competent evidence on plaintiff's part to show the location of the line and those executed to plaintiff to show his claim of title. —Wineman v. Grummond, 90 Mich. 280.

§ 27. ——Agreements or conveyances.

Settlement of boundary by agreement, see ante §§ 2-4.

¶ 135. A dividing line established for convenience by adjoining proprietors, and established by mutual quitclaims, is no evidence of the boundary as originally surveyed.—Dondero v. Frumveller, 61 Mich. 440.

§ 28. ——Fencing, improving or use of land.

Erection of party wall, see also post ¶ 199.
Weight to be given to evidence of early fencing or improvements on supposed line, see post § 33.

¶ 136. Disregard of the evidence furnished by fences, buildings and common repute, as to the true location of a surveyed line would justify granting a new trial in ejectment.—Baker v. McArthur, 54 Mich. 139.

¶ 137. In determining whether a boundary line has been established by acquiescence in a fence, the character of the land on either side should be taken into consideration, especially when unfit for husbandry and of little value even for pasturage.— Conner v. Detroit Terminal R. Co., 183 Mich. 241.

¶ 138. Where a surveyor had testified in an action of trespass that he had located a disputed section corner at a given point by reference to the field notes of the government survey, and that he had discovered there traces of the stake driven by the government surveyor to mark the place, it was not a material inquiry whether existing fences would have to be changed under his survey.—Woodbury v. Venia, 114 Mich. 251.

§ 29. ——Location of roads.

¶ 139. The record of the laying out and surveying of a state road is admissible without proof that it was ever opened or traveled, but it is immaterial for the purpose of defining the boundary of a tract under a deed calling for an existing highway, or under a prior deed calling for a "state road," which may have been a different one.—Atwood v. Canrike, 86 Mich. 99.

§ 30. ——Surveys and field notes.

Admissibility of evidence that datum taken for survey was erroneous, see post § 31.
Ex parte surveys, see also post ¶ 191.
Weight and effect of unrecorded survey, see also post ¶¶ 171, 172.
Relative weight of early and recent surveys as evidence, see post § 36.
Form and certification of the survey to be admissible, see Evidence, VIII, C.
County surveyor's survey as presumptive evidence of facts shown, see Comp. L. 1915, § 2481.

¶ 140. A county surveyor's certificate is not evidence of the facts therein contained (Comp. L. 1871, § 587, How. St., § 616) unless it contains the particulars required by Comp. L. 1871, § 590, How. St., § 619, to be entered in the surveyor's record; it must show that there was a survey, for whom made, etc.—Smith v. Rich, 37 Mich. 549.

¶ 141. The record of a county surveyor's survey that shows neither the name of the person for whom it was made nor the variation of the magnetic needle from the true meridian (How. St., § 619), is not admissible in evidence.—Van Der Groef v. Jones, 108 Mich. 65.

¶ 142. A survey recorded in the office of the county surveyor is admissible in an action of trespass under How. St., § 619.—Sherrard v. Cudney, 134 Mich. 200.

¶ 143. A resurvey which starts from a point outside of and not belonging to the immediate plan or local system that controlled the original survey is inadmissible to show that an old fence is an incorrect boundary.—Burns v. Martin, 45 Mich. 22.

¶ 144. A starting point cannot be assumed to be true merely because surveyors agree upon it; some proof must be made that it was one of the points actually fixed by the original survey before a survey starting from such point can be regarded.—Beaubien v. Kellogg, 69 Mich. 333.

¶ 145. In an action involving the boundary between a front and rear concession of a private claim, the field notes of the rear concession made by a United States surveyor are admissible in connection with the field notes of the front concession, to show the location of the witness trees as bearing upon the location of the true line and the quantity of land in each concession.—Olin v. Henderson, 120 Mich. 149.

¶ 146. In an action involving boundaries, evidence of a survey recently made, where the surveyor could find no old monument for a starting point, but started from a point which he testified he was certain was nearly correct, is admissible under instructions that its weight depends upon finding by the jury that the starting point was the proper one.—Olin v. Henderson, 120 Mich. 149.

¶ 147. Where a surveyor authorized by the board of supervisors to locate lost corners makes no return of his doings and does not cause the survey to be recorded, the fact of his authority to make the survey cannot be shown in a case where he has testified as to the location of the corners, for the jury might infer that his acts were official and so give his testimony undue weight.—Hess v. Meyer, 73 Mich. 259.

¶ 148. In ejectment to recover a strip of land separated from plaintiff's land by a line fence thirty years old, it was not error to refuse to strike out the testimony of a surveyor, testifying for plaintiff, that he ascertained that such fence stood several feet over plaintiff's land by measuring from a stone located at a certain corner, on the ground that there was no testimony showing that this was a proper starting point; where although the stone was not set at the time of the original survey, the fact that it stood very near if not at the center of two highways, and that it was properly situated with reference to a re-established quarter section post, furnished evidence of its proper location.—Miller v. Shumway, 135 Mich. 654.

¶ 149. In ejectment, it was not error to refuse to strike out the testimony of a surveyor, because in making his survey of the disputed strip he failed to observe all the requirements of law; where it might be fairly inferred that a correct measurement was made by the witness from the starting point and if so, it afforded evidence of the proper location of the disputed line.—Miller v. Shumway, 135 Mich. 654.

§ 31. ——Erroneous datum for survey.

¶ 150. In an action involving the boundary between two lots, where a surveyor testified that he took the center of a railroad track as a starting point on the assumption that the location of the track was in the exact center of the right of way, and that it had not been moved, it is error to exclude evidence that the track was not in the place

where originally laid though the offer of such testimony did not include a proposition to show that the track was originally laid in the center of the right of way.—Anderson v. Wirth, 131 Mich. 183.

¶ 151. Where ejectment is based on an allegation of a mistake in the original survey, it is admissible to show that the boundaries have been defined for twenty years or more.—Diehl v. Zanger, 39 Mich. 601.

¶ 152. A resurvey was had when the evidences of the original survey had nearly disappeared, and a question afterwards arose as to where the true line was. The boundaries of property conveyed before the resurvey were not to be disturbed. Held proper to show that lots had been laid out and buildings put up with reference to the line as established by the first survey and that it had been shown by a recent survey that the line as run by the resurvey would cross lots and bisect buildings.—Baker v. McArthur, 54 Mich. 139.

¶ 153. Two official surveys having resulted differently the question in ejectment was the real location of a section line. Held proper to show that a surveyor who had helped to run the original line had again run it in laying out village lots, while the corner post and witness trees were still standing; and that afterwards a grantee had built a fence along the line so run, and this fence was understood in the neighborhood to indicate that line.—Baker v. McArthur, 54 Mich. 139.

¶ 154. Where the accuracy of the starting points taken for test surveys is merely matter of speculation, they cannot be used to fix a disputed boundary between two lots when the dispute arises from a discrepancy which affects all the lots in the block, and which must therefore be apportioned among them. —Reimers v. Quinnin, 49 Mich. 449.

§ 32. Weight and sufficiency of evidence.

Of evidence of old fences, etc., located on supposed line, see post § 33.
Of surveys and surveyors' testimony, see post §§ 34-36.
Instructions, see post § 40.

¶ 155. Ejectment for land described as being in the southeast quarter of a specified section cannot be maintained if the evidence shows that it lies west of a line drawn north and south through a quarter post that stands midway of the south section line.—Wilson v. Hoffman, 54 Mich. 246.

¶ 156. Evidence of plaintiff's possession of what he has occupied as his lot cannot be overthrown, in a case where title is not in question, by any proof of where the line ought to have been.—Fisher v. Dowling, 66 Mich. 370.

¶ 157. It requires something more than proof of an overplus of land to change boundaries that are marked by monuments. —Prudin v. Inglis, 121 Mich. 410.

¶ 158. A supposed boundary line long acquiesced in is better evidence of where the real line should be than a survey made after the original monuments have disappeared.—Hoffman v. City of Port Huron, 102 Mich. 417.

§ 33. ——Early or old fences, roads, etc.

See also post ¶ 180.
Admissibility of evidence of improvements made before boundary became uncertain, see ante § 31.
Old fences as elements of establishment by acquiescence, see ante §§ 6-8.
Sufficiency and effect of evidence as to making improvements on question of acquiescence, see post § 37.
Earliness of survey as factor of weight, see post § 36.
Instructions as to, see post § 40.

¶ 159. A long-established fence is better evidence of actual boundaries settled by practical location than any survey made after the monuments of the original survey have disappeared.—Diehl v. Zanger, 39 Mich. 601.

¶ 159a. Fences of long standing, and erected upon what parties have called the "true line," and up to which they have improved and cultivated, are better evidence of the true line than surveys made after the monuments have disappeared.—Carpenter v. Monks, 81 Mich. 103.

¶ 160. Old fences have always been regarded as strong and trustworthy evidence in ascertaining and fixing boundaries.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 161. As between old boundary fences and any survey made after monuments had disappeared, the fences are by far better evidence as to what the lines of a lot actually are.—Anderson v. Wirth, 134 Mich. 612.

¶ 162. An agreed dividing line between farms upon which a line fence has been maintained for nearly sixty years is better evidence than surveys made after government monuments have disappeared.—Pugh v. Shindler, 127 Mich. 191.

¶ 163. Fences and monuments of long standing, established not long after a survey and plat were made, are better evidence of true boundary lines than surveys made after

the original stakes have disappeared.—Breakey v. Woolsey, 149 Mich. 86.

¶ 164. Fences which before their removal had stood a long time and the positions of which can be traced are strong evidence in fixing boundary lines as located by the original survey; and such lines are not to be disturbed by a new survey made from a starting point assumed by the late surveyors to be the true one.—Beaubien v. Kellogg, 69 Mich. 333.

¶ 165. Old fences are strong evidence in fixing boundary lines as located by the original survey; and if they have stood for twenty or thirty years they should be taken as the true lines, at least as against a resurvey which assumes a starting point at a certain street without any evidence that it was a point fixed by the original survey.—Beaubien v. Kellogg, 69 Mich. 333.

¶ 166. An old fence or a highway, merely supposed to be upon the boundary line between two sections, but not proved to have been erected or laid out with any reference to the original survey, is not better evidence of the actual location of a disputed section corner than surveys made from the government field notes by subsequent surveyors.—Woodbury v. Venia, 114 Mich. 251.

¶ 167. Undisputed evidence that a certain board fence had served as a line fence for many years together with confirming testimony as to the location of the boundary is held sufficient to support a decree fixing the dividing line.—Board of Managers of Michigan Soldiers' Home v. Jackman, 128 Mich. 679.

¶ 168. The mere fact that a line fence has existed forty years does not establish it as a boundary made by agreement, where there is no evidence that there was ever any dispute or any agreement.—Parsons v. Bills, 163 Mich. 415.

¶ 169. On a bill to establish a boundary line and to quiet title under Pub. Acts 1909, No. 256, § 36, How. St., 2nd Ed., § 11965, evidence held to sustain a finding that a boundary fence had been in existence for more than twenty years.—Parent v. Hodges, 188 Mich. 69.

§ 34. ——Official or recorded surveys.

See also ante ¶ 166.

¶170. The survey by the Federal Government of land adjacent to Lake Erie and the transfer to and sale by the state of the land up to the meander line of the lake as state swamp land conclusively establishes the boundaries of the lake and the titles of abutting owners extend to the meander line upon a presumption that must be conclusive.—Brown v. Parker, 127 Mich. 390.

¶ 171. No presumptions can be based upon the acts of a county surveyor relating to official surveys, unless the requirements of Comp. L. 1871, §§ 587, 590, How. St., §§ 616, 619, have been complied with. Oral evidence of his acts is of no more weight than similar evidence would be concerning the acts of any other surveyor.—Beeman v. Black, 49 Mich. 598.

¶ 172. Under How. St., § 616, the record of a survey by a county surveyor, if complying with the requirements of How. St., § 619, is presumptive evidence of the facts therein contained, and casts upon the opposing party the burden of producing evidence to rebut the presumption; but whenever other surveys, made by competent surveyors, are introduced, the survey of the county surveyor is of no more binding force than the others, unless it has been acquiesced in by the parties.—Van Der Groef v. Jones, 108 Mich. 65.

¶ 173. The record of a survey authorized under the statute to restore lost corners, etc., is evidence of the true location of the corners, but the work of the surveyor is not prima facie correct.—Hess v. Meyer, 73 Mich. 259.

§ 35. ——Surveyor's testimony or conclusions.

Impropriety of assuming data for relocation, see ante § 11.

¶ 174. A tangible and established boundary is not to be disturbed by a surveyor's opinion based on examination of records, etc.—Stewart v. Carleton, 31 Mich. 270.

¶ 175. In an action of ejectment involving a disputed boundary line, a surveyor, who had made a survey of the property, testified that he had taken pains to establish the correctness of a stake designating a section corner, used by him as a starting point; that he had used it for many years as a surveyor; that he knew it to be approximately the location of the original government section corner; that he had used said corner as thus located so frequently with reference to other surveys that he was perfectly sure of its correctness; and that, if it were not correct, the street to the north and the street to the west and the abutting lots would all be thrown out of line. Held, that the witness was shown by this testimony to be sufficiently familiar with the location of the stake to justify the inference by the jury that he had correctly located the starting point of his survey.—Manistee Mfg. Co. v. Cogswell, 103 Mich. 602.

§ 36. ——Early and recent surveys.

Acquiescence as better evidence than survey, see ante § 32.

Superior weight of evidence of old fences, etc., see ante § 33.

Of official or government or recorded survey, see ante § 34.

Old line by acquiescence as overcoming new surveys, see also ante § 5.

Instructions as to, see post § 40.

¶ 176. Where the line between quarter sections of land has gone unquestioned for a long time—as in this case twenty-three years—it ought not to be disturbed upon a mere disagreement between surveys, especially if the later survey is made under circumstances unfavorable to accuracy, such as the absence of corner posts and witness trees and the existence of a boundary dispute.—Case v. Trapp, 49 Mich. 59.

¶ 177. It seems that a survey made much earlier than another and at a time when the old landmarks were more apt to be found and rightly located is to be preferred as the more correct.—Wilmarth v. Woodcock, 66 Mich. 331.

¶ 178. A resurvey made on the assumption that the correct magnetic declination was used in the original survey cannot be regarded as correct where as projected it leaves a government meander line and runs out into Lake Huron 40 rods beyond and 50 to 70 rods beyond a surveyed road line, and where it also disagrees with long established conditions, and where no effort was made to verify the assumed declination by reference to a connecting portion of the road.—Hoffman v. City of Port Huron, 102 Mich. 417.

¶ 179. Evidence that old stakes used by early surveyors were driven into the ground along a certain boundary, and that other stakes, evidently placed by later surveyors, appeared at the same place, was cogent evidence of the location of the line, and while the proof did not amount to demonstration, it was ample to support a directed verdict in favor of the defendant.—Brudin v. Inglis, 121 Mich. 410.

¶ 180. Complainant brought a bill to enjoin defendant from building a new fence west of the fence which had for forty years stood as the line fence between complainant and defendant. There was no evidence that there had even been a dispute and an agreement establishing the old fence or any line as a boundary. The evidence showed two surveys, each made without an established starting point. One of them showed the boundary to be the old fence, the other that it should be some feet west of the old fence. Held, in view of the fact that the old fence was as likely to be the correct boundary as the new one, the decree for complainant should stand.—Parsons v. Bills, 163 Mich. 415.

¶ 181. The fact that the city surveyor, several years after a plat was made, made surveys of the land and located the boundaries of a tract according to the line of a warehouse, is not evidence that the warehouse line is the proper line of the plat in the face of further evidence to the contrary.—Anderson v. Wirth, 134 Mich. 612.

¶ 182. On a bill to establish a boundary line and to quiet title under Pub. Acts 1909, No. 256, § 36, How. St., 2nd Ed., § 11965, evidence held to sustain a finding that a particular survey was the correct one.—Parent v. Hodges, 188 Mich. 69.

§ 37. ——As to acquiescence or agreement.

¶ 183. A boundary by agreement or estoppel is not to be found on facts that heirs, assuming to represent themselves and infant coheirs, adopted a division line and with the other party built a fence thereon, that the fence remains, and that shortly after adopting it the heirs who negotiated the agreement, ascertaining that the other party had no title, gave notice that they would not carry out the agreement by making conveyances to the line in which all the heirs were to join as they came of age.—Wilson v. Hoffman, 70 Mich. 552.

¶ 184. The fact that the maker of a plat, several years afterwards located a warehouse along a railroad right of way, as shown, is not conclusive evidence that the warehouse represents the boundary line of the plat, in the face of other uncontroverted evidence to the contrary.—Anderson v. Wirth, 134 Mich. 612.

¶ 185. In ejectment, an attempt to fix the boundary line of a plat on the boundary of a warehouse, which it is alleged is fifty feet from the center of the railroad track, is defeated by evidence that after the plat was made showing such distance, the railroad track was moved two or three feet, that other monuments along the railroad track are situated at distances varying two or three feet, and that the lot owners have enjoyed possession of their respective lots since the time the plat was made, where all of these boundary lines of said lots would be changed a few inches if the plaintiff's contentions were upheld.—Anderson v. Wirth, 134 Mich. 612.

¶ 186. Evidence supporting an inference that all the parties agreed upon a survey, afterwards acquiesced in it and defendant changed the character of his occupancy in reliance upon such agreement, is sufficient to support a verdict for defendant in ejectment.—Brown v. Bowerman, 134 Mich. 695.

§ 38. ——As to water boundaries.

¶ 187. A government survey calling for a river at the end of the first course, and thence meandering it, will be held to have included area claimed to have been an island when the survey was made, where evidence is that the shore line has not changed in 30 to 60 years prior to 1897, and where the government field notes called for a stream intersecting the meander line which would require inclusion of the area, but a line run by a surveyor on an assumed starting point did not intersect the stream and could not be supported except by assuming its nonexistence. The case is governed by the rule that monuments prevail over courses and distances.—Brown v. Milliman, 119 Mich. 606.

§ 39. Questions of law and fact.

General rules as to court and jury questions, see Instructions, I; Trial, VI.

Law and fact questions in adverse possession, see Adverse Possession, § 53.

¶ 188. What constitutes a boundary is a question for a jury, and is provable by any evidence which is admissible to prove any fact; e. g., actual occupation, ancient reputation, admissions of one in possession against his own interest, or agreements by the parties as to the place of the boundary.—Jones v. Pashby, 62 Mich. 614.

¶ 189. All bounds and starting points are questions of fact to be fixed by evidence.—Cronin v. Gore, 38 Mich. 381.

¶ 190. The location or starting point of a section line cannot be determined finally by the opinion of a surveyor, but is a question of fact for the jury.—Stewart v. Carleton, 31 Mich. 270.

¶ 191. Surveyors cannot finally determine boundaries; all bounds and starting points are questions of fact, to be determined by testimony; and ex parte surveys cannot be regarded.—Cronin v. Gore, 38 Mich. 381; Gregory v. Knight, 50 Mich. 61; O'Brien v. Cavanaugh, 61 Mich. 368; Fisher v. Dowling, 66 Mich. 370.

¶ 192. The true location of a disputed section line is a question of fact for a jury, where the evidence of the original surveyor and that of a subsequent one are in conflict.—Herpel v. Malone, 56 Mich. 199.

¶ 193. It seems that it would be proper to take the question of the location of a government corner from the jury, where surveyors, retracing the lines from field notes of the original government survey, located it and nothing contradicted them, although no witness trees were ever taken for the section in question, and the field notes called for a stake of which apparent traces were found by running lines from other monumented section corners; but at any rate it was not reversible error to submit it to the jury which found accordingly.—Woodbury v. Venia, 114 Mich. 251.

¶ 194. The question as to whether or not the defendant's fence was too far south of the true boundary of the tracts in question, was properly submitted to the jury, where there was testimony from which it might be found that plaintiff's claim was correct.—Pugh v. Schindler, 133 Mich. 314.

¶ 195. It is not error to submit to the jury as a question of fact the true boundaries of land described in a deed where such land faces a street which had apparently been widened by the owners of the lands adjacent thereto by adding ten feet to each side of said street as shown by the plat expressly referred to in such deed.—Rix v. Smith, 145 Mich. 203.

¶ 196. The location upon the ground of the boundary lines of lots described in the deeds as the north and south halves of certain lots, is a question for the jury, where the testimony tended to establish the correct line of the street lying to the north of the premises so divided, by running a line between a point at the northwest corner of the northeast corner of such premises, the location of such points being undisputed, that such line was found to coincide, not only with the platted distance from the section line, but also within an inch of the distance at which the street curb was actually laid, and the only testimony inconsistent therewith was that of an employee of the city who fixed the line for laying such curb, who testified that at the time of laying such curb there was a stake near the northwest corner 14 inches north from such straight line, but that there were also a number of stakes about there.—Turner v. Angus, 145 Mich. 679.

¶ 197. A., the owner of a parcel of land supposed to contain 40 acres, conveyed to B. and C. each 12½ acres of the north 25 acres, and to D. the south 15 acres of such parcel. It subsequently developed that the parcel did not contain full 40 acres. A boundary dispute arose between C. and D., and in a suit in ejectment brought by the latter, wherein C. claimed that D. had agreed to a line as established by a certain surveyor engaged by C., it appeared that the surveyor, without D.'s knowledge, had divided the land by giving to B. and C. the full amount described in their deeds, reducing D.'s parcel to the extent of the shortage. The evidence tended to show that B. and C. were parties to such arrangement. Held, that there was at

least a question of fraud for the jury, and that even a direction of verdict for the plaintiff would have been proper.—Dauer v. Hildebrandt, 110 Mich. 272.

¶ 198. It is a question for the jury whether the north and south side boundaries of a city lot had been fixed by mutual agreement and acquiescence of the adjoining property owners who at various times had made deeds to rectify deviations from the lot lines and had fixed party-wall rights thereby.—Scott v. Baird, 145 Mich. 116.

¶ 199. It is a question for the jury whether the defendant in ejectment is not estopped to deny that the wall standing at the north and the wall standing at the south of a city lot are party walls and mark the north and south boundaries of such lot, where the evidence shows that the defendant admitted an agreement to establish and subsequently to such agreement had obtained a deed establishing the south wall as a party wall, and that defendant had represented to plaintiffs that the north and south walls marked the north and south boundaries of such lot.—Scott v. Baird, 145 Mich. 116.

¶ 200. Where in ejectment to establish a disputed boundary line there was testimony to support the claim of plaintiff as to making a survey in 1872 to fix the line, and there was built a fence thereon which had been recognized by the parties for more than twenty years, such was sufficient to put it before the jury, and it was error to direct a verdict although it was claimed that the effect of this testimony had been destroyed by the cross-examination of the witness.—Coleman v. Robens, 146 Mich. 333.

¶ 201. In an action of ejectment arising out of an alleged encroachment of two inches on plaintiff's property by defendant's building, it was held that the property line between the adjoining lots was a question for the jury.—Outhwaite v. Gunn, 180 Mich. 66.

§ 40. Instructions.

General law of instructions, see Instructions.
As to correctness of assumed starting point, see also ante ¶ 146.

¶ 202. In an action involving title to land along the boundary between two concessions of a private claim, it is not error to instruct the jury that the question is where the true line between the two concessions lay unless a line had been established by adverse possession, where there is no evidence that there was any unsurveyed land between the two concessions.—Olin v. Henderson, 120 Mich. 149.

¶ 203. It was not error to tell the jury in the charge in an ejectment case involving the true location of fences, that plaintiff claimed that such fences started at a quarter post when built, where the charge did not state what the testimony was in that regard, and the whole question was left to the jury upon such evidence as there was as to where the quarter posts were.—Pugh v. Schindler, 133 Mich. 314.

¶ 204. When admissions of a party as to location of a boundary, made at the time of a survey had for the purpose of ascertaining the line, are introduced, he is entitled to an instruction explaining the effect to be given such admissions.—Sherrard v. Cudney, 134 Mich. 200.

¶ 205. Where a survey which attempted to reproduce the original regarded the lines of twenty-year-old fences, while a later survey, made after the fences had been removed, assumed a starting point, it was held that the jury should have been instructed to consider the relative situations of the fences in determining which survey best reproduced the lines as originally located.—Beaubien v. Kellogg, 69 Mich. 333.

¶ 206. In ejectment, where the government stakes were not discoverable, but where fences had been built, and there was conflict as to whether, when rebuilt, the fences were rebuilt on practically the same lines, the defendant was entitled to have the jury instructed as to the evidentiary value of the old fence.—Dawson v. Falls City Boat Club, 136 Mich. 259.

¶ 207. In ejectment where the true location of a fence was in dispute, an instruction telling the jury that the old crooked fence in question was better evidence of the line in its entirety and at all points than a survey lately made, was properly refused, and especially so, as from the counsel's statement there was no presumption that the fence as a whole was upon a true line if it was a crooked fence.—Pugh v. Schindler, 133 Mich. 314.

¶ 208. An instruction that the jury is not bound by surveys introduced in an ejectment trial, but must consider them with other evidence as to location of the monuments is correct.—Dawson v. Falls City Boat Club, 125 Mich. 433.

¶ 209. It is not error to refuse requested instructions relative to the inaccuracies of early plats, and that such should not be subject to correction by new surveys, where the only plat in the case was made in 1899, and the trial was soon thereafter.—Dubay v. Kelly, 137 Mich. 345.

¶ 210. An instruction in a disputed boundary case, bearing on the acquisition of the strip by adverse possession which in turn depended on whether a fence established on the supposed line had thereafter been moved, is misleading, where it refers to "that property" in telling the jury that if the fence was moved the possession thereby acquired was shifting and not the basis of adverse possession, and where under the evidence it was possible that it had been moved without passing over the true line or taking in any property that did not belong to the party.—Dawson v. Falls City Boat Club, 142 Mich. 615.

¶ 211. An instruction in an ejectment case, that "it will not do to permit boundaries to be disturbed and moved upon a survey made from an assumed starting point, without some proof of its being a true line, located and fixed by the government survey," was not misleading, as the jury had already been instructed that plaintiff's claim could only be established by a preponderance of the evidence.—Pugh v. Schindler, 133 Mich. 314.

§ 41. Destruction or disturbance of marks of boundary.

Relocation of boundaries where original marks have been lost or changed, see ante §§ 10-16, 26-38.

Criminal liability for defacement or disturbance, see Comp. L. 1915, §§ 2330, 15331.

§ 42. Political and public boundaries.

See generally, Counties, I; Municipal Corporations, I; Townships, I; Schools, II; State of Michigan.

Highway boundaries, see Highways, III.

Line of separation of navigable waters, see Navigable Waters, I.

Erection and control of boundary bridges, apportionment of expense and duty of maintenance, see Bridges, II, V.

Jurisdiction of crimes committed on or near boundary, see Indictment, III.

BOUNTIES.

TREATS of donations or subsidies in money or property for aid or encouragement of trade, industry or military service, excluding exemptions from taxation made on like considerations (see Taxes), aids or bonuses to railroads (see Railroads, V), and public land grants for like purposes (see Public Lands), and also excluding the power of the state or its subdivisions to apply public money or property for such purposes (see Constitutional Law; Municipal Corporations; Townships).

Analysis.

§ 1. In general.
§ 2. For furnishing men for military service.
§ 3. ——Assignment of bounties.
§ 4. ——Allowance and payment.

§ 1. In general.

Bounties for killing noxious animals and birds, see Comp. L. 1915, chap. 135, §§ 7244-7266.

¶ 1. A corporation which engaged in the manufacture of sugar so as to earn the bounty provided under Pub. Acts 1897, No. 48, which the court holds unconstitutional, is not entitled to have the bounty paid under the claim that Pub. Acts 1899, No. 263, providing for a tax to meet appropriations for which a tax is not otherwise provided, recognized the right of such corporation to have the bounties earned by it paid. The first act must be treated as if never enacted, hence not recognized.—Michigan Sugar Co. v. Auditor General, 124 Mich. 674. Writ of error dismissed in 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581.

§ 2. For furnishing men for military service.

Issuance of public bonds to pay bounties, see Municipal Bonds, I.

Mode of enforcing payment of bonds issued to pay bounties, see Municipal and Public Bonds, VI.

Township elections to validate allowance, see Townships, III.

¶ 2. Laws 1864, Act No. 23, providing for the payment of a state bounty of $100 to soldiers enlisting after its passage, and credited under any call or order made or issued since January 1, 1864, applies only to soldiers who enlisted under the call of February 1, 1864.—Smith v. Board of State Auditors, 85 Mich. 407.

¶ 3. Under the act of March 6, 1863, authorizing the payment of a state bounty to

volunteers in the military service of the United States, when the state authorities had offered a bounty they had no right to discriminate between the various classes of volunteers who came within the terms of the offer. A man drafted for nine months, and then allowed to volunteer for three years, was entitled to the bounty.—People ex rel. Blair v. Quartermaster General, 12 Mich. 191.

¶ 4. Where one enlisted March 12, 1864, and was credited to a town whose quota under the call of October 17 was not full, he was held not entitled to the bounty under Laws 1864, Act No. 23.—People ex rel. Lomane v. Hammond, 13 Mich. 247.

¶ 5. Where one enlisted after the quota of the town to which he was credited was actually filled, he was entitled to the bounty under Laws 1864, Act No. 23, notwithstanding the state authorities at the time supposed it was not filled.—People ex rel. Nichols v. Palmer, 19 Mich. 384.

¶ 6. Laws 1864, Act No. 23, authorizing the payment of bounties to volunteers from this state in the military service of the United States, was designed to distinguish between volunteers under the president's call of October 17, 1863, and those enlisting under the call of February 1, 1864, and to provide a bounty for the latter only.—People ex rel. Lomane v. Hammond, 13 Mich. 247.

¶ 7. The act authorizing the payment of a state bounty, not exceeding $50, to each volunteer from this state mustered in the national military service (Laws of 1863, p. 60), conferred on the governor a discretionary power in the exercise of which he might confine the bounty to such organizations, or such branch of the service, as, in his opinion, the public interest might require, provided it should be uniform to all coming within the terms of the order. The word "each" is to be understood only as restrictive of the amount that could be paid, and not as designating the persons who should be included within the offer of bounty.—People ex rel Hanselmann v. Quartermaster General, 14 Mich. 23.

¶ 8. Where the governor, by a published order, offered a uniform bounty of $50 to each volunteer who should enlist and be mustered into the service of the United States "in any regiment or battery," held, that the terms of such order did not embrace volunteers in a separate company, like the state guard.—People ex rel Hanselmann v. Quartermaster General, 14 Mich. 23.

¶ 9. A substitute is not a volunteer within the meaning of the acts providing for bounties to volunteers.—People ex rel. Giddings v. Quartermaster General, 25 Mich. 340.

¶ 10. Under municipal resolutions authorizing the payment of bounties to such as shall give satisfactory evidence that they have furnished a recruit, one enlisting of his own motion, and without solicitation, might "furnish" himself as an enlisted man.—Roberts v. Field, 27 Mich. 337.

§ 3. ——Assignment of bounties.

¶ 11. Where the right to a state bounty has been assigned, a petition by the assignee for a mandamus to compel the quartermaster general to issue his certificate of the amount due thereon, must show that the latter has had notice of the assignment, or of evidence thereof, and has been requested to issue the certificate.—People ex rel Giddings v. Quartermaster General, 25 Mich. 340.

¶ 12. Laws 1864, Act No. 23, only authorized the raising of money to pay bounties, as such, to the person enlisting; when, therefore, a recruit, "for value received," assigned his certificate of enlistment, together with the bounty to be paid for such enlistment and additional bounty was afterwards granted by municipal action taken under said act, it was held that he had assigned only so much as had been actually advanced to him by the assignee, and that whatever additional bounty might afterwards be drawn by the assignee on the strength of the assignment was drawn to the use of the recruit.—Roberts v. Field, 27 Mich. 337.

¶ 13. The assignment by a recruit of a future bounty coming from a municipal corporation was held sufficient evidence, as between the assignee and the corporation, that the bounty had been paid or purchased by the assignee; as between the assignee and the recruit, however, it is not conclusive evidence of such payment, but may be explained by oral evidence, like a mere receipt.—Roberts v. Field, 27 Mich. 337.

§ 4. ——Allowance and payment.

Persons entitled, see ante § 2.
Refundment by townships, see Townships, III.

¶ 14. By Laws 1881, Act No. 173, the quartermaster general's authority in allowing claims for bounties for soldiers, under Laws 1864, Act No. 23, is revoked, and such claims, like others against the state, must be established before the board of state auditors, consisting of the secretary of state, state treasurer, and commissioner of the state land office.—Smith v. Aplin, Auditor General, 80 Mich. 205.

§ 15. The proviso to Laws 1881, Act No. 183, repealing the war bounty acts of 1864 and 1871, recognized and preserved the rights of soldiers to their bounties under such acts, and is a waiver of the statute of limitations. —Smith v. Aplin, Auditor General, 80 Mich. 205.

BOWLING ALLEYS to BREACH.

Cross-References.

Bowling alleys—
Licensing and regulation, see Licenses; Municipal Corporations, IX.
As nuisances, see Nuisances.
Boycott—
See Conspiracy; Combinations and Monopolies.
Brakes—
Injuries from defects in, see Carriers; Master and Servant, III; Railroads, VIII; Street Railways, IV; Highways, XIII; Workmen's Compensation Law.
Branch banks—
Power to establish, see Banking, § 52.
Branch railroads—
See generally Railroads; Street Railways.
Brands—
Trade marks and labels, see Trade Marks.
Misbranding food containers, see Food.
Regulations permissible under Interstate Commerce Law, see Commerce.
Brandy—
See Intoxicating Liquors.
Brawls—
Offense of fighting or disorderly conduct, see Crimes, II; Indictment.
Breach—
Of contract, see generally Contracts, VII; Sales; Vendors and Purchasers; and other specific contract topics.
Of covenants and conditions, see foregoing cross-reference and also Covenants for Title; Landlord and Tenant; Insurance; Fraternal Associations; Indemnity; Guaranty; Suretyship; etc.
Of duty, see Negligence; and specific topics such as Carriers; Master and Servant; Railroads; Agency; Attorneys; Trusts; etc.
Of the peace, see Arrest, I; Crimes; Indictment.
Of promise to marry, see Breach of Promise.
Of trust, see Trusts; Estates of Decedents; Agency; Corporations, XVII; etc.
Remedies and procedure to redress breach of contract or duty, see topics before referred to.
Preventive remedy, see Injunctions.
Coercive remedy, see Mandamus.
Specific enforcement, see Specific Performance.

BREACH OF PROMISE TO MARRY.

TREATS of civil liability for breach of a promise to marry, excluding the measure and proof of damages (see Damages), and the tort of seduction under promise of marriage (see Seduction).

Analysis.

§ 1. Contract or promise and breach in general.
§ 2. Actions and pleading.
§ 3. ——Presumptions and burden of proof.
§ 4. ——Evidence.
§ 5. ——Evidence as to promise.
§ 6. ——Instructions and jury questions.

§ 1. Contract or promise and breach in general.

Capacity to marry and validity of marriage, see Marriage.
Legality of contracts in general, and of contracts based on consideration of marriage, see Contracts.
Meretricious considerations for promises in general, see Contracts, IV.

§ 1. A breach of promise suit does not lie upon a minor's promise to marry.—Frost v. Vought, 37 Mich. 65.

¶ 2. Where a man who is engaged to one woman marries another, he has put it out of his power to marry the first, who has thus an immediate right of action against him for breach of promise.—Sheahan v. Barry, 27 Mich. 217.

¶ 3. It cannot be said as matter of law that persons otherwise competent, occupying immoral relations, may not contract marriage with each other.—Foss v. Brown, 151 Mich. 119.

¶ 4. Where a woman submits herself to the sexual embraces of a man solely in consider. tion of his promise to marry her if she becomes pregnant, such consider tion is immoral and a promise based thereon is void. —Gagush v. Hoeft, 198 Mich. 263.

§ 2. Actions and pleading.

General law of procedure, see specific topics treating thereof.

Capias ad respondendum against defendant, see Civil Arrest.

Damages and measure of damages, see Damages, II, E.

Aggravation and mitigation and excessiveness of damages, see Damages, V, IX.

Pleading damages, see Damages, X.

Inadmissible arguments of counsel, see Argument of Counsel.

¶¶ 5, 6. A declaration for breach of promise averred a promise to marry plaintiff (1) on request; (2) within a reasonable time; and (3) generally. Held, that evidence was admissible to prove a promise to marry when certain buggies were finished, at all events where this promise was only a part of what had passed between the parties, on which the suit was based.—Bennett v. Beam, 42 Mich. 346.

§ 3. ——Presumptions and burden of proof.

¶ 7. In an action for breach of promise to marry it is not necessary for the plaintiff to prove that defendant was of full age when the contract was made.—Simmons v. Simmons, 8 Mich. 318.

§ 4. ——Evidence.

Competency of evidence in general, see Evidence.

Evidence as to damages, see Damages, XI.

Mode of examination and cross-examination of parties, see Examination of Witnesses.

¶ 8. In an action to recover damages for breach of promise of marriage, aggravated by claimed seduction, a wide range of inquiry as to the conduct of the parties during the existence of the claimed contract, as well as the causes attending the breaking of the engagement is permissible.—Bischoff v. Harris, 198 Mich. 59.

¶ 9. It is not error to allow proof that defendant borrowed money of plaintiff, and renewed his notes therefor immediately before marrying another, as it is important for the jury to understand as fully as possible the mutual conduct of the parties during the existence of the contract, as well as the causes and circumstances attending the breaking off of the engagement.—Simmons v. Simmons, 8 Mich. 318.

¶ 10. Proof of the frequent intermarriage of the ancestors of the parties—who are cousins—and of the evil tendency of the marriage of relations in producing deformed or sickly and imbecile children, is incompetent where the contract was not broken on any such ground.—Simmons v. Simmons, 8 Mich. 318.

¶ 11. It is not clearly error to permit a father to testify in a breach of promise suit brought by his daughter that after he had given his consent to defendant, upon the latter's telling him that the lady had consented to marry him, the pair conducted themselves towards each other as though they were engaged. This is not to show the mutual promise, but to show that defendant trifled with plaintiff's affections.—Vanderpool v. Richardson, 52 Mich. 336.

¶ 12. Where in reply to a note from plaintiff, asking why he did not call, defendant, sued for breach of promise to marry, had replied that it was because his proposal of marriage was never accepted and he had concluded that his company was not wanted and there was no use in coming, her ensuing letter stating that she thought he knew his offer was accepted, and that she would not have him think otherwise, is admissible in her behalf as part of the res gestæ.—Rutter v. Collins, 96 Mich. 510.

¶ 13. Judgment in favor of a woman complaining of breach of promise was, by the equal division of the Supreme Court, left standing, where the error assigned was that plaintiff's witnesses had been allowed to state what she had, in defendant's absence, told them, tending to show that she was engaged to him.—McPherson v. Ryan, 59 Mich. 33.

§ 5. ——Evidence as to promise.

¶ 14. Plaintiff, in a breach of promise suit, may put in evidence the letters written by her to defendant before she broke the engagement.—Vanderpool v. Richardson, 52 Mich. 336.

¶ 15. Where plaintiff in a breach of promise suit has put her letters to defendant in evidence, defendant may put in evidence the replies.—Vanderpool v. Richardson, 52 Mich. 336.

¶ 16. Where defendant admits making an offer of marriage which plaintiff testifies she accepted, while defendant testifies there was no acceptance, the subsequent conduct of the parties is admissible as bearing on the truth of their respective stories as to what occurred when the offer was made, but their conduct from the time of their introduction cannot be considered in determining their agreement.—Rutter v. Collins, 96 Mich. 510.

¶ 17. In a breach of promise suit, the plaintiff claimed she cohabited with defendant trusting to his agreement that he would marry her. Held, evidence was admissible of acts and declarations made in defendant's presence to show that he held out the plaintiff as his wife and treated her two adopted children as his own.—Duff v. Judson, 160 Mich. 386.

¶ 18. Surmises and conclusions of witnesses, based on what they have observed of mutual behavior, are not sufficient to prove a promise of marriage; the facts observed should be shown.—Vanderpool v. Richardson, 52 Mich. 336.

¶ 19. Where in an action for breach of contract to marry, plaintiff confesses to the establishment of immoral relations with defendant, it cannot be said as matter of law that her testimony does not tend to prove the mutual promises relied on, made when she was legally competent to contract.—Foss v. Brown, 151 Mich. 119.

§ 6. ——Instructions and jury questions.

In general, see Instructions; Trial, VI.
Instructions as to damages, see Damages, XII.

¶ 20. In an action for breach of promise and seduction a charge to the effect that if the promise was made solely in consideration of sexual intercourse, and to be fulfilled in case of pregnancy, it was void, held correct.—Jaskolski v. Morawski, 178 Mich. 325.

¶ 21. In an action for breach of marriage promise, aggravated by seduction, a requested instruction that if the jury found that the only consideration for the promise, if any promise was made, of marriage, was a promise that, if plaintiff would submit herself to have sexual intercourse with defendant, he would marry her in case she became pregnant, and that was the only consideration, the contract rested upon an immoral consideration and was void, held to be improperly refused.—Gagush v. Hoeft, 198 Mich. 263.

¶ 22. Alluding in the charge in a breach of promise case to "the contract under which this suit was brought," while giving the rule of damages, does not assume that there was a contract to marry, where the immediately succeeding part of the charge expressly disavowed that meaning and left it to the jury whether there was a contract proven.—Rutter v. Collins, 103 Mich. 143.

¶ 23. A charge: "Taking into consideration what I have said, and what has been given you bearing upon the subject during the courtship, and after the time it is claimed that the contract was made, which has been allowed to go to you as bearing upon the proposition of her acceptance and the forming of a contract, looking the whole situation of the parties over in connection with all the evidence here, you are to decide who is in the right in that contention," cannot be regarded as having misled the jury as to the question so left to them, where the quoted language followed a charge which was explicit on the sole subject of an offer by defendant and an acceptance by plaintiff of a proposal to marry.—Rutter v. Collins, 103 Mich. 143.

¶ 24. In a breach of promise suit, it was not prejudicial error for the trial court to suggest in his charge that the Supreme Court and a certain judge had not considered an alleged compromise a bar to the suit, where the court added that if the compromise was made without fraud or deceit it would bar a recovery by plaintiff.—Duff v. Judson, 160 Mich. 386.

BREAD to BRIBERY.

Cross-References.

Bread—
Validity of regulations of baking and selling, see Constitutional Law; Municipal Corporations, IX.
Food regulations, see Food.
Breaking and entering—
See Crimes, II (burglary); Indictment; Trespass.
Breaking doors—
In service of process or in making arrest, see Process, II; Arrest; Sheriffs, IV (liability for).
Breeding agreements—
See Animals, § 24.
Breed of animals—
Evidence as to, see Evidence, VI.
Bribery—
See Crimes, II; Indictment.

BRIDGES.

TREATS of the law relating to establishment, construction, use and maintenance of bridges, public or private, for the use of travelers. It excludes matters relating to toll bridges and the franchise to build and operate them (see Toll Roads and Bridges), and rights in waters affected by bridges (see Navigable Waters; Waters), and bridges and viaducts as part of railroads or railroad crossings (see Railroads).

Analysis.

I. Franchises, Construction and Regulation.

§ 1. Franchises and authorization.
§ 2. Power and duty of construction.
§ 3. Regulation and manner of construction.

II. Use, Control and Maintenance.

§ 4. In general.
§ 5. Responsibility and control.
§ 6. Boundary bridges.
§ 7. Joint use and liability.

III. Injuries to Users and Adjacent Property.

§ 8. Duty and negligence as to construction, inspection and repair.
§ 9. ——Notice of defect.
§ 10. ——Means or ability to repair.
§ 11. Injury and proximate cause.
§ 12. Injury in unusual use.
§ 13. Contributory negligence.
§ 14. ——Overloading; heavy vehicles.
§ 15. Actions and pleading.
§ 16. Presumptions and evidence.
§ 17. ——As to structural conditions and notice thereof.
§ 18. ——Of contributory negligence.
§ 19. ——Weight and sufficiency.
§ 20. Questions of law and fact.
§ 21. Instructions.
§ 22. Liability for injury to adjacent property.

IV. Injuries To, or Crimes Respecting Bridges.

§ 23. Liability in general.
§ 24. Indemnification of public by primary wrongdoer.
§ 25. Who can sue.

V. Public Erection, Upkeep and Expense.

§ 26. Obligation to erect and repair.
§ 27. ——Enforcement of duty.
§ 28. Boundary line bridges.
§ 29. ——Apportioning expense.

Condemnation of land otherwise than as part of highway for erection of bridge, see Eminent Domain.
Proceedings to lay out and condemn land for highways, see Highways, II, B.
Pleading duty to erect bridge in mandamus to compel it, see Mandamus, V.
Bridge as nuisance, see Nuisances.
For the statute law relating to bridges, see Comp. L. 1915, Part Three, chaps. 86-92, being the Highway, Bridge and Ferry Law, as revised and consolidated. For details consult the indexes to the published statutes.

I. FRANCHISES, CONSTRUCTION AND REGULATION.

§ 1. Franchises and authorization.

Franchises, construction and operation of toll bridges, see Toll Roads and Bridges.
Duration of toll bridge franchise granted to a corporation, see Franchises; Toll Roads and Bridges.
Bridging of navigable waters, see Navigable Waters, II.
Authorization of bridge over navigable water, see Navigable Waters, II.
Sufficiency of petition for construction of bridge over navigable waters, see Navigable Waters, II.

¶ 1. The previous refusal of a petition to have a bridge constructed between two townships and the cost apportioned, need not be reconsidered by the board of supervisors in order to make valid the grant of a new petition subsequently filed.—Ionia Co. Sup'rs v. Ionia Circuit Judge, 134 Mich. 412.

¶ 2. Authority granted by the board of county supervisors in 1891 for the construction of a bridge by a city, is sufficient to cover the construction of a bridge in 1902. —Kundinger v. City of Saginaw, 132 Mich. 395.

§ 2. Power and duty of construction.

Public duty to erect bridges, see post § 26.
Corporation or public division responsible for bridge, see post II.
Legislative interference with local self-government relating to bridges, see Constitutional Law, II.
Limitations on the legislative power of bridging navigable streams, see Constitutional Law, IV.
Constitutional limitations on public indebtedness or expense, see Constitutional Law, XV.
Condemnation of land for erection of bridge, see Eminent Domain.
Establishment of highway to which bridge may be incident, see Highways, II.
Enforcement of duty to erect public bridges, see Mandamus.
Authority for the bridging of navigable waters, see Navigable Waters, II.
Ratification of erection of bridge by legalization of toll rates, see Navigable Waters, II.

¶ 3. Where the proceedings for laying out a highway were regular and the said highway was to extend across a millpond, although the petition made no reference to the construction of a bridge, such construction is necessarily implied.—Andrews v. Weckerman, 144 Mich. 199.

¶ 4. The duty of mill owners to build and maintain a bridge over a mill race is a common-law duty.—McRae v. Township of Hart, 179 Mich. 325.

¶ 5. Public Acts, 1909, No. 283, Ch. VIII, §§ 14-16 relative to the construction and repairing of bridges over mill races is an affirmance of the common-law duty and affords a means of benefit to the public.—McRae v. Township of Hart, 179 Mich. 325.

§ 3. Regulation and manner of construction.

Issue of bonds for building of bridge by city, see Municipal and Public Bonds.

¶ 6. A township which has acquired a right to construct a highway across a millpond is not limited to any particular form of structure, but is under obligation to leave an opening sufficient for the flow of water at ordinary stages of high and low water, and having done this might erect a solid embankment from the shores to the bridge over such opening, and any injury resulting to the water power is damnum absque injuria.—Andrews v. Weckerman, 144 Mich. 199.

II. USE, CONTROL AND MAINTENANCE.

Public duty to erect and keep up bridges, see post V.

§ 4. In general.

Right of recovery for injury to bridge, see post § 25.

¶ 7. Under 1 Comp. L. 1897, § 3441, and 2 Comp. L. 1897, §§5516-5521, the bridge commission acquiring a drawbridge from Bay County, and controlling the same, is acting in the interest of the public, and is not liable as an independent corporation for torts to third persons arising from the negligent operation of the bridge.—Scharman v. Bay County Bridge Commission, 158 Mich. 77. (Blair, C. J., Moore, Montgomery and McAlvay, JJ., dissenting.)

§ 5. Responsibility and control.

Degree of care required in maintenance of bridge, see post §§ 8-10.
Power of legislature to interfere with control of bridge by city authorities, see Constitutional Law, II.
Officers intrusted with care and custody of bridges within city limits, see Municipal Corporations, VIII.

¶ 8. In an action for personal injuries caused by defective railing on a bridge over a mill race on a state road within the corporate limits of a village, the road having been laid and the bridge built before the incorporation of the village, under Comp. L. 1897, § 2775, and Public Acts 1909, ch. VIII, § 26, the authority to repair the bridge

vested in the township and not in the village, and hence the former and not the latter is liable.—McRae v. Township of Hart, 179 Mich. 325.

¶ 9. Since the public must use a bridge constructed over a mill race on a highway, negligence of the owner in failing to construct or repair the bridge may support an action by an individual lawfully using the highway and injured by defects in the bridge.—McRae v. Township of Hart, 179 Mich. 325.

¶ 9a. A railroad company which built a bridge over its tracks under contract with a city under which the company agreed to maintain the masonry and foundations at its own expense and to deliver the bridge to the city, was not liable for an injury sustained by a pedestrian because of defects in planking, after the bridge was turned over to the city, as the company was under no legal obligation to maintain the bridge, and the superstructure was to be under the control of the city to be maintained at its expense.—Wetherbee v. Michigan Cent. R. Co., 122 Mich. 1.

§ 6. Boundary bridges.

Proper plaintiff to sue for injury to bridge, see post § 25.

Duty to erect or reconstruct, and apportionment of expense, see post §§ 28, 29.

¶ 10. Two townships contracted under Laws 1861, No. 163, § 4, that each should maintain specified divisions of a highway upon the township line between them, and the agreement was performed for many years. Subsequently one township knowingly allowed a bridge on its division to remain out of repair, whereby plaintiff was injured. Held, that plaintiff could recover, although the contract was not recorded as required by the statute.—Hunter v. Township of Dwight, 157 Mich. 634.

§ 7. Joint use and liability.

¶ 11. In construing a contract by which a railroad company agreed to keep in repair the road-bed or road-way across the draw in a draw-bridge used by it, and by which a bridge company agreed to keep in repair the highway or roadway across said drawbridge used exclusively by it, it being mutually agreed that all other portions of said drawbridge, its piers and abutments, should be maintained in common by both of the parties, the wheels supporting the draw, upon which it rested and turned, are to be regarded as included with the "other portions of the draw-bridge" mentioned in the contract—Portage Lake Bridge Co. v. Wright, 78 Mich. 426.

¶ 12. In an action for injuries sustained as a result of the defective railing of a bridge over a mill race, both the owner of the mill and the township in which the bridge was situated may properly be joined as parties defendant, since though legal defense is open to one defendant it may not have been open to the other, as both defendants owed ultimately the same duty.—McRae v. Township of Hart, 179 Mich. 325.

III. INJURIES TO USERS AND ADJACENT PROPERTY.

§ 8. Duty and negligence as to construction, inspection and repair.

What constitutes negligence in permitting use for heavy vehicle, see also post ¶ 23.

Pleading negligence, see post § 15.

Necessity of railing as fact question, see post § 20.

¶ 13. The obligation of a township is to provide reasonably safe bridges under existing conditions and it is not liable for the failure to provide structures that will not sustain loads that could not reasonably be anticipated.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 14. Such means should be employed by township officers from time to time in making their examinations of bridges, as usually disclose the defects to be expected.—Stebbins v. Township of Keene, 55 Mich. 552.

Sufficiency of guard rail or barrier on bridges as dependent upon ability to resist automobiles and other vehicles, see note, 9 N. C. C. A. 1022-1025.

What are bridges within statute rendering public corporations liable for injuries thereon, see note, 12 N. C. C. A. 199-207.

§ 9. ——Notice of defect.

Presumptions and evidence as to notice of defects, see post § 17.

Presumptions from fact of repairs after notice of defect, see post § 16.

Questions of fact, see also post § 20.

Instructions as to notice of defects, see post § 21.

¶ 15. The failure of a township to keep a bridge in a reasonably safe condition for travel is not a ground of recovery, unless knowledge or notice of the existence of the defect and an opportunity to remedy it is shown, and such notice is not inferable from a mere failure to seasonably inspect.—Pearl v. Township of Benton, 123 Mich. 411.

¶ 16. Those whose duty it is to keep a bridge in repair may be charged with notice of a deficiency, if, when repairs are going

on, caused by suspicious appearance in one part of the timber, a full examination is not made.—Stebbins v. Township of Keene, 60 Mich. 214.

¶ 17. A city was not liable for an injury sustained through the absence of a short board forming part of the floor of an iron bridge which was first observed to be loose on Saturday night preceding the Tuesday on which the accident occurred, where the board had been put back in place and thus gave no sign of the defect, and where the city had no notice and there was no evidence from which notice could be properly inferred; the mere neglect of the city to inspect not being actionable under Comp. L. 1897, § 3441 et seq., imposing liability for injuries sustained upon a defective bridge provided the city had reasonable notice of the defect.—Thomas v. City of Flint, 123 Mich. 10.

¶ 18. Notice to a contractor that a bridge was not properly built would not be notice to the town that such bridge was weak, such contractor not being an officer of the town. —Moore v. Township of Hazelton, 118 Mich. 425.

§ 10. ——Means or ability to repair.

¶ 19. A township which elected to maintain its highways and bridges, not by general taxation as provided by the general highway act, Comp. L. 1897, § 4104-4114, but by the labor of the inhabitants, under chapters 2 and 3, sections 4072-4103, was not relieved from the obligation to keep its highways in repair as provided by Pub. Acts 1887, Act No. 264, because it had neither the means nor the authority to comply with such act; as the township had authority to make repairs under sections 1, 2 and 3 of chapter 7 of the highway act, and was therefore not relieved from liability for a personal injury sustained upon a bridge.—Pearl v. Township of Benton, 136 Mich. 697.

§ 11. Injury and proximate cause.

Instructions, see post § 21.

¶ 20. Where plaintiff's horse, frightened by a hole in a bridge, backed against the railing of the bridge, which gave way and threw plaintiff below, the defective condition of the bridge is the proximate cause of the injury.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 21. A township is not responsible for injuries to a driver of a vehicle, caused by a horse being frightened because of a large crack in the snow on the bridge, as the want of barriers was not the proximate cause of the injury, but a remote cause, and the township is liable only where the negligence complained of is the proximate cause of the injury.—White v. Township of Riley, 121 Mich. 418.

¶ 22. Under Comp. L. 1897, §§ 5516, 5517 (How. 2d Ed., §§ 4239, 4240), a city is liable in a civil action for the death of an occupant of an automobile, which was driven by the owner, due to the failure of the bridge tender to close the gates on the approach to a drawbridge while the bridge was up, resulting in the automobile going into the river and drowning such occupant.—Beach v. City of St. Joseph, 192 Mich. 296.

§ 12. Injury in unusual use.

Overloading as contributory neglect, see post § 14.

Question for the jury as to what load a bridge must be able to sustain, see post ¶ 56.

Instructions, see post § 21.

¶ 23. Where the driver of an engine was warned to use planks in crossing a bridge, and told by the highway commissioner that it would be safe if planks were used and probably was safe anyway, and planks were used but the engine fell off the planks and through the bridge, the township, not being an insurer, was not liable though the running off the planks was not due to plaintiff's negligence.—Comstock v. Township of Georgetown, 137 Mich. 541.

§ 13. Contributory negligence.

Mode of questioning of plaintiff as to carelessness, see Examination of Witnesses, II.

Presumptions and evidence as to, see post §§ 18, 19.

Questions for jury, see post § 20.

Instructions as to contributory negligence, see post § 21.

¶ 24. There is contributory negligence in driving across a bridge so recklessly and turning off from it so abruptly as to suffer injury in consequence of catching the wheel in or upon some crack or obstruction not in the traveled part of the way. And it is no excuse that others are similarly careless, especially if one is not familiar with the bridge and cannot therefore rely upon the carelessness of others.—Abernethy v. Township of Van Buren, 52 Mich. 383; Beckwith v. Township of Van Buren, 66 Mich. 89.

¶ 25. One, who starts to cross a bridge when a vicious bull is being driven across and is tossed by the bull, is not contributorily negligent if ignorant of the bull's vicious disposition.—Barnum v. Terpening, 75 Mich. 557.

¶ 26. Plaintiff was injured by his team and wagon falling off a bridge without rail-

ings, in the night-time, and sued defendant township. He was familiar with the bridge, but did not go ahead of the team to find his way. Held, he was not as matter of law guilty of contributory negligence.—Priebe v. Township of Moorland, 162 Mich. 110.

¶ 27. A bicyclist misled by the moonlight and shadows on a bridge, which is not in alignment with the road, who turns from one side of the road to the other for a better path and thereby falls off the bridge, which is not protected by a rail, cannot be said to be guilty of contributory negligence as a matter of law.—Lauder v. Township of St. Clair, 125 Mich. 479.

¶ 28. A drawbridge was opened with no signal of danger except a bell placed upon it. The night was dark, and a bicyclist approaching at a moderate speed ran into the open bridge and was drowned. There was evidence that he looked both up and down the river and directly ahead while approaching. Held, he was not, as a matter of law, guilty of contributory negligence.—Scharman v. Bay County Bridge Commission, 158 Mich. 77. (Brooke and Grant, JJ., dissenting.)

§ 14. ——Overloading; heavy vehicles.

Evidence as to, see also post § 18.

¶ 29. One who crosses a bridge with an unusually heavy load does so at his own risk.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

§ 15. Actions and pleading.

Joinder of owner of mill race and township as defendants in action for negligence in repairing bridge, see ante ¶ 12.

General law of pleading and practice, see Pleading, and other specific practice topics.

¶ 30. A declaration for causing the death of plaintiff's intestate alleged that the planks in the bridge where the accident occurred were loose, and the stringers uneven, so that the planks were liable to slip off and turn over, and thereby to trip horses, and that decedent's horses became entangled in the loose planks and thereby tripped. The evidence showed that there was a broken plank and a hole in consequence thereof, and that one of the horses driven by decedent had stepped into the hole, whereby the team became frightened, resulting in the injury complained of. Held, no variance.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 31. Under a declaration that plaintiff's horse, while alarmed at a hole in the bridge, backed against the railing, which giving way the vehicle and its contents were precipitated below, it is immaterial whether the proof shows that plaintiff was precipitated from the bridge itself or from the abutment of the bridge.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 32. Plaintiff's intention to rely upon structural as well as surface defects in a bridge, by the collapse of which she claims to have been injured, is sufficiently indicated by the averment in her declaration that defendant allowed its sidewalk and bridge "to become and remain broken, torn up, and out of repair, and not reasonably safe and convenient for public travel," and that, "while the plaintiff was walking over said walk and bridge, said sidewalk and bridge, by reason of its being in an unsafe, broken, torn up, and out of repair condition, broke and fell into the river." So held, at least, where, though no demurrer had been interposed, want of notice of the exact nature of the claim was urged to defeat the verdict.—Snyder v. City of Albion, 113 Mich. 275.

¶ 33. In an action for injury from a defective highway, which injury was caused by a horse's backing off from an unguarded approach to a bridge, a variance of four feet between the evidence and the averment in the declaration as to the distance from the end of the bridge to the point at which the horse backed off is not fatal.—Ross v. Township of Ionia, 104 Mich. 320.

¶ 34. In an action against a township for failing to maintain a bridge in proper condition the declaration alleged fully the defective condition of the bridge, and that because of such condition plaintiff's horse became frightened and sprang suddenly forward with great violence, whereby his wagon came against loose planks, and was suddenly checked, causing plaintiff to be jerked and thrown forward. Held, that proof of the dangerous condition of the bridge and that the horse stepped into holes caused by the loose planks, whereby the progress of the wagon was suddenly checked and plaintiff was thrown forward, sufficiently supports the declaration.—Hunter v. Township of Dwight, 157 Mich. 634.

¶ 35. A declaration for injuries on "a bridge" on Lake street in defendant village "constructed across Bear river and flume, as aforesaid," further alleging that for want of a railing plaintiff fell from the bridge over the raceway (flume), is sufficient to allow recovery respecting negligence in keeping up the bridge over the flume, which was a duty of the village; though there were in fact two adjacent bridges, one over the flume and one over the river, and it was the duty of the township at large to keep up the bridge over the river.—Williams v. Village of Petoskey, 108 Mich. 260.

¶ 36. An allegation in a declaration in an action for personal injuries against a township caused by the falling of a bridge, that the original construction of the bridge was defective in that the bridge which crossed a drain, rested on mudsills which were not sunk below the bottom of such drain, and that the bridge was not properly braced and strengthened and no piling or posts were driven to prevent the mudsills from dropping into the drain, does not warrant recovery on the ground of negligent construction, where each count showed that no such claim was relied on but that the accident was ascribed to a subsequent deepening of the ditch whereby the undermining by the action of the water occurred.—Pearl v. Township of Benton, 123 Mich. 411.

§ 16. Presumptions and evidence.

As to contributory negligence, see post § 18.
Weight and sufficiency, see post § 19.
In cases of injury on highways, see Highways, XII, H.

¶ 37. In the absence of any knowledge on the subject or anything apparent to observation that would lead to a contrary opinion, it may be presumed that a township has repaired a weak and shaky bridge after a lapse of a year from the time that it was known to be in that condition.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 38. In an action for injury resulting from the breaking of a bridge, evidence of new methods in building bridges is immaterial unless it appears that there was fault in not knowing and using them.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 39. As bearing on negligence in failing to repair a bridge it is not competent to show in what manner the city repaired the bridge after the accident.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 40. In a suit against a township for injuries received by plaintiff in being thrown from a bridge through the backing of his horse which took fright at a hole in the bridge, it is competent to show particular instances of other horses being frightened at the hole; such evidence tended to show the dangerous character of the bridge, and knowledge thereof on the part of the township authorities.—Smith v. Township of Sherwood, 62 Mich. 159.

¶ 41. One who sued a drawbridge company for the injury caused him by falling in the night into the gap while the draw was open, and who alleged that defendant negligently left it so without any protection against the opening, is entitled to show the situation and circumstances at the time of the accident, including the number of men in charge of the bridge, and the fact that during the month when it happened there was no bar or gate, or anything put up by the company when the draw was open.—Goodale v. Portage Lake Bridge Co., 55 Mich. 413.

¶ 42. In an action against a bridge company for personal injuries sustained by a man falling into the draw in the night, it is proper to show that a bull's-eye-headlight, so placed as to illuminate the toll-house, did not shine so as to show the opening when the bridge was drawn.—Goodale v. Portage Lake Bridge Co., 55 Mich. 413.

¶ 43. A traveler, at night, fell into an open draw on a toll-bridge. Held, in his action against the bridge company, that if negligence was shown a liability existed; that it might be shown that the bridge company knew its draw-tender to be incompetent, and that the light was so placed as not to show the opening, and generally the situation and circumstances existing at the time.—Goodale v. Portage Lake Bridge Co., 55 Mich. 413.

§ 17. ——As to structural conditions and notice thereof.

See also ante ¶¶ 37, 38, and § 9.

¶ 44. The general condition of a bridge at the time of an accident from its non-repair being in issue, it is proper to ask, after evidence had been offered showing the condition of the lugs which carried the floor joists where the accident occurred, about the condition of the lugs on the other part of the bridge.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 45. Where a city is sued for injuries from a defective bridge, evidence that a few days before the accident another person drove over it and found the planks loose, by reason of which his horses fell through, is competent as tending to show the bridge's condition before the accident complained of occurred, there having been no repairs meantime.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 46. Where the condition of a bridge at the time of an accident is in issue, evidence that some of its planks were loose and that its stringers were rotten less than a month before is admissible.—Lay v. City of Adrian, 75 Mich. 438.

¶ 47. To rebut testimony that the stringers of a bridge were not decayed, as alleged by plaintiff, the latter may in rebuttal interrogate as to the condition of the bridge a

witness who had walked over the bridge the day of the accident and before plaintiff left it.—Lay v. City of Adrian, 75 Mich. 438.

¶ 48. On issue of the strength of defendant's bridge evidence of the strength of the bridge to sustain heavy loads at the time of the trial and after the structure has been changed, is inadmissible.—Woodbury v. City of Owosso, 64 Mich. 239.

¶ 49. In an action against a city under the Highway Damage Act (Comp. L. 1915, § 4287 et seq.) for the death of the occupant of an automobile who met his death as the result of the car plunging into the river while a drawbridge was open at night, and alleged to be due to the failure of the bridge tender to lower the gates, which were operated by an electric button, and where defendant contended that the accident was due to a defective mechanism which had not been discovered at the time of the accident, held that evidence that the morning after the accident a defect was discovered in the mechanism of the gate which prevented its lowering when the button was turned the first time the defendant attempted to lower it after the accident, that neither the defendant nor its agents knew of any such defect before the injury, nor had any notice, and that one of defendant's officers, when the gate refused to work on a subsequent trial, ordered the draw closed, and fixed the defect so that it then worked, was erroneously excluded.—Beach v. City of St. Joseph, 192 Mich. 296.

§ 18. ——Of contributory negligence.

See also ante § 13.

Cross-examination of plaintiff as to carelessness, see Examination of Witnesses, II.

¶ 50. In an action for injuries caused by the breaking of a bridge while an engine was crossing it, testimony is admissible to show that it was negligent and unusual to take a tank full of water upon the bridge with the engine, such evidence being competent on the question of defendant's negligence and on plaintiff's contributory negligence.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 51. The exclusion of evidence that a threshing machine outfit consisting of a ten-horse engine and a tank full of water is an extraordinary load for a bridge is error where the other party to an action has been allowed to prove that such engines or larger ones frequented the highways of the township.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 52. In action for negligence in leaving a drawbridge unguarded by reason of a broken guard chain, where a defense of contributory negligence was made, it was proper to receive proof that on a prior occasion deceased rode his bicycle against the chain, since it tended to show knowledge of the situation; but it was inadmissible to show that he was habitually a careless rider and so inferentially was negligent on the occasion when he met his death.—Benedict v. City of Port Huron, 124 Mich. 600.

§ 19. ——Weight and sufficiency.

¶ 53. It is only necessary for a party injured by a defective bridge in an action for damages to show upon the subject, by proper testimony, knowledge on the part of the township officers of such a state of facts as reasonably and necessarily made it their duty to examine and act, in order to protect the traveling public, and their neglect to do so.—Stebbins v. Township of Keene, 55 Mich. 552.

¶ 54. Evidence that in rebuilding a bridge the township left the mudsills some 12 to 16 inches above the bottom of the drain, is insufficient to show that it was improperly constructed where it appeared that the mudsills were more than 5 feet distant from the edge of the drain at the bottom, and that the bridge stood for three years after rebuilding though subjected to repeated severe tests, and that it was weakened through extraordinary circumstances.—Pearl v. Township of Benton, 131 Mich. 275.

¶ 55. In an action against a township for damages alleged to have been sustained by reason of its negligence in permitting the supports of a bridge to become rotten, so that one side was lower than the other, the testimony of the highway commissioner that an actual measurement showed an incline of one inch, if unimpeached, must prevail as against the testimony of witnesses who confessedly rely upon estimates in placing the incline at several inches.—Perkins v. Township of Delaware, 113 Mich. 377.

§ 20. Questions of law and fact.

See also ante ¶¶ 26, 28.

¶ 56. The question whether a township is required to provide a bridge sustaining a load such as a threshing machine outfit consisting of a ten-horse engine and a tank full of water, is a question of fact upon which it is proper to receive evidence.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 57. The question of notice, in an action against a township for injuries caused by the fall of a bent under a bridge, should be submitted to the jury where there is testimony that the imperfect condition of the bridge was visible and generally known for

a long period.—Pearl v. Township of Benton, 131 Mich. 275.

¶ 58. A question as to whether a township had notice, prior to the date of an injury, that snow would create an appearance upon single-floor bridges at night to the effect that seams or cracks would appear wider than they really were, is properly given to the jury in an action for injuries sustained because of a horse's shying and backing up, causing a vehicle to fall off the bridge, and a driver to become injured.—White v. Township of Riley, 121 Mich. 413.

¶ 59. Whether a railing along the banked approach to a bridge is necessary for the safety of travelers is a jury question.—Shaw v. Township of Saline, 113 Mich. 342.

¶ 60. Where the evidence is conflicting, the question as to whether or not it is the duty of a township to maintain a rail upon the side of a bridge is for the jury.—Lauder v. Township of St. Clair, 125 Mich. 479.

¶ 61. In an action against a city for the death of an occupant of an automobile, who was riding with the owner, resulting from the automobile plunging into a river at night after a drawbridge had been raised, and alleged to be due to the failure of the bridge tender to lower the gates when the drawbridge was open, where it appeared that the owner of the automobile had passed over the bridge a number of times and knew that the drawbridge was provided with gates which were lowered when the drawbridge was opened, and other safeguards were provided in the way of lights and stop signals, held that it was a question for the jury whether the driver of the automobile acted as a reasonable and prudent man would act.—Beach v. City of St. Joseph, 192 Mich. 296.

¶ 62. In an action for injuries to a threshing machine outfit caused by the fall of a bridge, it is proper to submit to the jury the question of the plaintiff's knowledge and opportunities of knowing if the bridge has been repaired.—Moore v. Township of Hazelton, 118 Mich. 425.

¶ 63. In an action for personal injuries caused by an engine's breaking through a bridge, where it appears that plaintiff had been warned that the bridge was not very strong, the question of contributory negligence in attempting to cross with a tank full of water attached to the engine, is for the jury.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 64. Plaintiff on dismounting from his bicycle upon a bridge over a mill race on account of an accumulation of dirt washed upon the bridge either struck, pushed against or rested upon a temporary railing of the bridge, which being insecure gave way, causing him to fall some twenty feet into the stream below. In an action against the township and the owner of the mill his contributory negligence was held to be for the jury.—McRae v. Township of Hart, 179 Mich. 325.

¶ 65. Whether the owner of a horse, in permitting it to be driven unshod when the roads were slippery because of rains, was guilty of contributory negligence, precluding a recovery for damages resulting from its inability to keep its footing upon an inclined highway and bridge, which was unprotected by barriers, was a question for the jury, as was also the question of the negligence of the driver in not alighting before attempting to drive up the incline.—Perkins v. Township of Delaware, 113 Mich. 377.

§ 21. Instructions.

Presumption that person killed exercised due care as matter of self-preservation, see Negligence, V, B.

Instructions as to the foregoing presumption, see Negligence, V, C.

General law of instructions, see Instructions.

¶ 66. In an action against a township for personal injuries caused by an engine which broke through a bridge, requests to charge as to latent defects not being notice to the township are properly refused where it appears that the township officers had notice and claim to have given the information to plaintiff.—Comstock v. Township of Georgetown, 137 Mich. 541.

¶ 67. A statement, in a charge to the jury, of the law governing actual notice, of which there was no evidence, in an action for personal injuries alleged to have been caused by a defective bridge, is not reversible error where it was immediately followed by instructions regarding constructive notice upon which the jury alone could base their verdict.—Bratfisch v. Township of Mason, 120 Mich. 323.

¶ 68. Where the testimony was conflicting as to whether, for a long time prior to an accident, a bridge had been out of repair at the place where the accident occurred, and some recent repairs had been made, it was proper for the court to direct the jury's attention to the precise place in controversy, and to the disputed question whether it had been repaired there as bearing on notice of the defect.—Merkle v. Township of Bennington, 68 Mich. 133.

¶ 69. In an action for personal injuries alleged to have been caused by the defective

condition of a bridge. the fact that the court in the charge to the jury recognized the failure to erect railings for the bridge, which was only 3½ feet high and from 12 to 14 feet wide and 8 feet long, as negligence, is not reversible error where such instruction was immediately followed by one which limited the right to recover upon a finding relative to a hole in the bridge.—Bratfisch v. Township of Mason, 120 Mich. 323.

¶ 70. In an action against a city for the death of a bicyclist by riding through an open draw at night and drowning, it was not error to refuse to instruct that if the deceased rode over the draw because of the absence of the chain which he was looking for, plaintiff was entitled to recover, as the request for such charge left out other circumstances.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 71. In an action against a city for the death of a bicyclist by riding at night through an open drawbridge and drowning, it was not error for the court to fail to call the attention of the jury to differences in the condition of the bridge and surroundings at the time of the accident from those existing at the time of the trial, where the request was more in the nature of an argument than a proper request and the jury could not have failed to understand, if possessed of ordinary intelligence, that it was the condition upon the former and not the latter occasion that they were considering.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 72. In an action against a city for the death of a bicyclist by his riding on a moonlight night into an open draw and drowning, where the proof showed that the deceased knew he was approaching a place that might be dangerous, the refusal of a request to instruct the jury that the deceased had a right to assume that the city would do its duty in the premises, was not error when coupled with the implication that the deceased was under no obligation to look for danger if he could not reasonably be expected to see or expect that the draw was open.—Benedict v. City of Port Huron, 124 Mich. 600.

¶ 73. A man was driving a traction engine across a bridge. The bridge gave way and the driver's foot slipped and caught in the chain so that he was seriously hurt. Held, that in an action for the injury the court should have charged, if there was evidence to support the instruction, that the driver was negligent in having no guard for his foot if he knew of the danger, or in removing it if there had been one.—Stebbins v. Township of Keene, 55 Mich. 552.

¶ 74. In an action for injuries to a threshing engine through the collapse of a bridge, an instruction concluding with the words "There is something left at least that you can remember; that the engine went down and was injured; that the bridge gave way; that they were starting to use considerable caution by putting planks across, making it double plank floor; how the engine went off; how the bridge gave way; and all about it. That is something that we must leave to the judgment of eleven men" is erroneous as liable to create a wrong impression as to what would establish the defendant's negligence.—Conn v. Township of Brownstown, 126 Mich. 626.

¶ 75. In an action for injury to a person crossing a defective bridge with a team it was error to charge that the fright of a team was no defense unless the jury found it was caused by something else than the defect, for that places the burden upon the defense of proving that it was something else while in fact it was the plaintiff's duty to establish his own case and show the affirmative fact, if it existed, that the defect caused the fright.—Merkle v. Township of Bennington, 58 Mich. 156.

§ 22. Liability for injury to adjacent property.

Liability of assenting board of supervisors for creation of nuisance in erection of bridge, see Nuisance, I.

¶ 76. If even a lawful bridge or pier is constructed so near to a riparian owner's dock as to preclude its profitable use or to inconvenience its use, he is entitled to compensation.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

¶ 77. A city constructing a bridge in a street over a railroad track without eminent domain proceedings, is liable to an abutting owner for damages from depreciation in rental value resulting from such structure.—Phelps v. City of Detroit, 120 Mich. 447.

¶ 78. The act of the legislature in legalizing rates of toll fixed by a board of supervisors for the use of a bridge previously erected without authority of law does not cut off an existing claim for damages arising from the establishment of such bridge.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

IV. INJURIES TO, OR CRIMES RESPECTING BRIDGES.

§ 23. Liability in general.

Proper plaintiffs, see post § 25.

¶ 79. One who contracts for logs to be cut and delivered at the mouth of a stream

is not liable under Comp. L. 1897, § 4160, for injuries caused to a bridge through the negligence of the other party to the contract.—Overseer of Highways of Road District No. 4 of St. Ignace Township v. Pelton, 120 Mich. 31.

¶ 80. Under Comp. L. 1897, § 4160, providing for treble damages for injuries to a public bridge by logs drawn over it or in any other way, a party driving logs on a river is not liable for injuries caused by a jam and freshet after notice, except where the act is wilful or the negligence so gross as to amount to culpable and wanton negligence.—Overseer of Highways of Road District No. 4 of St. Ignace Township v. Pelton, 120 Mich. 31.

Injury to bridge by floating logs, see note, 2 N. C. C. A. 404-405.

§ 24. Indemnification of public by primary wrongdoer.

¶ 81. In an action by a township to recover indemnity against a person who wrongfully took down a good railing on a bridge over a mill-race, which was built and maintained by the owners of the mill-race, and substituted a temporary and inadequate one without authority from either the township or the owners of the mill-race, the township having paid a judgment in favor of a person injured as a result of falling into the stream while attempting to lean on the railing, a declaration that defendant wrongfully and without authority removed and took away substantial railings from the bridge and later substituted defective railings; that the plaintiff in the former action against the township, while lawfully passing over the bridge, and without any fault on his part, came into contact with such railing, and, as a result of its defective condition, was precipitated into the stream and injured, and that such person recovered a judgment, of a certain amount, which was paid by the city, held sufficient.—Township of Hart v. Noret, 191 Mich. 427.

¶ 82. Where a person, without authority from a township or from the owner of a mill-race, who built and maintained a bridge, took down a good railing thereon and later put up a temporary and inadequate one, and a person using the bridge was injured as a result of leaning on such defective railing and falling into the stream, the township, upon payment of a judgment recovered against it and the owners of the mill-race, may recover indemnity from the person who erected the inadequate railing, although it had notice of its defective condition, as the doctrine of no contribution between joint tort feasors is inapplicable.—Township of Hart v. Noret, 191 Mich. 427.

§ 25. Who can sue.

¶ 83. The overseers of two adjoining road districts cannot join as plaintiffs in an action for an injury to a bridge partly in each district, nor, on their refusal to sue, can the highway commissioners of the township bring a joint action.—Port Huron Highway Com'rs v. Stockman, 5 Mich. 528.

¶ 84. Damages to highways, bridges and culverts in a township by flooding cannot be recovered by the township either at law or in equity under the rule established in Township of Denver v. White River Log & Booming Co., 51 Mich. 472, and Township of Merritt v. Harp, 131 Mich. 174, but must be recovered by the overseer or commissioner of highways designated by the statute to sue for such damages.—Township of Merritt v. Harp, 141 Mich. 233.

V. PUBLIC ERECTION, UPKEEP AND EXPENSE.

Responsibility for control and maintenance in general, see ante II.
Liability for injuries as dependent on responsibility and control, see ante II.
What constitutes negligence in maintaining, see ante III.

§ 26. Obligation to erect and repair.

Notice of defect to fix duty and negligence, see ante § 9.
Boundary bridges, see post § 28.
Sufficiency of title of statute requiring joint action of city and township in rebuilding bridge, see Statutes, III.

¶ 85. Municipalities are under no legal obligation, outside of the constitution and statutes, to build bridges where no bridges ever stood before.—Fulton Iron & Engine Works v. Township of Kimball, 52 Mich. 146.

¶ 86. It is the duty of the highway commissioners of townships to build, rebuild or repair bridges and keep them in repair where they are not called upon to expend more than $1,000 (How. St., §§ 1379-1381).—Pigelow v. Brooks, 119 Mich. 208.

¶ 87. In a mandamus proceeding to compel commissioner of highways of a township to erect a bridge the "necessity of the public safety" mentioned in the statute (Comp. L. 1897, § 4131), refers to the bridge on the highway of which it is a part and not to a bridge on another highway several miles distant. The necessity of the public highway in question has been settled in the proceeding to lay it out. A bridge must be built so as to constitute an essential part of the highway in question.—Berube v. Wheeler, 128 Mich. 32.

Liability of county for failure to keep bridge in repair, see note, 14 N. C. C. A. 697 714.

§ 27. ——Enforcement of duty.

Mandamus to enforce duty to erect bridges, see Mandamus, III.

Interest sufficient to sustain mandamus to erect bridges, see Mandamus, I.

¶ 88. On the petition of private citizens, the circuit court has the power to mandamus the township highway commissioners to rebuild a bridge where the necessary appropriation is within the power of the commissioners and the road has never been vacated.—Brophy v. Schindler, 126 Mich. 341.

¶ 89. It is no defense to a petition in mandamus to compel the township highway commissioner to build a bridge that no money has been voted by the electors to construct the bridge; the statute provides for issuing orders and the method for collecting them (Comp. L. 1897, § 4130).—Berube v. Wheeler, 128 Mich. 32.

¶ 90. In a mandamus proceeding to compel the commissioner of highways of a township to erect a bridge, opinion evidence as to the necessity of a bridge over the stream is not competent.—Berube v. Wheeler, 128 Mich. 32.

§ 28. Boundary line bridges.

Effect of failure to record contract apportioning expense and duty of upkeep, see ante ¶ 10.

¶ 91. It is lawful for a township, with the authority of the board of supervisors, and by virtue of an express grant from the legislature, to assume voluntarily the erection and maintenance of a drawbridge over a navigable stream that is the dividing line between it and another township.—Dietrich v. Schremms, 117 Mich. 298.

¶ 92. Comp. L. 1897, § 4131, requiring the voters of a township to pass upon the raising of more than $2,000 for building or repairing any bridge in a township, relates to bridges wholly within the township and does not forbid the raising of a larger sum in each of two townships for a boundary line bridge as provided by Comp. L. 1897. § 4051-4056.—Board Sup'rs Ionia Co. v. Ionia Circuit Judge, 134 Mich. 412.

¶ 93. It is the duty of the several highway commissioners to rebuild a bridge on a town-line road at a point off of the town-line, where the authorities for both townships had regarded the deflected road in question as part of the town-line road and had for ten years recognized a joint obligation to construct and maintain the bridge.—Bigelow v. Brooks, 119 Mich. 208.

¶ 94. Where pursuant to notice duly served the highway commissioners and the township boards of two adjoining townships met to confer about the rebuilding of a bridge that had been destroyed by a freshet, and the officials of one refused to do anything, but a petition by the other township was presented to the supervisors requesting the rebuilding of the bridge, and the supervisors had passed such a resolution by a majority vote, such action is in substantial compliance with the provisions of Pub. Acts 1905, No. 306, providing for ordering the building of bridges between townships on application.—Horner v. Board Sup'rs Ionia Co., 147 Mich. 581.

¶ 95. In case of township authorities being unable to agree about the construction of a bridge on the town-line, How. St., § 1310a et seq., will not be given such retrospective action as would destroy the agreements between such townships lawfully made, existing at the date of its passage, and having been acted upon for years.—Bigelow v. Brooks, 119 Mich. 208.

§ 29. ——Apportioning expense.

¶ 96. In the absence of constitutional restrictions the legislature has power to provide for the erection of a bridge between two townships, and to repose in the board of supervisors the duty of determining the relative proportion of costs for each township.—Board of Sup'rs Ionia Co. v Ionia Circuit Judge, 134 Mich. 412.

¶ 97. Pub. Acts 1889, No. 62 (Comp. L. 1897, §§ 4051-4056), providing for the construction of bridges partly in one township and partly in another, and for the calling of a meeting of the board of supervisors on application of one of the townships, and providing that the board shall have the power and it shall be their duty to grant or refuse the prayer of the petitioner and to fix the character of the bridge and the proportions of cost to be borne by each of the townships, is a complete act in itself; and the action of the board thereunder may be by majority vote, although a two-thirds vote is required by Comp. L. 1897, §§ 2484 (as amended by Pub. Acts 1905, No. 98), and 2485, in taking the actions therein enumerated among which is that of determining the relative proportions which townships shall contribute to the building and repairing of joint roads and bridges. Accordingly Pub. Acts 1905, No. 306, which covers the same subject as the act of 1889 and repeals it, is also satisfied by a majority vote according to the usual order of procedure.—Horner v. Board Sup'rs Ionia Co. 147 Mich.

581. (See Comp. L. 1915, §§ 4441-4446 for the statutes which supplant Pub. Acts 1905, No. 306.—Editor.)

¶ 98. Where for many years the commissioners of two townships had allotted portions of the town line to each township, and where the portion of the highway in question would have fallen under the allotment to one of the townships, but where it also appeared that the construction of the bridges on the town line was not included in the allotment, and that the authorities had acted jointly in building and repairing such bridges, it was the duty of such two townships to rebuild the bridge in question and keep it in repair.—Bigelow v. Brooks, 119 Mich. 208.

BRIEFS to BRITISH LAWS.

Cross-References.

Briefs—
On appeal or error, see Appeal, XI, E.
On certiorari, see Certiorari.
Presentment of points and authorities on motions, see Motions and Orders.
Bringing in parties—
See Parties; Interpleader.
Pleading by or against new parties, see Equity, VII; Pleading.
British laws—
As part of common law, see Common Law.
As controlling law of controversy, see Conflict of Laws.

BROKERS AND FACTORS.

TREATS of agents and intermediaries for the sale or exchange of property, real or personal, for a compensation or commission from either or both of the parties, with or without having possession of the subject matter or the paper evidences of ownership.

Analysis.

§ 1. In general; nature of the relation.
§ 2. ——Factors and consignments.
§ 3. Creation, duration and termination of the relation.
§ 4. ——Agency to employ broker.
§ 5. Licenses and public regulation.
§ 6. Functions, duties and authority; double or single agency.
§ 7. Rights and liabilities of third persons.
§ 8. Ratification and disaffirmance.
§ 9. Rights and liabilities towards principal.
§ 10. ——Exclusive selling rights.
§ 11. ——Rights in property held or consigned.
§ 12. ——Stock and margin transactions.
§ 13. ——Sale or subpledge of stocks or goods.
§ 14. ——Purchasing from or selling to principal.
§ 15. ——Advances and expenses and lien.
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§ 17. ——Party liable; right to double compensation.
§ 18. Earning by negotiation of bargain.
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§ 21. ——Due to defective title.
§ 22. ——Due to insistence on modified terms.
§ 23. ——Due to conditions known by broker.
§ 24. Bargain made through others.
§ 25. Bargain with person introduced by broker.
§ 26. Bargain made over broker's head.
§ 27. Fraud or misdoing affecting compensation.

§ 28. ——Secret interest or profit.
§ 29. ——Taking commissions from other party.
§ 30. Specific agreement as to compensation.
§ 31. Measure and amount of compensation.
§ 32. Accounting and settlement with principal.
§ 33. ——Presumptions and evidence.
§ 34. Actions and pleading between broker and principal.
§ 35. Burden of proof.
§ 36. Admissibility of evidence.
§ 37. ——As to employment or revocation and party liable.
§ 38. ——As to performance by broker.
§ 39. ——As to failure of bargain made.
§ 40. ——Of specific agreement as to compensation.
§ 41. ——As to measure and amount of compensation.
§ 42. Weight and sufficiency of evidence.
§ 43. Questions for court and jury.
§ 44. ——As to terms and existence of broker's employment.
§ 45. ——As to procurement or failure of bargain.
§ 46. ——As to bad faith of broker.
§ 47. Instructions in general.
§ 48. ——As to employment of broker.
§ 49. ——As to controlling cause of sale.
§ 50. ——As to value of services.
§ 51. Actions between brokers.

[Note. Since the employment of a broker or a factor is a contract creative of an agency, there are many questions arising out of such an employment which present merely general propositions of law pertaining to Contracts or Agency. No attempt has been made to treat such matter in this topic, which is restricted to matter appearing to be specifically or distinctively pertinent to brokers or factors.]

§ 1. In general; nature of the relation.

General law of contracts, see Contracts.
For the law governing principal and agent generally, see Agency.
Broker's contracts, illegal as gambling contracts, see Gambling Contracts.
Consignment and sale distinguished, see also Sales, I.

¶ 1. Brokers who are paid a commission are agents for those for whom they buy.—Gregory v. Wendell, 40 Mich. 432.

¶ 2. Defendant made a written contract with plaintiff authorizing him to sell a homestead for a stipulated sum and agreeing that plaintiff might add to the price such sum as he saw fit for his service in making the sale, said excess to be plaintiff's sole compensation. Defendant's wife did not join with him in the contract. Held, the contract between plaintiff and defendant was a contract of agency and for commissions, and not a contract to sell land, and plaintiff was not precluded from recovering on same by the failure of the wife to join in the contract.—Hayes v. McAra, 106 Mich. 198.

§ 2. ——Factors and consignments.

Burden of showing relationship on accounting, see post § 33.

¶ 3. A commission merchant to whom goods are intrusted for sale is the agent of the consignor.—Hutchins v. Vinkemulder, 187 Mich. 676.

¶ 4. An arrangement which as between a manufacturer and a retail piano dealer would be regarded as a consignment for sale, is not altered in its character by the fact that it is between such a piano dealer and one who has bought certain pianos from a manufacturer.—Wasey v. Whitcomb, 107 Mich. 58.

¶ 5. A transaction is not prevented from being regarded as a consignment for sale from the fact that the consignee is to receive as commission the difference between the amount for which he sells the goods consigned and the valuation fixed in the consignment receipt.—Wasey v. Whitcomb, 107 Mich. 58.

¶ 6. A transaction is not the less a consignment for sale for the reason that the

factor sells in his own name.—Wasey v. Whitcomb, 167 Mich. 58.

¶ 7. The fact that on a consignment for sale the consignee agrees to pay interest upon the fixed value of the property consigned, does not alter the character of the transaction.—Wasey v. Whitcomb, 167 Mich. 58.

¶ 8. A transaction may be a consignment for sale though the consignee agrees to make good to the consignor any deficiency between the amount realized through a sale of the property on instalment contracts and the price at which the property was consigned.—Wasey v. Whitcomb, 167 Mich. 58.

¶ 8a. A transaction is not rendered the less a consignment for sale by the fact that the consignee is required to carry insurance upon the property consigned.—Wasey v. Whitcomb, 107 Mich. 58.

§ 3. Creation, duration and termination of the relation.

Termination of contract by specified notice, see post ¶ 98.
Liability for termination without right, see post § 9.
Rights of broker where agency is revoked and bargain made to avoid commissions, see also post § 26.
Evidence of creation and termination, see post §§ 37, 42.
Court and jury questions as to existence of employment, see post § 44.
Termination of broker's contract as jury question, see also post § 223.
Instruction as to employment of broker, see post § 48.
Estoppel to assert undisclosed principalship for one dealing with brokers, see Agency, ¶ 103.
Necessity of written contract for commissions on sale of real estate, see Comp. L. 1915, § 11981, ¶ 5.
Acceptance of contract to deliver mining shares, see Contracts, III, B.
Consideration sufficient to support broker's contract, see Contracts, V, A.

¶ 9. An agency for the period of 60 days only for both tracts of land was created, where in an action for a broker's commission, it appears that such broker in a letter to the owner, asked for prices on two tracts of land, stating that he had customers, and asking the "privilege of looking the lands for 60 days," and that in the owner's reply to such letter, the words granting an option for 60 days are found in a sentence relating to one parcel; since such letter of acceptance must be construed in connection with the letter of request.—Beadle v. Sage Land & Improvement Co., 140 Mich. 199.

¶ 10. A letter in which the owner of timber states the amount which he wishes to have cut, the manner in which it is to be cut, the terms of shipment, and the price, and states that the person to whom the letter is addressed "may have ten days from this date in which to place the stock," amounts to an employment of the person addressed as a broker.—Obenauer v. Solomon, 151 Mich. 570.

¶ 11. A contract of employment of a real estate broker need not be in writing and is not within the statute of frauds.—Hannan v. Prentis, 124 Mich. 417.

¶ 12. A broker who makes a purchase, with the understanding, and with the concurrence of the seller, that the contract is to be at once turned over to his principal, ceases his connection with it on payment of his commissions.—Gregory v. Wendell, 40 Mich. 432.

¶ 13. Where a stockbroker notifies a customer that he is retiring from business and desires to transfer the account to a succeeding broker, and makes a settlement that is accepted and transfers the account to his successor with whom the customer continues to deal, the settlement terminates the liabilities of the original broker on the day it is made and is conclusive unless tainted with fraud.—Vanderveen v. Ellis, 172 Mich. 615.

¶ 14. The right of a broker to sell land does not continue beyond the date of expiration of an option on such land secured by the broker for a customer, where, in an action for a broker's commission, it appears that the only right such agent had asked was the right to sell such land to such particular customer, with the privilege of "looking the lands for 60 days."—Beadle v. Sage Land & Improvement Co., 140 Mich. 199.

§ 4. ——Agency to employ broker.

Authority to employ subagents in general, see Agency, § 29.

¶ 15. Where application is made to an owner of land by a person known to her to be a real-estate broker, or who so represents himself at the time, to have the land placed in his hands for sale, and the owner refers the broker to her son to act for her with respect to such employment, she will be liable to the broker upon the contract made with the son regarding such employment.—Hensel v. Maas, 101 Mich. 443.

¶ 16. If the applicant for purchase of land was not known to the owner prior to the application, and did not represent himself as a broker, but, instead, held himself out as

an intending purchaser of the land, and thereupon the owner referred him to her son for the terms and conditions of the sale, such a holding out would not justify the broker in assuming that the son had authority to enter into a contract for his mother with him to find a purchaser of the land.—Hensel v. Maas, 101 Mich. 443.

¶ 17. Defendant Ferris told one Mingus that if he would find a buyer for defendant's real estate, defendant would give him all over $1,800 which he secured for the same. Mingus, assuming to be authorized by defendant, employed plaintiff as a broker to negotiate the sale and plaintiff supplied buyers. In a suit for commissions, held, in the entire absence of evidence showing that defendant authorized Mingus' dealings with plaintiff or ratified them, a verdict should be directed for defendant.—Benham v. Ferris, 159 Mich. 632.

§ 5. Licenses and public regulation.

General law of licenses and power of municipalities to regulate business, see Licenses; Municipal Corporations, IX.
Statutes relating to gambling contracts and validity of contracts as such, see Gambling Contracts.
Specific law regulating insurance agency or brokerage, see Insurance, III.
Regulation under the Blue Sky Law, see Comp. L. 1915, chap. 230.

§ 6. Functions, duties and authority; double or single agency.

Right to double compensation, see post § 17.
Right to commissions as affected by representation of third person or other property, see post § 27.
Taking commissions from other party as defense to action for compensation, see post § 29.
Sufficiency of evidence as to double or single agency, see post § 42.

¶ 18. A man placed certain property in the hands of agents for sale or exchange for farm property at his option, and agreed to render all the assistance he could in making such sale or exchange. Held, that the contract conferred authority to negotiate, and did not constitute the agents mere middlemen to bring the parties together.—Scribner v. Collar, 40 Mich. 375.

¶ 19. Where an agent for the sale of land conducted the entire negotiations and, after securing an offer from one party, communicated it to the other, who accepted it, an instruction based on the theory that the agent was a mere middleman, is erroneous.—Woods v. Palmer, 151 Mich. 30.

¶ 20. The authority of a real estate broker to sell property is not limited to a certain purchaser for whom an inquiry is sent by the broker as to the price thereof, where the communications between the owner and the broker are in the form of letters and telegrams from which it seems the question should be settled, and the first telegram to the broker in answer to the inquiry quotes a price and mentions that such owner has six purchasers.—Harger v. Watson, 176 Mich. 192.

¶ 21. Where a sale of perishable goods was consummated through brokers the latter have no authority to make a contract with the buyer on behalf of the seller to annul the contract and authorize him to sell them for the account of the seller where the goods on arrival proved defective.—Jones v. Bloomgarden, 143 Mich. 326.

¶ 22. Plaintiff manufacturer of pianos made a contract to consign to one Ray, a local dealer, pianos to be sold by the latter. Plaintiff reserved title in itself until Ray should fully remit for the pianos. Ray received a piano, put it in his salesroom, and traded the same to defendant for another piano. In replevin, held Ray acted outside the scope of his authority in trading instead of selling the piano, and nothing plaintiff had done estopped him from setting up such facts against defendant.—Starr Piano Co. v. Morrison, 159 Mich. 583.

§ 7. Rights and liabilities of third persons.

Right of broker to recover from opposite party for services, see post ¶ 64.
Right to hold opposite party for refusal to perform contract as negotiated, see post ¶ 63.

¶ 23. A broker contracting in his own name, without authority from others, to furnish lumber at an agreed price, does not contract as the agent of dealers with whom, for a commission, he places the order and the buyer is not liable to them on the contract.—Peirce v. Closterhouse, 96 Mich. 124.

¶ 24. Where a surety on an appeal bond accepts as indemnity an assignment of the appellant's interest in a quantity of apples in the hands of a commission merchant, relying upon the latter's representations that his lien upon the apples amounts to a certain sum, and that the apples are worth enough to make the assignment good security, being silent as to any further claims upon the apples, and where the merchant sells the apples at a price sufficient to cover his lien and the judgment appealed from, which has been affirmed and paid by the surety, the merchant is estopped, in a suit brought against him by the surety to recover the amount of the judgment, from setting

up as a defense that the apples were subject to further liens growing out of prior dealings between him and appellant.—Barkworth v. Isbell, 101 Mich. 40.

§ 8. Ratification and disaffirmance.

See also post ¶ 118.
Jury question as to ratification, see post § 43.
Of acts of agents in general, see Agency, II, C.

¶ 25. A merchandise broker, who is not authorized to make binding contracts, as brokers usually do, but to take orders subject to approval, and is paid a commission on approved sales, is so far the agent of the vendor as to warrant the supposition on the part of the vendee that the order will be honestly transmitted, and that the goods will be shipped according to its conditions, and, by accepting the order, the vendor ratifies the contract as made by the broker.—Hitchcock v. Griffin & Skelley Co., 99 Mich. 447.

¶ 26. Even if the doctrine of ratification can be invoked by an agent, such doctrine was inapplicable to a case where the seller of property did not know, when he consummated the sale in question, that the plaintiff had rendered services to him as a real estate agent.—Downing v. Buck, 135 Mich. 636.

§ 9. Rights and liabilities towards principal.

Particular rights, see also post §§ 10-15.
Right to compensation, see post §§ 16-31.
Extent of authority, see ante § 6.
Net price agreements, see post § 30.
Accounting and settlement, see post §§ 32, 33.
Misconduct, bad faith or fraud as defeating right to commissions, see post §§ 27-29.
Reserved right to cancel agency, see also post ¶ 98.
Termination of liability upon transfer of business to succeeding broker, see ante ¶ 13.
Sufficiency of evidence as to sale in violation of instructions, see post § 42, ¶¶ 194, 195.
Fraud or misdoing by broker as jury question in principal's action, see post § 46, ¶ 226.
Revocation of contract as breach, see also Agency, § 95.
Liability of bailees for loss in general, see Bailments, §§ 5-9.
Damages for breach of contract, see Damages, II.

¶ 27. The employment of a broker to procure a purchaser for land, which is indefinite as to time, cannot be terminated by the owner without notice to the broker.—Nolan v. Swift, 111 Mich. 56.

¶ 28. The fact that consignees have made advances on goods, which they had been instructed to sell according to their judgment of the market, "unless otherwise advised," could not justify their refusal to sell immediately on being ordered to do so, unless the sale was directed on terms that would prejudice them.—Howland v. Davis, 40 Mich. 545.

¶ 29. Sewing machines, shipped under a contract to be sold on commission, were destroyed by fire without the consignee's fault, and after he had given reasonable notice to the shippers to take them back. The contract did not make him agent of the shippers for any definite time, and did not transfer the title to the machines. Held, that after he had given reasonable notice to remove them he would be liable only for gross negligence, and the shippers could not recover for the loss.—Barrows v. Cushway, 37 Mich. 481.

§ 10. ——Exclusive selling rights.

In property tendered back to consignor and afterwards destroyed, see also ante ¶ 29.
Breach of agreement through sale to stranger by owner, see also post ¶ 115.
Questions of law and fact as to exclusive selling rights, see post § 44.
Instruction as to liability of factor in possession of the goods, see post § 47, ¶ 232.

¶ 30. A contract creating an exclusive brokerage for the sale of land for a certain time, providing a fixed commission for a sale by the broker and for the payment of liquidated damages by the owner in the event of a sale by the latter direct, is not unreasonable or unlawful.—Axe v. Tolbert, 179 Mich. 556.

¶ 31. Contract with a broker contemplating the sale of land at a certain price cont ining provisions for commission to the broker on effecting the sale within a definite time, and for the payment of liquidated dam ges in the event of a sale being made through the owner direct, construed as a contract for an exclusive and special agency for the sale of the land, although in the form of an option.—Axe v. Tolbert, 179 Mich. 556.

§ 11. ——Rights in property held or consigned.

See also ante ¶ 12.
Care required of consignee of goods with privilege of selection, see also Bailments, ¶ 24.

¶ 32. A commission merchant to whom goods are intrusted for sale is required to exercise ordinary prudence in caring for and disposing of the property intrusted to him and to duly account for it or its proceeds.—Hutchins v. Vinkemulder, 187 Mich. 676.

¶ 33. A commission merchant is not a purchaser of property intrusted to him for sale. —Hutchins v. Vinkemulder, 187 Mich. 676.

¶ 34. A commission merchant to whom goods are delivered for sale is a bailee in possession of property for the purpose of sale and accounting for proceeds thereof.—Hutchins v. Vinkemulder, 187 Mich. 676.

¶ 35. A letter from a retail dealer in jewelry to a wholesale dealer, stating that the former has a customer for a diamond, and asking the latter to send him a number of stones, and suggesting that he may have to keep them for ten days or two weeks, as the customer is slow on selection, is merely a request to send goods with the privilege of purchase; and the custody of the goods sent in pursuance of the letter is in the nature of a bailment.—Knights v. Piella, 111 Mich. 9.

§ 12. ——Stock and margin transactions.

Authority to sell to close out transaction, see post § 13.
Right to reimbursement for advances or expenses, see also post § 15.
Lien on stocks, see post § 15.
Rights of broker where stocks are fully paid for, see also post ¶ 43.
Evidence as to margin agreement, see post ¶ 141.
Court and jury questions as to nature of contract, see post § 44.
Gambling contracts and dealings in futures, see Gambling Contracts; and see also Contracts, IV.

¶ 36. The relation between a stockbroker and a customer buying stock on margin is that of pledgor and pledgee, the broker's ultimate rights in the stock being limited to the money he had advanced to purchase the same, with interest, and his commissions for transacting the business.—Austin v. Hayden, 171 Mich. 38.

¶ 37. As between a stockbroker and his customer it is the duty of the former always to have available and be prepared to deliver stock of the kind and quantity purchased by the customer, whenever full payment for the same is made.—Austin v. Hayden, 171 Mich. 38.

¶ 38. By a "marginal" purchase is usually meant a purchase where the full price or cost of the stock purchased is not given to the stockbroker at the time of the execution of the order of the customer, without regard to the percentage of the unpaid balance thereon, and without regard to whether the purchase was made as an investment with the expectation on the part of the customer of later making full payment and acquiring the ultimate possession of the stock, or as a speculation with the intention of selling the stock upon a rise in the market, and without any intention of making full payment therefor, or acquiring possession of the stock purchased.—Austin v. Hayden, 171 Mich. 38.

¶ 39. Where a defendant broker sells stocks on margins to plaintiff, and neither ever had possession of the same, plaintiff, upon defendant's refusal to deliver the stocks, cannot recover upon the theory of a conversion.—Goodspeed v. Smith, 162 Mich. 641.

§ 13. ——Sale or subpledge of stocks or goods.

Scope of agency as to selling or trading, see also ante § 6.
Knowledge of equities of owner of stock by pledgee, see Pledge, II.

¶ 40. A broker, whom a produce dealer has directed to buy corn, and who subsequently tenders to the dealer elevator receipts for the corn, which the dealer thereupon refuses to accept, may sell the corn to indemnify himself, and recover from the dealer for any deficiency.—Gregory v. Wendell, 40 Mich. 432.

¶ 41. Where a contract with a broker for the purchase of wheat provided that the broker could close out the transaction if the margins were not kept good, and the customer died while the margins were in arrears, and his representatives declined to take any action, the broker was justified in closing out the deal.—DeMary v. Burtenshaw's Estate, 131 Mich. 326.

¶ 42. A broker who has bought stock for a customer may repledge this stock en bloc with stock held by him to the broker through whom he purchased, and if the broker through whom the customer dealt becomes insolvent, the customer cannot compel delivery of the stock by the second broker or subpledgee on the strength of having paid the insolvent broker in full for the stock, but must settle according to the lien of the second broker, provided that the second broker acted in good faith and without notice. —Austin v. Hayden, 171 Mich. 38.

¶ 43. Where a broker has bought stock for a customer and the same has been paid for, and the broker wrongfully pledges this stock with another broker who has knowledge of the fraud, the relation becomes one of simple agency, unprotected by either equitable estoppel, the law of brokerage or the usages and customs of the stock exchange. —Austin v. Hayden, 171 Mich. 38.

§ 14. ——Purchasing from or selling to principal.

Agents in general buying from or selling to principal, see Agency, § 92.
Sale of commercial paper by bank president as broker to bank, see Banking, ¶ 159.

¶ 44. An agent who has contracted to sell property for his principal at a minimum price and to retain for his services all above that figure that he can obtain, may himself become the purchaser.—Hutton v. Sherrard, 183 Mich. 356.

¶ 45. A principal who reserves the right to approve all contracts of sale made by his agent, cannot, when the latter may rightfully become the purchaser, arbitrarily withhold his approval.—Hutton v. Sherrard, 183 Mich. 356.

¶ 46. A broker who receives certificate of stock for safe keeping, but who delivers it up to company's officers who cancel it, and issue new certificate to third person, is guilty of conversion and liable for value, whatever his intent.—Hubbell v. Blandy, 87 Mich. 209.

§ 15. ——Advances and expenses and lien.

Estoppel as to amount of lien as against third person, see also ante ¶ 24.
Duty to sell as ordered notwithstanding claim for advances, see ante ¶ 28.
Sufficiency of evidence of improper retention, see post § 42, ¶ 194.

¶ 47. In a proceeding by a principal against his real estate agent for an accounting in relation to the purchase of the principal's property on his own behalf at foreclosure sale, the agent in so accounting, was entitled to interest on disbursements made by him.—Kimball v. Ranney, 122 Mich. 160.

¶ 48. A broker has a lien upon all stocks purchased by him for a customer, for all unpaid balance of the purchase price.—Austin v. Hayden, 171 Mich. 38.

¶ 49. Brokers who, without consideration therefor, merely express a willingness to hold until it rises, wheat bought for their principal, lose no existing lien upon it.—Stebbins v. Walker, 46 Mich. 5.

¶ 50. Brokers who had dealt with O. S. (given name Osmyn), supposing him to be a principal because of appearances held out by his brother O. S. (given name Oramel), and who on learning that the latter was the real principal, agreed to hold wheat that they had bought for him until it should rise in value, did not thereby waive a lien on it for advances and loans made to the supposed principal; since there was no consideration for such a waiver.—Stebbins v. Walker, 46 Mich. 5.

¶ 51. Real estate brokers have no lien upon moneys or papers placed in their hands to use in the purchase of land; e. g., upon an indorsed certificate of deposit delivered to such a broker to be returned to the payee if not used as a deposit on the purchase of certain property.—Robinson v. Stewart, 97 Mich. 454.

§ 16. Compensation and commissions in general.

Procurement of bargain necessary to earn commissions, see post §§ 17-26.
Fraud or misconduct defeating right to compensation, see post §§ 27-29.
Specific agreement as to compensation, see post § 30.
Measure and amount, see post § 31.
When and how earned, see post § 18 et seq.
Right to compensation as jury question, see post §§ 43-46.
Commission agreements with agents generally, see Agency, § 101.

¶ 52. The world "commission" implies a compensation to a factor or other agent for services rendered in making a sale.—Smith v. Starke, 196 Mich. 311.

¶ 53. One who is the procuring cause of the sale of a chattel may recover the reasonable value of his services from the seller, where the latter knowingly accepts and avails himself of the benefit of such services.—Case v. Rudolph Wurlitzer Co., 186 Mich. 81.

¶ 54. In a suit for commissions for the sale of real estate, plaintiff testified that his agreement with defendant was one of ordinary agency, wherein the vendor retained the right to control the selling price; that the price was controlled by defendant, and modified from time to time during the brief negotiations, until an agreement was reached satisfactory to the vendor. Defendant testified that plaintiff was to secure a purchaser for a certain net price named at the beginning of the negotiations. The jury under proper instructions found for the plaintiff. Held, the defendant was not entitled to a reversal on the ground that plaintiff's version of the agreement clearly showed that he agreed to secure a purchaser at said net price.—Prindle v. Allen, 164 Mich. 553.

§ 17. ——Party liable; right to double compensation.

Double or single agency, see also ante § 6.
Taking commissions from other party as defense to action for compensation, see post § 29.

Sufficiency of evidence, see post § 42.
Evidence of single or double agency, see post ¶ 161.
Evidence as to which was the principal, see post ¶ 162.

¶ 55. D. promised M. to compensate him if he would find a purchaser for certain lots. Sale was made to a purchaser found by M. Held, that D. was liable personally although the lots belonged to D.'s wife and were sold by D. as administrator.—Moore v. Daiber, 92 Mich. 402.

¶ 56. A broker who merely brings the parties together, and has no hand in the negotiations between them, they making their own bargain without his aid or interference, can legally receive compensation from both of them, although each was ignorant of his employment by the other.—Ranney v. Donovan, 78 Mich. 318.

¶ 57. A real estate broker cannot recover dual commissions in the case of an exchange where his client has no knowledge that the agent is to receive a commission from the other party.—Hannan v. Prentis, 124 Mich. 417.

¶ 58. A broker acting as middleman to bring two parties together to make their own bargain, may recover commissions from both, though neither knows that he is to receive compensation from the other.—Friar v. Smith, 120 Mich. 411.

¶ 59. One who simply brings buyers and sellers together to make their own bargain is entitled to recover an agreed compensation from both of them.—Montross v. Eddy, 94 Mich. 100.

¶ 60. The same agent was retained by different persons on commission to negotiate sales or exchanges of their property, and he brought about an exchange between two of them, neither knowing that he was acting for the other. Held, contrary to public policy to allow him a right of action against both to recover his commissions, even though he had acted in good faith.—Scribner v. Collar, 40 Mich. 375.

¶ 61. One whose employment was by the buyer, who helped to make the bargain in the buyer's favor, and was not a mere go-between, cannot have commissions from the seller.—Leathers v. Canfield, 117 Mich. 277.

¶ 62. Defendant was employed by plaintiff to act as a broker in negotiating the purchase for plaintiff of a certain piece of real estate. The defendant secured from the seller an option at the price of $19,110, but represented to the plaintiff that the seller demanded $20,000, and upon putting the deal through pocketed the difference, $890. In a suit in assumpsit under section 10421, 3 Comp. L. 1897, held, plaintiff could recover the $890, and that defendant was not entitled to keep the same on the theory that he had a right to accept commissions from both parties.—Hogle v. Meyering, 161 Mich. 472.

¶ 63. A real estate broker who is under no contract relations with the owners of property and who expects to get his commission from the purchaser cannot recover damages against such owners where they refuse to perform the contract, on the theory that by such refusal they became indebted to him for services in procuring a purchaser.—Dickinson v. Hanley, 193 Mich. 585.

¶ 64. A real estate agent employed to sell property for the owner cannot recover from the purchaser for the value of his services in making trips to show him the land.—Hale v. Knapp, 134 Mich. 622.

§ 18. Earning by negotiation of bargain.

See also post ¶ 150.
When earned though bargain fails, see post §§ 19-23.
When earned though concluded by principal or others, see post §§ 24-26.
Modification of selling price, see also ante ¶ 54.
Employment requiring sale to be accepted, see also post ¶ 83.
Bargain by principal including other lands, see post ¶ 109.
Pleading "sale" and proving "exchange," see post ¶ 145.
Burden of proof of procuring cause, see post § 35.
Evidence of performance by broker, see post § 38.
Sufficiency of evidence, see post § 42.
Jury questions as to earning of commission, see post § 43.
Procurement in reasonable time as jury question, see post § 45.
Instruction as to reasonable time, see post § 47.
Instruction as to procuring cause, see post § 49.
Ratification of variant offer by principal, see also Agency, ¶ 353.

¶ 65. The commission of a real estate broker is earned when a customer is procured ready to purchase at the price agreed or to make an exchange on terms satisfactory to the employer.—Hannan v. Prentis, 124 Mich. 417.

¶ 66. A contract to procure a tenant for real estate was performed where the plaintiff produced a prospective tenant ready, willing and able to take the lease on the defendant's terms, and the testimony showed

that the defendant had announced his satisfaction with such tenant.—Collins v. Kittelberger, 193 Mich. 133.

¶ 67. If an agent appointed to sell property on commission finds a purchaser ready, willing and able to complete a purchase, and the terms are agreeable to the vendor, the agent is entitled to his commission.—Armstrong v. Martin, 171 Mich. 291.

¶ 68. An agent, in order to recover commissions on the sale of real estate, must show that he procured a purchaser, and got from him an unqualified acceptance of an offer of sale which the agent was authorized to make.—Hannan v. Fisher, 82 Mich. 208.

¶ 69. A broker who does not have the exclusive sale of real estate does not become entitled to a commission merely by bringing the property to the attention of the person who finally buys it, but he must also show that his services were the efficient or effective means of bringing about the actual sale.—Kinsey v. Barth, 192 Mich. 219.

¶ 70. In a suit to recover commissions for the sale of real estate, plaintiff must show that he was the procuring cause of the sale, that the purchaser learned of the property through him, and that through his efforts, with no termination of the negotiations until the result was accomplished, the sale was made.—Wood v. Smith, 162 Mich. 334.

¶ 71. The word "sale" as used in an agreement to pay a broker a certain commission upon a sale of the estate applies to a written contract for the purchase of the estate binding both vendor and purchaser, although a formal deed has not been made.—Cain v. Masurette, 196 Mich. 7.

¶ 72. A "sale" of real estate is consummated only when the grantor and grantee have entered into a valid and binding contract for the sale, so as to entitle a broker to his commission on a "sale"; hence a sale agreed upon verbally does not earn commissions because either party is at liberty to retire from his parol agreement.—Horton v. Immen, 145 Mich. 438.

¶ 73. A broker who entered into a written agreement with a land owner whereby he was to receive a commission if he consummated a sale of land to a proposed purchaser within a certain time, otherwise the contract to be null and void, is not entitled to his commission unless a sale is consummated to the person and within the time agreed upon.—Horton v. Immen, 145 Mich. 438.

¶ 74. A broker who negotiated and procured mutual signatures to a contract for exchange of lands, which exchange was not consummated because of a disagreement between the parties over taxes due, cannot recover his commissions, where the original employment made them dependent on his actually effecting a sale or exchange, and where after some negotiation resulting in no bargain his principal told him that "if I [broker] could get K. [purchaser] to give him [principal] six lots and a mortgage back for $2,750, he would pay me $150"; since such statement properly construed with earlier conversations merely amounted to an agreement to make the commission $150 if the other party was induced to modify his unacceptable proposal.—Keating v. Haley, 147 Mich. 279.

¶ 75. While a real estate broker need not be present at a sale to entitle him to his commission for effecting it, yet his efforts must be the procuring cause thereof.—Douville v. Comstock, 110 Mich. 693.

¶ 76. Where a broker's contract binds him, as a condition to his right to demand a commission, to bring the buyer and seller to an agreement, it is not necessary for him to conclude the sale in person, but it is sufficient if his efforts were the procuring cause of the sale.—Reade v. Haak, 147 Mich. 42.

¶ 77. A real estate broker employed to sell land, who negotiates with a corporation for its purchase, is entitled to commissions on a sale made by the owner to one of the stockholders, where the latter was influenced to purchase by the broker's efforts to sell to the corporation.—Brooks v. Leathers, 112 Mich. 463.

¶ 78. Where the owner of land writes to a real estate agent accepting an offer of purchase "if the sale is made right away," the agent has a reasonable time to bring about negotiations with the proposed purchaser.—Lorimer v. Boylan, 98 Mich. 18.

¶ 79. A claim for commissions on a sale of logs was based on the following advices from the owner: "I would sell them for $8 or, if you thought necessary, as low even as $7.50. I want you to find a customer for me, and I will feel greatly obliged, besides paying you whatever you ask for your trouble." The logs were in fact sold to a purchaser designated to the agent by the owner, at prices lower than those stated, and the agent acted in part in the purchaser's interest. Held, that he was not entitled to commissions.—Williams v. McGraw, 52 Mich. 480.

§ 19. Bargain made but not carried out.

Because of principal's fault or bad title, see post §§ 20, 21.

Because of insistence on modified terms, see post § 22.

Because of reasons known to broker, see post § 23.

Questions of law and fact as to failure of bargain, see post § 45.

¶ 80. If A., at B.'s request, finds a purchaser for B.'s property on B.'s terms he is entitled to his commission, though the bargain falls through by B.'s fault or inability to complete it.—Hannan v. Moran, 71 Mich. 261.

¶ 81. In an action by a real estate agent for commissions for the sale of land, it was held that commissions were properly disallowed on sales where the vendee was unable to meet the terms of the sale as advertised.—Sotham v. Macomber, 180 Mich. 120.

¶ 82. A real estate broker is not entitled to recover commissions for the rental of property by simply producing a party who makes a paper offer where such prospective lessee is unable to meet the conditions for a lease prescribed in the agreement between the owner and the broker.—Morgan v. Zanger, 188 Mich. 212.

¶ 83. Where, in an action by a broker to recover commissions, the evidence shows that plaintiff was not to be entitled to a commission until an order was received and accepted, and the order was never accepted, the court should direct a verdict for defendant.—Sterling v. Aultman Engine & Thresher Co., 151 Mich. 184.

§ 20. ——Due to rejection by principal.

Sufficiency of declaration where sale is made by principal without notice to broker, see post ¶ 142.

Question of law or fact, see post § 45.

¶ 84. An agent who, at the request of a land owner, procures a purchaser ready, able and willing to buy property on the owner's terms, may recover his commission from his principal, notwithstanding the latter refused to make the sale.—Blakeslee v. Peabody, 180 Mich. 408.

¶ 85. A real estate broker who furnishes a buyer for property able and willing to complete the purchase on the owner's terms, is entitled to his agreed compensation if the owner refuses to complete the sale.—Evans v. Russell, 180 Mich. 534.

¶ 86. A produce dealer instructed a broker to bargain for corn, deliverable some months later, and agreed to pay the broker a commission and receive and pay for the corn at the time of delivery. The broker had a like agreement to receive the corn from certain other brokers and they from the sellers. The first broker settled with his correspondents. Held, that on tendering to the produce dealer elevator receipts for the corn he had discharged his obligations, and his right to compensation did not depend upon acceptance.—Gregory v. Wendell, 40 Mich. 432.

§ 21. ——Due to defective title.

See also post ¶¶ 90, 91.

Broker's knowledge that title was bad and would not be accepted, as barring him of commissions, see post § 23.

¶ 87. Where a laundry company employs an agent to procure a laundry agency and barber shop business and such agent enters into a contract with the owner whereby he is to receive certain commission for the sale of such property as broker, and he subsequently enters into a contract with such owner to purchase such laundry agency and barber shop business, and such owner knows that such agreement is executed merely as a means to secure a sale to plaintiff's undisclosed principal and such agreement to purchase is assigned to such undisclosed principal, which refuses to purchase because of the existence of a contract between such owner and another laundry company for the exclusive right to its laundry business for a specified period, such broker is not entitled to recover any commission from such owner of the business.—Hunter v. Blosser, 194 Mich. 157.

¶ 88. Where a real estate broker is authorized to secure purchasers for certain land he is entitled to the commission agreed upon where he secures a purchaser on the terms specified who is ready to accept title and deposits the purchase price in a bank as demanded, though such purchaser refuses to carry out the agreement when he discovers that a suit by attachment levy on the land has been started, and a lis pendens filed in a suit for specific performance of an alleged contract by the owner to convey the land to another purchaser.—Harger v. Watson, 176 Mich. 192.

¶ 89. Where the plaintiff procured a purchaser for defendant of certain land, but the sale failed because the records in the office of the register of deeds failed to show that the defendant had acquired the interest of two heirs interested in the property, his right to recover commissions on the sale is not affected by the existence of a will, which

was not known to the parties, wherefrom it appeared that defendant's title was good as the heirs had conveyed their interest.—Weaver v. Richards, 144 Mich. 395.

§ 22. ——Due to insistence on modified terms.

See also ante ¶ 74.
Admissibility of evidence as to, see post § 39.
Questions for jury, see post § 45.

¶ 90. A real estate agent, having secured a purchaser for lands upon which he had acquired an option, is not precluded from recovering his commission from the owner by the fact that the contract of sale subsequently entered into between the purchaser and the owner required the latter to furnish an abstract showing a good and perfect title, which provision was not expressly included in the option, and that the sale failed by reason of the inability of the owner to show such title.—Stange v. Gosse, 110 Mich. 153.

¶ 91. It cannot be said as a matter of law that the purchaser procured by the broker knew of certain reservations in the title tendered and did not object, and that the sale fell through solely because of defective title rather than through the presence of such reservations, merely because of the fact that the title examiner employed by the purchaser saw the deed containing such reservations; since, having found that the title was defective, it cannot be said that he would have unnecessarily communicated to his client that there were also objectionable reservations in the deed.—Weaver v. Richards, 150 Mich. 20.

§ 23. ——Due to conditions known by broker.

Questions for jury, see post § 43, ¶ 204.

¶ 92. A real estate agent does not produce a purchaser for property so as to entitle him to commissions where he knows of an alleged infirmity in the title to the land and the prospective purchaser refuses to complete the purchase until such defect is removed.—Appleby v. Sperling, 194 Mich. 681.

¶ 93. A real estate broker is not entitled to recover a commission contracted for upon a sale where the sale failed because of defects in his employer's title known or which should have been known to such broker at the time he contracted for a commission, unless it was the parties' intention that the employer should subsequently perfect his title in order to be able to perform.—Cain v. Masurette, 196 Mich. 7.

¶ 94. In an action by an agent to recover commissions for a sale which was alleged not to have been consummated by reason of a defect in defendant's title, an instruction that complainant cannot recover in case defendant had only an option for the purchase, and that plaintiff knew such fact, is properly refused where it appears that at the time it was attempted to consummate the sale, defendant had received a deed, and had tendered a warranty deed to the purchasers.—Weaver v. Richards, 150 Mich. 20.

§ 24. Bargain made through others.

Needlessness of personal presence of broker at conclusion of sale, see also ante ¶¶ 75, 76.

¶ 95. An agent who is promised a commission for finding a purchaser does not lose his right to it where, without his knowledge, another agent of his employer has meanwhile effected a sale.—Fox v. Rouse, 47 Mich. 558.

¶ 96. A real estate broker who secures a purchaser, and brings the parties together, cannot be deprived of his commission by the land owner's acceptance of substantially the same offer, secured from the same customer by another party, and upon terms more favorable to the purchaser, notwithstanding the fact that the sale may have been finally consummated by the other party.—Wood v. Wells, 103 Mich. 320.

¶ 97. Where defendant had authorized a broker to find a buyer for certain timber, and later refused to deal with a purchaser procured by the plaintiff, but sold the timber through another broker, plaintiff may sue at once, as defendant had not only repudiated the contract, but had disabled himself from performing it.—Obenauer v. Solomon, 151 Mich. 570.

¶ 98. Where a contract between the owner of real estate and a real estate firm for the sale of such property on commission expressly provides for the right of cancellation of the agency by giving a specified notice, such owner, with knowledge th t the agent had been negotiating with a proposed purchaser, may cancel the authority to sell, and effect the sale through a former agent of the real estate firm, who had been instrumental in presenting such prospective purchaser to the owner during the course of his employment by the real estate firm by which he was formerly employed, and thus avoid the payment of commission.—Holmes Realty Co. v. Silcox, 194 Mich. 59.

¶ 99. Where defendant lists his farm with plaintiff and at the same time with another broker, and plaintiff shows the farm to a prospective purchaser, stating the price, and such purchaser afterwards purchases through the other broker at a lower figure, plaintiff is not the procuring cause of the sale and cannot recover commissions.—Byers v. Williams, 175 Mich. 385.

¶ 100. The defendant employed the plaintiff as agent to sell certain real estate, and the plaintiff procured one Reed as a prospective buyer. Later defendant sold the property to Reed, through another agent, and plaintiff sues for commissions. Held, it was error for the court to refuse a requested instruction that the defendant was not liable if Reed had abandoned all negotiations for purchase of the property through the plaintiff.—Young v. Hubbard, 154 Mich. 218.

¶ 101. A real estate broker authorized to sell land, but not having an exclusive agency, is not entitled to commissions on a sale made by the owner directly through another broker, because the latter had previously had correspondence with the first broker respecting a sale of the land and a division of the commissions, and the purchasers were the same persons with whom the second broker negotiated during the correspondence, where all attempt at an agreement between the two brokers had ceased before negotiations were commenced directly with the owner, and the first broker had at no time before the sale any knowledge of the prospective purchasers, and the owner, when he consummated the sale and paid the second broker his commissions, was not aware that he had had dealings with the first broker; nor does the fact that the second broker was interested in the purchase entitle the first broker to commissions, where the owner dealt with him as a broker only, and did not know that he was otherwise interested in the purchase.—Douville v. Comstock, 110 Mich. 693.

§ 25. Bargain with person introduced by broker.

Bargain made over broker's head, see post § 26.
Through other broker with person approached or introduced by plaintiff broker, see ante § 24.
Necessity that broker be procuring cause, see also ante § 18.
Questions for jury, see post § 45.

¶ 102. A theatrical broker is entitled to the commission agreed upon for securing employment for an actor who demanded a certain salary where the broker introduced the actor to a theatrical agent and tried to get contracts, and as a result thereof and without revoking the broker's authority the actor closed contracts with such agent after negotiations between themselves though for a smaller salary than the broker was authorized to secure.—Friedenwald v. Welch, 174 Mich. 399.

¶ 103. In a suit for broker's commissions for the sale of real estate, plaintiff brought the purchaser and defendant together at the instance of defendant, and the negotiations, after the introduction, continued until they ripened into a sale. Held, plaintiff was entitled to recover even though the price secured was not the price first asked by defendant.—Prindle v. Allen, 164 Mich. 553.

¶ 104. When an agent is employed by an officer of a corporation to sell its bonds and stocks and to introduce prospective customers, and is to receive his commission whether he personally closes a sale or not, he may recover for commissions for sales made to prospective customers introduced by him to the company, although the sales were not consummated until after he left the defendant's employ.—Sorensen v. Charlevoix Rock Product Co., 191 Mich. 86.

¶ 105. A real estate broker is entitled to his commission and the defendant cannot avoid his liability therefor under a written contract authorizing the broker to make a sale of defendant's land and agreeing to pay a commission therefor, where it appears that defendant himself made the sale of the property to a prospect previously secured by such broker and on substantially the same terms as were originally proposed through such brokerage.—Hubbard v. Leiter, 145 Mich. 387.

¶ 106. Where a real estate broker is employed to sell real estate within a certain time, and the time has expired without his having consummated a sale, he is not entitled to his commission, although a sale is ultimately made by the land owner to a person introduced by the broker, where there is no fraud or bad faith on the part of the owner which has prevented performance on the part of the broker.—Decker v. Klingman, 149 Mich. 96.

§ 26. Bargain made over broker's head.

See alsop post ¶ 122.
Made by principal with person introduced by broker, see also ante § 25.
Evidence as to making over head, see post § 39.
Questions for jury, see post §§ 43, 45.

¶ 107. A broker is entitled to his full commission where the land owner knowing he has been negotiating with certain parties takes the matter out of his hands and then sells the same property to the same people at a reduced price.—McGovern v. Bennett, 146 Mich. 558.

¶ 108. The owner of real estate, which he has placed in the hands of agents for sale, cannot, with knowledge that the agents are negotiating with a proposed purchaser, cancel their authority, effect the sale himself, and avoid the payment of their commissions.—Heaton v. Edwards, 90 Mich. 500.

¶ 109. An agent for the sale of lands is entitled to his commission if he secures a purchaser therefor, although the principal, who completes the sale, includes therein lands which the agent had no authority to dispose of.—Ranson v. Weston, 110 Mich. 240.

¶ 110. Where a land owner who listed property with a broker to sell at a price to include the latter's commission, with knowledge that the broker has found and was negotiating with a prospective purchaser, steps in and sells to such person for an amount less than the broker's agreed compensation, the latter may recover it from the seller.—Davis-Fisher Co. v. Hall, 182 Mich. 574. (Ostrander and Bird, JJ., dissenting.)

¶ 111. Where a lumber manufacturer receives an option on a quantity of logs from a log and lumber broker, and agrees to pay a certain commission if he purchases the logs, he cannot defend, in an action to recover the agreed commission, upon the ground that he purchased the logs from the owner conditionally, or upon terms different from those contained in the option, the broker not being notified of any such change and given an opportunity to sell to another or abandon the option.—McKinnon v. Gates, 102 Mich. 618.

¶ 112. Where an owner of real estate agrees to allow an agent to sell it if the latter can get $1,400 net for the owner, and the agent introduces a purchaser who declines to take the property for the sum asked, but six weeks later buys it of the owner direct for $1,300, the agent is not entitled to his commission.—Gilmore v. Bollo, 165 Mich. 633.

¶ 113. A broker is not the procuring cause of a sale of real estate where the prospective purchaser was not induced to look at the property as the result of anything the broker had said or done, but had dropped it from his mind, and would not have looked at or purchased it except for the subsequent, independent action of a relative.—Kinsey v. Barth, 192 Mich. 219.

¶ 114. A broker is not entitled to commissions on sale of pine land where he failed to find a purchaser at a price fixed by the original proposal, or at the lesser price fixed by a new proposal, but afterwards at a still lower price the owner effected a sale with one with whom he had been negotiating, both proposals having been invited by the broker who professed to have inquiries looking towards a purchase.—Antisdel v. Canfield, 119 Mich. 229.

¶ 115. Where within the time during which an agent held an option to sell land, the owner without the former's aid, effected a sale to a stranger, the agent's damages for the breach of his contract, held to be too speculative to permit a recovery.—Crawford v. Cicotte, 186 Mich. 269. (Ostrander and Bird, JJ., dissenting.)

§ 27. Fraud or misdoing affecting compensation.

As court or jury question, see post § 46.
Selling at cut prices as breach of agency, see also Agency, § 514.

¶ 116. A broker may recover his commissions on a sale of real estate, notwithstanding the fact that he attempted to sell to the purchaser property which he had in charge belonging to other persons.—Lemon v. Macklem, 157 Mich. 475.

¶ 117. The fact that a purchaser obtained by an agent for the sale of lands bought the lands for much less than the price asked, and immediately sold them to a third person at a considerable advance, does not of itself show that the agent in bad faith led the purchaser to understand he could buy for less than the asking price.—Harvey v. Lindsay, 117 Mich. 267.

¶ 118. Defendant Henry negotiated with one Turnbull, a real estate agent, to assist him in selling certain real estate of his to one Schmidt. Plaintiff, a real estate agent, through a friend, got defendant to fix a price. Defendant informed plaintiff that if his prospective purchaser was Schmidt he could not recognize him in the way of commissions. Plaintiff told him such was not the case, and took a contract for the land running to himself as vendee. This contract he assigned to Schmidt, who tendered the price, and defendant completed the deal. In a suit for commissions, held, defendant's act in going through with the deal did not ratify the plaintiff's deceptive conduct violative of his fiduciary relation as agent, so as to render defendant liable.—Ranney v. Henry, 160 Mich. 597.

¶ 119. Defendant Henry negotiated with one Turnbull, a real estate agent, to assist him in selling certain real estate of his to one Schmidt. Plaintiff, a real estate agent, through a friend got defendant to fix a price. Defendant informed plaintiff that if his prospective purchaser was Schmidt he could not recognize him in the way of commissions. Plaintiff told him such was not the case, and took a contract for the land running to himself as vendee. This contract he assigned to Schmidt, and the deal was completed. In a suit for commissions, held, plaintiff owed a

duty of frank disclosure to defendant as his agent, and having deceived him, could not recover.—Ranney v. Henry, 160 Mich. 597.

§ 28. ——Secret interest or profit.

Burden of proving principal's knowledge, see post § 35.

Secret contrivance to cover real purchaser, see ante ¶ 119.

¶ 120. A real estate agent who acts as an intermediary between a land owner and a prospective purchaser must at least act in good faith, and cannot be allowed to attempt to extort a price from one principal not demanded or required by the other, and then be entitled to a commission as for a service. —Phinney v. Hall, 101 Mich. 451.

¶ 121. An agent for the sale of property loses his right to commission from his principal where he does not disclose the fact that a corporation in which he is interested as stockholder and director is the real purchaser, and that the nominal purchaser, who has a valuable contract with the seller dependent upon the making of the sale, is furnishing a large bonus towards the purchase.—Humphrey v. Eddy Transp. Co., 107 Mich. 163.

¶ 122. In an action for broker's commissions on the sale of real estate, the testimony tended to show that the broker asked as the lowest price for the land a sum in excess of what was authorized by the owner, that the offeree declined to accept, and made no arrangements with the broker for future negotiations, but purchased the property directly from the owner. Held, that the jury was warranted in inferring that the broker's efforts did not procure the purchaser, and were fraudulently intended to secure more than the agreed compensation. —Heenan v. Harris, 157 Mich. 187.

¶ 123. A real estate agency which leases a building to several persons, one of whom is a member of the agency firm, is entitled to its commission provided such member has not acted adversely to the interests of lessor in consummating the lease.—Kirby-Sorge-Felske Co. v. Doty, 190 Mich. 553.

¶ 124. Where the general manager of a transportation company was authorized to arrange for the sale of its property, and to agree upon the commissions to be paid to the agent for bringing about the sale, the company cannot avoid paying the commissions on the ground that the agent was himself interested in the company to which the sale was made, and that a third company was contributing a bonus towards the purchase price, if knowledge of these facts was brought home to the general manager before the sale. —Humphrey v. Eddy Transp. Co., 115 Mich. 420.

§ 29. ——Taking commissions from other party.

Right to double commission by mere middleman, see ante § 17.

Nature of broker's agency, whether sole for one party or mere go-between for both parties, see ante § 6.

¶ 125. One who acts as agent for both parties in a sale and purchase of land, concealing from them his double agency and making different representations to them about the value when both relied to some extent upon his judgment, cannot recover the agreed commission from the purchaser.—McDonald v. Maltz, 94 Mich. 172.

¶ 126. The broker who does not disclose to the opposite party that he expects a commission for effecting an exchange, and who is not a mere middleman, cannot recover commissions from him.—Pinch v. Morford, 142 Mich. 63.

¶ 127. In an action for commission on a sale made by the principal to an individual after the broker had endeavored to sell to a corporation, it was proper to show that the buyer was a heavy stockholder in the corporation to which the broker's efforts had looked as a possible purchaser, where it also appeared that the ultimate buyer was interviewed twice and another stockholder numerous times by the broker soliciting a purchase by the corporation, and that offers from the corporation had been submitted, and a promise made to pay the broker if they should sell "to them."—Brooks v. Leathers, 112 Mich. 463.

¶ 128. Where an owner knowing that a broker was listing farms for an agency and that he had the agency's permission to accept a commission from the owner as well as a fee from them, agrees to pay the broker a certain per cent of the selling price if the agency sold the farm at a price net to them, the agency to make their commission by raising the selling price, and a sale is consummated in accordance with the arrangement, it is proper to direct a verdict for the broker against the owner for the amount of the agreed commission.—Cross v. Day, 173 Mich. 553. (Ostrander and Stone, JJ., dissenting.)

¶ 129. Where a broker has been in the habit of investing money for certain persons and giving them advice in real estate matters and they only enter into an agreement to purchase land from others on the assurance of the broker that the investment will be profitable and that the broker will handle the land, which is to be improved, divided into lots and sold for a share in the profits, fiduciary relations exist between the parties, and the concealment of the receipt of a com-

mission from the vendor for the sale of the property bars any right of recovery of compensation for platting and improving the property and endeavoring to market the same upon the ground that the broker was prevented from performing the contract by the opposition of the purchasers.—Brown v. Hurt, 198 Mich. 276. (Ostrander, J., dissenting.)

§ 30. Specific agreement as to compensation.

See also ante ¶ 128.
Reasonable value or customary commission as measure of compensation, see post § 31.
Burden of proof under net price agreement, see post § 35, ¶ 149.
Evidence as to specific agreement, see post § 40.
Sufficiency of evidence, see post § 42.
Questions for jury, see post §§ 43, 44.
Effect of written contract for sale of goods and commission upon previous oral agreement, see Contracts, VIII.

¶ 130. An arrangement whereby two real estate agents have authority to sell the same land, one to receive one per cent commission in case of a sale by the other, cannot be construed as giving the other the right to sue for two per cent commission on making the sale.—Lorimer v. Boylan, 98 Mich. 18.

¶ 131. Compensation for finding a person to explore and sub-lease a mine cannot be recovered where the plaintiff fails to establish a contract.—Carey v. Gleason Exploration & Mining Co., 183 Mich. 139.

¶ 132. A contract for the sale of land by a broker on commission providing that the owner will be content with a certain sum for the farm and that all received over such sum shall go to the broker and that if a good sale is made a note owed by the broker will be canceled must be construed as not providing for the deferring of payment of commissions nor for a fee contingent upon full payment by the purchaser, who agrees to pay a certain sum down by deeding property and pay the balance in annual instalments, so as to deprive the broker of his right to a commission upon the furnishing of a satisfactory purchaser at a price exceeding the minimum sum stated, although the purchaser forfeits the contract after making the cash payment and the first annual payment.—Fuday v. Gill, 195 Mich. 613.

§ 31. Measure and amount of compensation.

See also ante ¶ 53.
Agreement for specific sum, see ante § 30.
Questions for jury, see post § 43.
Instruction as to measure and amount of compensation, see post § 50.
Measure of damages for breach of broker's contract, see Damages, II, D.

¶ 133. One who makes a sale of lands under an agreement with the owners that, if he effects a sale at a price fixed by them, they will pay him for it, can recover the reasonable value of his services.—Montross v. Eddy, 94 Mich. 100.

¶ 134. A farmer not engaged in the real estate business, who sells a farm for a neighbor without any agreement as to compensation, is entitled to recover the fair value of his services, and not what is customarily charged in the vicinity by real estate brokers.—Morehouse v. Shepard, 183 Mich. 472.

¶ 135. In an action by a real estate agent to recover commissions for the sale of land, it was held that his recovery was properly restricted to commissions on lands where the deals were finally consummated.—Sotham v. Macomber, 180 Mich. 120.

¶ 136. Under a contract between a broker and an owner, whereby it was agreed that the commission should be $2,000 if the land sold for $75,000, he is limited in an action to recover his commission to the amount agreed upon with interest, and he cannot recover the customary five per cent where he had been wrongfully discharged and the property sold for a lesser amount by the owner.—McGovern v. Bennett, 146 Mich. 558.

§ 32. Accounting and settlement with principal.

¶ 137. Where a stockbroker notifies a customer that he is retiring from business and desires to transfer the account to a succeeding broker, and upon inquiry states he believes his successor to be honest and worth a certain amount, and a settlement is made and accepted and the account transferred, the statement of opinion as to his successor, that the facts showed to be true when made, is not a fraudulent misrepresentation that will justify impeaching the settlement.—Vanderveen v. Ellis, 172 Mich. 615.

§ 33. ——Presumptions and evidence.

¶ 138. The burden of showing the existence of the relationship of principal and agent between the owner of personal property and a commission merchant to whom goods are intrusted for sale, and such a receipt of money as will require him to account is on the principal.—Hutchins v. Vinkemulder, 187 Mich. 676.

¶ 139. When a commission merchant to whom goods are intrusted as an agent for

sale voluntarily admits the receipt of the property or money, the burden of showing that he made a proper disposition of it rests upon the agent.—Hutchins v. Vinkemulder, 187 Mich. 676.

¶ 140. The presumption arising from the failure of a commission merchant to account for goods intrusted to him for sale after the lapse of a considerable length of time is overcome by proof that the commission merchant had not received any return for the goods, where there is no evidence that he sold the goods or received any money for them.—Hutchins v. Vinkemulder, 187 Mich. 676.

¶ 141. Evidence consisting of plaintiff principal's testimony as to the details of her dealings with an agent in Houghton of a Boston stock broker, held sufficient to show that in giving verbal orders to buy and sell stocks plaintiff knew that she was buying on a margin of $20 per share and that that was the customary margin for copper stocks in which she dealt, it appearing that she had deposited certain valuable securities with them as collateral which secured them in making the transactions ordered.—Douglass v. Paine, 141 Mich. 485.

§ 34. Actions and pleading between broker and principal.

Actions between brokers for share of commissions, see post § 51.
Measure of damages for breach of contract, see Damages, II, D.
General law of actions and pleading, see Pleading; Parties; Trial; etc.; and see Contracts, X.
Remedy by common assumpsit, see also Assumpsit § 34, ¶ 124.
Effect of notice of defense as admitting consideration for promise to pay broker, see also Contracts, X; Pleading, IX.

¶ 142. In an action to recover commissions on sale of real estate under defendant's written authority to sell for a specified sum, agent to retain surplus as commission, a declaration setting forth the agreement, the securing of a purchaser by plaintiff in accordance with its terms, the purchase-price, and the sale by defendant without notice to plaintiff, is sufficient.—Wright v. Beach, 82 Mich. 469.

¶ 143. In an action by a real estate broker for commissions, where the declaration sets out the contract on which the right to commissions is based, the defendant may show that the contract actually entered into was different from that alleged by plaintiff under the general issue, and without setting up his claim by confession and avoidance.—Weaver v. Richards, 156 Mich. 320.

¶ 144. Goods were shipped with instructions to the consignees to sell on their judgment of the market, unless otherwise advised, but some time afterwards they were ordered to sell immediately. They did not do so, and the shippers sued for damages resulting from delay, and in the declaration averred shipment, delivery and orders to sell immediately as of the day and year aforesaid. Held, that the variance as to the time of the order was not material.—Howland v. Davis, 40 Mich. 545.

¶ 145. That plaintiff's proofs disclose a right of action for commissions due on an "exchange" of real estate, whereas his bill of particulars in justice's court claimed commissions upon a "sale," does not constitute a fatal variance, where defendant has been in no way misled by the pleading.—Whitaker v. Engle, 111 Mich. 205.

§ 35. Burden of proof.

See also ante ¶¶ 68-70.
Presumptions and burden of proof of accounting and settlement with principal, see ante § 33.
Instruction as to necessary proof, see also post § 238.
In actions on contracts generally, see Contracts, X.

¶ 146. Under a declaration in assumpsit for services rendered in and about effecting a sale of real estate, the plaintiff cannot recover by showing an agreement by the owner to pay him his commission if the land was sold by another to a purchaser originally procured by the plaintiff.—Jones v. Pendleton, 134 Mich. 460.

¶ 147. In an action by brokers to recover commissions for the sale of real estate the burden of proof is on plaintiffs to show that they were the procuring cause of the sale.—Kinsey v. Barth, 192 Mich. 219.

¶ 148. Where by the terms of the employment of a real estate broker, his duty is to secure the best trade for his employer that he could, the employer has the right to assume that the agent acts solely in his interest until apprised to the contrary and the burden in an action for commissions is on the agent to show that his employer was so apprised.—Hannan v. Prentis, 124 Mich. 417.

¶ 149. In order for a broker to recover commissions under an option contract for the sale of real estate, authorizing sale for specified sum, agent to retain surplus as commission, where the owner made a sale of the real estate to another than the broker's proposed purchaser, the broker must show that he procured a purchaser able and willing to buy under the terms of the agreement, his

notification to the owner of such purchaser before the expir tion or revocation of his authority as agent or before his knowledge of the sale by the owner and that the consummation of the broker's proposed sale failed through some fault of the owner.—Wright v. Peach, 82 Mich. 469.

¶ 150. In a suit for commissions for securing a loan the broker must show either that he completed his undertaking or that its completion was pre ented without his fault by his principal.—West v. Hudson, 171 Mich. 669.

§ 36. Admissibility of evidence.

As to fraud by broker, see also ante ¶ 117.
Evidence on accounting and settlement with principal, see ante § 33.
As to particular issues, see post §§ 37-41.
Examination of defendant by plaintiff in action between brokers, see also post ¶ 247.
General law as to relevancy and competency of evidence, see Evidence, IV-IX.
Admissibility of parol evidence by principal to vary terms of written contract of sale. see Evidence, V, B.
Letter offering compromise on commission as admission. see Evidence, VII, C.
In actions on contracts generally, see Contracts, X.

¶ 151. Where a contract of general agency for the sale of real estate exists, and the broker is the procuring cause of the sale, it is immaterial in an action for commissions that the property was sold at a price lower than the agent was first instructed to ask.—Lerner v. Harvey, 189 Mich. 249.

¶ 152. In an action to recover a commission agreed to be p id by the ven lee of logs, defendant's testimony th t in his conversations with plaintiffs he had no idea they intended to charge for commission is inadmissible.—McKinnon v. Gates, 102 Mich. 618.

¶ 153. In a broker's action on his contract for fixed commissions earned, his subsequent conversation with the buyer, including a statement to the buyer that the sale was a made-up plan to beat pl intiff out of his commission, is inadmissible.—McDonald v. Ortman, 98 Mich. 40.

¶ 154. In a suit for real estate commissions it is error to permit defendant to testify to facts showing th t he is heavily indebted.—Crane v. Ross, 168 Mich. 623.

¶ 155. Where, in a suit to recover a commission on a sale of real estate, neither the pleadings nor plaintiff's version of the contract of employment leave the case open for any claim under the quantum meruit, it is not error to exclude testimony as to expenditures made by t.e plaintiff in advertising.—Thuner v. Kanter, 102 Mich. 59.

¶ 156. In an action by one, claiming to have been a broker, to recover for breach of a contract to sell goods through him on commission, it was competent for defendants to prove that the reason for their publishing a notice, introduced by plaintiff, in which they warned buyers that they employed no agent soliciting for them or managing their business, was that they had learned that plaintiff claimed to be their agent and business manager.—Dodge v. Reynolds, 135 Mich. 692.

¶ 157. In an action by a real estate broker to recover u on defendant's undertaking to pay plaintiff for effecting the sale of certain l ts, defendant claimed that the agreement related to the sale of sand and not of the lots. Held, that evidence that the lots belonged to defendant's wife was admissible to show the probability of the theory of the defense.—Moore v. Dalber, 92 Mich. 402.

§ 37. ——As to employment or revocation and party liable.

¶ 158. In an action for commissions for effecting a s le of defen lant's real est te, it is competent to show that the plaintiff is not a real estate dealer and never attempted a deal before, together with his relations and dealings with the defendant for the jury to consider in determining whether there was an implied contract of e ployment.—Horwitz v. Pepper, 128 Mich. 688.

¶ 159. In a suit by a real estate broker for commissions, a letter from defendant w s introduced in evidence in which defendant withdrew certain lands from the market, but authorized the plaintiff to continue in his efforts to sell the land in question. Held, that it was not error, in view of this evidence, to admit in evidence a prior letter and postscript from the plaintiff, notifying the defendant that he was trying to sell the lands to a person to whom defendant afterwards did sell a part of them.—McGovern v. Bennett, 152 Mich. 538.

¶ 160. Where, in a suit by plaintiff for commissions for the sale of re l estate, the defendant's defense is that the pl intiff's agency was c nceled before the sale was consummated, defendant m y introduce evidence, in proof of cancellation, th t h: had a better offer for the property than the one procured by the pl intiff.—Young v. Hubbard, 154 Mich. 218.

¶ 161. In an action for commissions for selling real estate, evidence that neither the defendant nor the vendee knew that the

other party was paying the plaintiff a commission and the plaintiff's testimony that he negotiated the trade with the defendant in his own name and that the defendant did not know who the real vendee was tends to show that the plaintiff was not a middleman within the rule of Friar v. Smith, 120 Mich. 411.—Horwitz v. Pepper, 128 Mich. 688.

¶ 162. Where a real estate agent's interviews with a prospective purchaser who previously knew that the agent had the premises for sale, grew out of the agency, his conduct in securing the offer of purchase and in reporting it to the owner, does not show that he was acting as agent for the purchaser instead of the owner.—Lorimer v. Boylan, 98 Mich. 18.

§ 38. ——As to performance by broker.

Admissible cross-examination of party on willingness to accept bargain, see Examination of Witnesses, II.

Right of broker to show by parol true consideration for conveyance, see Evidence, V, B.

Evidence of value of property taken in exchange in determining consideration for sale, see Values.

¶ 163. In an action for commissions for procuring a tenant for the defendant, testimony of a prospective tenant, claimed to have been procured by the plaintiff, as to a conversation with the plaintiff in which the terms of the lease were mentioned, and accepted by the witness, held competent on the issue as to whether the plaintiff had procured a tenant willing to take the lease on defendant's terms.—Collin v. Kittelberger, 193 Mich. 133.

¶ 164. In an action to recover commissions for the sale of timber, a broker may testify to a conversation with an agent of an intending purchaser, in order to show the willingness of such purchaser to buy the timber, on the terms of the brokerage contract.—Obenauer v. Solomon, 151 Mich. 570.

¶ 165. In an action for commissions in the sale of real estate, a newspaper advertisement offering the property for sale, is admissible as showing what plaintiffs did in pursuance of the alleged agreement.—Decker v. Widdicombe, 137 Mich. 331.

¶ 166. In an action on a contract for showing timber lands for a commission on all lands purchased, testimony that plaintiff hired a livery team and employed men to aid him in showing the lands, is admissible as showing the history of the transaction though no recovery was claimed or could be had therefor under the bill of particulars.—Culver v. Smith, 131 Mich. 359.

¶ 167. Where, in an action to recover commissions for the sale of timber, a broker has introduced evidence of conversations tending to show the willingness of a proposed purchaser to buy, evidence of inconsistent statements made at a later time and place is inadmissible as hearsay.—Obenauer v. Solomon, 151 Mich. 570.

§ 39. ——As to failure of bargain made.

¶ 168. In an action by agents to recover commissions on a sale of real estate made by their principal, they may introduce in evidence the contract between the principal and his vendee.—Heaton v. Edwards, 90 Mich. 500.

¶ 169. In a suit by agents to recover commissions on a sale made by their principal, the principal cannot introduce evidence of after-disputes between himself and the purchaser as to the performance of the contract on the purchaser's part, especially if such disputes have been settled by litigation in favor of the purchaser.—Heaton v. Edwards, 90 Mich. 500.

¶ 170. In an action to recover commissions for the sale of land, evidence as to information obtained by defendant from certain lawyers as to the title to the land, is immaterial, unless communicated to plaintiff.—Weaver v. Richards, 150 Mich. 20.

¶ 171. In an action to recover a share of profits realized from a sale of lands, under an agreement the testimony of another agent of defendant that he was to work up timber for the purchaser from defendant and have an interest in it for such work, is immaterial.—Davis v. Gerber, 69 Mich. 246.

¶ 172. Evidence whether a purchaser would have paid more than he actually did for property is not admissible in an action by a broker against a seller for an agreed compensation, where the land had been listed for sale at a price to include the broker's commission, and the owner with knowledge that the broker was negotiating with the purchaser, stepped in and sold it for a less amount.—Davis-Fisher Co. v. Hall, 182 Mich. 574. (Ostrander and Bird, JJ., dissenting.)

¶ 173. In an action for fixed commissions alleged to have been earned by effecting a sale, which the principal made over the broker's head, evidence of prior transactions between the parties and correspondence relating to other deals is incompetent.—McDonald v. Ortman, 98 Mich. 40.

§ 40. ——Of specific agreement as to compensation.

¶ 174. In a suit for commissions for selling defendant's farm, plaintiffs relied upon a

special contract alleged to have been made in a conversation with defendant on a certain day. The trial court admitted evidence offered by plaintiffs to show a former agreement with plaintiffs and to prove the prices at which defendant had at various times offered his farm for sale. Plaintiffs contended that they were to receive as commission all the money received for the farm above a certain figure per acre. Held, said evidence was immaterial and its admission constituted prejudicial error.—Hoopengarner v. Stipe, 169 Mich. 307.

¶ 175. Plaintiffs were real estate brokers as well as building contractors. They made an express agreement to sell certain real estate for defendant and later made a separate agreement to erect buildings thereon at cost. On a suit for commissions they expressly relied on the said former contract. Held, the court properly refused to permit plaintiffs to ask defendant's witness as to the usual price real estate people obtained for building on account of a client, and as to whether plaintiffs spent any money to advertise defendant's property.—Lambrecht v. Stoepel Realty Co., 169 Mich. 81.

¶ 176. Evidence of the price at which the defendant had listed property with other brokers, and as to its value, is not admissible in an action by a real estate broker to recover commissions under an express contract.—Williams v. Otto, 181 Mich. 657.

§ 41. ——As to measure and amount of compensation.

Where contract is express, see ante § 40.

¶ 177. In determining the fair value of a farmer's services in selling the farm of a neighbor, the jury may consider the customary rate of commission charged in the vicinity by real estate agents.—Morehouse v. Shepard, 183 Mich. 472.

¶ 178. In a suit for commissions for obtaining a loan on property, the plaintiff is entitled to recover for the amount of the loan secured for defendant, and it is immaterial that a portion of the money secured is used by defendant to pay off a mortgage upon the property offered as security.—Roney v. Healy, 170 Mich. 46.

¶ 179. In an action by a broker for agreed commission for effecting the sale of mining property, it is error to admit letters between the broker and third persons whom he attempted to induce to buy the property but who had nothing to do with the ultimate transaction, either for the purpose of showing the amount of services rendered by the broker under the common counts or as part of the res gestae.—West v. Demmie, 128 Mich. 11.

§ 42. Weight and sufficiency of evidence.

See also ante ¶ 122.
As to terms of compensation, see also ante ¶ 54.
In action between brokers for share in commissions, see post § 51.
Sufficiency as question for jury, see post §§ 43-46.
Instructions as to weight, see post §§ 47-50.
In actions on contracts generally, see Contracts, X.

¶ 180. Evidence consisting principally of the testimony of the broker held to show that he represented one of the parties and negotiated the bargain for an exchange and not that he was a mere middleman bringing them together to make their own bargain, especially where the party first consulted testified that the broker was negotiating for him because one cannot very well trade off his own property to advantage, and where confessedly another broker was employed to help the deal through and got half-commissions for doing it; hence that he was not entitled to commissions from the opposite party.—Pinch v. Morford, 142 Mich. 63.

¶ 181. A verdict in favor of a broker for his commissions is sustained by evidence that he had been employed as broker, that after a time a letter was written informing him that if sale was not made by a given Saturday all obligation "or extension of option with you" would cease, that on the day it was written the broker procured an oral offer and went by rail to present it to the principal, that it was so presented on Monday following the Saturday, that on the ensuing day the principal was prevailed on to accept, that the deal was finally closed on the terms procured; though the broker had originally been working under an option which had expired by its own terms previous to the writing of the letter, since the letter did not terminate the broker's employment before he found the purchaser.—Nolan v. Swift, 111 Mich. 56.

¶ 182. It cannot be said that there was no evidence of the employment of the broker to sell land for a wife, where it appears he had sold other lands for her and her husband and that they had at one time left the land in question to the broker to sell at a price in which he failed after which the price was raised, he finally obtaining an offer at the raised price and a deposit thereon and reporting to the wife, which sale fell through because she would not sign the deed; and where she denies that the price was ever satisfactory to her, or that she ever authorized plaintiff's employment; but where circumstances warrant the inference that she did authorize it and told the broker the price was satisfactory.—Codd v. Seitz, 94 Mich. 191.

¶ 183. Evidence held insufficient to show that a certain broker was defendant's agent in the purchase of a certain car load of fruit, the only proof of such agency being the broker's telegram to defendant "offered car," etc., and defendant's reply "can use car," etc.—E. R. Brackett & Co. v. Schiappacasse, 196 Mich. 124.

¶ 184. Plaintiff suing for commissions on sale of land makes out a prima facie case by testimony that he was instrumental in bringing about a sale, and that defendant had agreed to give him a certain per cent of the amount obtained in a sale which plaintiff should bring about.—McDonald v. Ortman, 88 Mich. 645.

¶ 185. A purchase by a broker through his correspondent is sufficiently shown in an action by the broker against his principal by showing that the broker had reported the purchase to his principal and received his approval.—Gregory v. Wendell, 40 Mich. 432.

¶ 186. Evidence of a conversation in which plaintiff was employed as a broker to procure a sale or exchange of property at a fixed price for a stated commission, followed by the submission of three offers culminating in no agreement and finally a fourth, which was rejected as first made, was held sufficient to show that the original agreement was for commission only on consummation of an actual sale or exchange and not upon an agreement to exchange; and a subsequent conversation amounting only to an agreement for a lump commission if the terms of the last offer were modified by the broker's procurement did not change it in this respect.—Keating v. Haley, 147 Mich. 279.

¶ 187. In an action by a broker against the purchaser of property to recover a commission which the seller had promised to pay the broker, evidence held insufficient to show that the purchaser promised to pay the commission either to the seller or broker.—Edwards v. Thoman, 187 Mich. 361.

¶ 188. In an action by a real estate broker for commissions for the sale of property evidence held sufficient to sustain a finding of the jury that an oral contract of general agency existed between the parties under which the seller retained control of the price, which he modified during negotiations, and that the plaintiff found the purchaser, brought the parties together, and was the procuring cause of the sale.—Lerner v. Harvey, 189 Mich. 249.

¶ 189. An agent's right to recover commissions on an exchange of land is prima facie established by proof that defendant agreed to pay commissions if a person having satisfactory property to exchange should be secured, and that the agent found such a person, with whom the defendant executed a contract for the exchange of the lands in question.—Whitaker v. Engle, 111 Mich. 205.

¶ 190. Under an agreement by a broker to sell a mining property for the defendant or to organize a corporation through either of which the defendant is to receive $75,000 for his interest, the plaintiff is not entitled to his commission by merely showing that the defendant finally organized a corporation in which a party introduced by the plaintiff has obtained some interest.—West v. Demme, 128 Mich. 11.

¶ 191. In an action against a corporation for commission for procurement of a loan under a contract whereby the broker was to receive a specified commission if he secured the assent of two-thirds of the preferred stock to the issuance of the bonds and obtained an underwriting of the bonds, evidence held insufficient to show performance of the contract.—Whittlesey v. Smith, 194 Mich. 494.

¶ 192. Where the evidence failed to disclose whether plaintiff was acting as agent or in his own interest, he cannot recover commissions for bringing about a sale of timber lands, especially where there was no contract to sell the lands on commission, and the idea of commission appeared to be thought of only after plaintiff had lost on a contract which the purchaser had given him, to do some logging on the lands.—Woods v. Palmer, 151 Mich. 30.

¶ 193. In an action for commissions under evidence that plaintiff had been given an option for the sale of certain lands owned by defendants; that the option had expired, and that plaintiff had expressed himself as being unable to make a sale, it was held that his rights were covered by the option and he was not entitled to a commission on a sale made afterwards by another to a party with whom plaintiff had been negotiating.—Carr v. Manistee Land & Timber Co., 179 Mich. 338.

¶ 194. Where it was claimed that a contract for the sale of celery was entered into whereby an agent agreed to ship and sell the produce for a certain sum at the point of shipment, less a specified brokerage fee, and that if the market went down the principal should be notified so that he could trench the celery and ship it himself, and the agent did not comply with such agreement, but sold one shipment for the stated price after its rejection and incurring of additional expenses for brokerage fees paid third persons, which were charged to the principal, and other cars are sold at other

places for the stated price, and others at a higher price, after having been placed in storage, and another car was sold at another place at the stated price, after having been put in storage, and the agent deducted the extra brokerage charges, and the freight and storage charges, held, in action by the principal against the broker, that the evidence was insufficient to sustain a recovery on the theory that defendant had committed a breach of the contract by selling plaintiff's celery and retaining some of the money received which belonged to the plaintiff.—Maxon v. Chaddock-Carney Sales Co., 195 Mich. 249.

¶ 195. In an action by the owner of goods against a commission merchant to whom goods were intrusted for sale, evidence held insufficient to warrant a recovery.—Hutchins v. Vinkemulder, 187 Mich. 676.

§ 43. Questions for court and jury.

Particular questions, see also post §§ 44-46.
Instructions, see post §§ 47-50.
General rules as to court and jury questions, see Trial, VI.
In actions on contracts generally, see Contracts, X.
Direction of verdict in action for recovery from real estate broker, see Directing Verdict, I.

¶ 196. In an action by a real estate broker for commissions in which the defendant admits that the plaintiff was instrumental in securing an arrangement for the sale of a certain parcel of land, but disputes the extent and value of his services, it is error to allow the jury to find a verdict of no cause of action.—Scribner v. Hazeltine, 79 Mich. 370.

¶ 197. Where, in an action brought upon a contract whereby plaintiff if he sold defendant's land for more than $5,000 was to receive the excess, it appeared that the land did so sell, and that a mortgage was taken for the purchase-price, held that the testimony that plaintiff was to receive his commission before the price was paid was not so conclusive as to make the case one for the court.—Marx v. Otto, 117 Mich. 510.

¶ 198. In a suit for a commission for the sale of real estate, where the testimony is conflicting as to whether or not the plaintiff was authorized by defendant vendor to sell the house, whether he presented the proposition to the buyer, and whether he was actively employed on the case at the time of the sale, the question as to the plaintiff's right to a commission is properly left to the jury.—Wood v. Smith, 162 Mich. 334.

¶ 199. In an action by a real estate broker for commissions where he had brought to the defendant owner a proposed purchaser ready and willing, and the defendant had then effected the sale, excluding the plaintiff from the transaction, there is no question of good faith to submit to the jury.—Heaton v. Edwards, 90 Mich. 500.

¶ 200. In an action by a real estate agent for commissions, a verdict for the defendant was properly directed, where plaintiff who in looking over an atlas with a third party, observed defendant's land marked thereon, and thereupon the two called on defendant, and thereafter plaintiff carried on numerous communications between the parties, and defendant repeatedly called at plaintiff's office and house, and where plaintiff drew the papers at defendant's request, and had made no arrangement for pay, and in fact received none from the purchaser.—Downing v. Buck, 135 Mich. 636.

¶ 201. In a suit for commissions against a husband and wife it is error to direct a verdict for the wife where there is evidence that she knew of the agreement between plaintiff and her husband, and acquiesced therein, and that her husband had acted for her respecting her property, with her knowledge and consent.—Crane v. Ross, 168 Mich. 623.

¶ 202. Under conflicting evidence the question whether a broker's contract for the sale of real estate was ratified by his principal's dealings with the purchaser. is a question for the jury.—Blakeslee v. Peabody, 180 Mich. 408.

¶ 203. Whether the defendant was notified that the plaintiff had secured a purchaser ready, able and willing to purchase land on the defendant's terms, when in dispute, is a question for the jury.—Blakeslee v. Peabody, 180 Mich. 408.

¶ 204. Where defendant testified and plaintiff denied, in an action to recover an agreed commission for effecting a sale of defendant's premises, that at the time defendant signed the agreement for such sale he stated to plaintiff that if it required his wife's signature to the deed he could not give it, held that a question of fact was presented for the jury and the court erred in directing a verdict for the plaintiff.—Cain v. Masurette, 196 Mich. 7.

¶ 205. In an action by a real estate agency, which leased a building to several persons, one of whom was a member of the agency firm, for its commission, held that it was a question for the jury whether such member, as the representative of the agency, waived the right to the commission from lessor in consideration of a reduction in the rent.—Kirby-Sorge-Felske Co. v. Doty, 190 Mich. 553.

§ 44. ——As to terms and existence of broker's employment.

¶ 206. In an action by a broker to obtain commissions for the sale of real and personal property, where there is a conflict as to the original agreement and what was done under it there are proper questions of fact which must be decided by the jury.—Reade v. Haak, 147 Mich. 42.

¶ 207. In an action for commissions on the purchase of certain timber the question what were the terms of the contract, and whether it had been modified by subsequent conduct and correspondence is properly for the jury where the evidence is conflicting.—Holmes v. Foss, 131 Mich. 487.

¶ 208. In an action by a broker for commission on the sale of mining property, testimony by the plaintiff that he was to dispose of the property so as to get $75,000 for the defendant, conbined with statements that he was to organize a corporation to put the property on the market raises a question for the jury as to the real agreement between the parties, there being no written contract in evidence.—West v. Demme, 128 Mich. 11.

¶ 209. In an action by a broker on an oral contract for commissions for the sale of real estate, where the evidence was conflicting, held that the question as to whether or not plaintiff had the exclusive sale of defendant's property was a question for the jury.—McGavock v. Ducharme, 192 Mich. 98.

¶ 210. Where a real estate agent claimed that certain conversations with the owner of land constituted a contract whereby he was to receive commissions upon its sale, and the language employed was susceptible of such construction, it was proper to submit the testimony to the jury for them to determine whether or not contract relations were in fact established.—Brooks v. Leathers, 112 Mich. 463.

¶ 211. In an action against a corporation to recover commissions under a contract for the sale of bonds and stock made with defendant's officers and in which the evidence was conflicting as to what the contract was, held that the nature of the contract was a question for the jury.—Sorensen v. Charlevoix Rock Product Co., 191 Mich. 86.

¶ 212. Where the recovery of commissions on a sale of a chattel are sought under a count on a special contract as well as under the common counts, both counts held properly submitted to the jury, where the existence of the special agreement was in dispute.—Case v. Rudolph Wurlitzer Co., 186 Mich. 81.

¶ 213. In an action for the balance due on produce where the plaintiff testifies that the defendant guaranteed to make money for him over and above a given price which had been offered for the goods, and the defendant testified that he never guaranteed any profit, that he merely offered to sell the goods for what he could get in the market, the question of whether or not there was a guaranty is for the jury.—Clintsman v. Alfred J. Brown Seed Co., 127 Mich. 280.

¶ 214. If the evidence is conflicting as to whether a real estate broker's commission was to be paid when an agreement for the exchange of properties was made or when "the deal went through," a question for the jury was presented.—Wolverine Farms Co. v. De Young, 182 Mich. 200.

§ 45. ——As to procurement or failure of bargain.

Instructions, see post § 49.

¶ 215. Where, in a suit to recover a commission on a sale of real estate, the pleadings limit the issue to the question whether plaintiff did in fact procure a purchaser, either at the price stated in the declaration or at a price satisfactory to the defendant, and the undisputed testimony shows that plaintiff did not bring the purchaser and defendant together, and that the purchaser was not a customer of plaintiff, and did not acquire his knowledge that the property was for sale from him, directly or indirectly, a verdict is properly directed in defendant's favor.—Thuner v. Kanter, 102 Mich. 59.

¶ 216. Where it appeared that plaintiff real estate firm had interested a prospective buyer in the sale of defendant's property, that the buyer subsequently purchased other property, and that the buyer's wife later purchased the defendant's property, the question as to whether plaintiffs were the procuring cause of the sale was properly left to the jury.—Parker v. Davis, 178 Mich. 93.

¶ 217. The testimony of a real estate agent, in an action for commissions, that he had several conversations relative to the purchase of the land with the officers of a corporation in which the person to whom the property was finally sold was a stockholder, that on two occasions the conversations were with the subsequent purchaser, and that he communicated the same to the owner of the property, who shortly afterwards himself effected the sale, raises a question for the jury as to whether the agent's efforts were the moving cause in the transaction, even though the purchaser fails to recall the conversations, or that he was influenced by plaintiff.—Brooks v. Leathers, 112 Mich. 463.

¶¶ 218, 219. The question whether an agent was the procuring cause of a sale of a chattel so as to entitle him to compensation from the seller, held properly submitted to the jury.—Case v. Rudolph Wurlitzer Co., 186 Mich. 81.

¶ 220. The question whether plaintiff was the procuring cause of the sale on account of which he seeks to recover a commission, which he claimed defendant agreed to pay him if he found a purchaser, was held to have been a question of fact for the jury where they were fully instructed that they could not find for the plaintiff if they found defendant's version of the contract to be true.—Kelso v. Woodruff, 88 Mich. 299.

¶ 221. In an action for recovery of broker's commissions for effecting an exchange of property it was proper to submit to the jury whether the opposite party cleared up his title in a "reasonable time" after a bargain was signed, where the bargain was signed on May 7th and title was perfected on June 20th following and an offer to perform was then made, but the principal had withdrawn on June 14th.—Keating v. Haley, 147 Mich. 279.

¶ 222. It is for the jury to determine what is "a reasonable time," under the circumstances, within which a broker may bring about negotiations with a proposed purchaser so as to satisfy the land owner's acceptance of an offer "if the sale is made right away."—Lorimer v. Boylan, 98 Mich. 18.

¶ 223. In an action by real estate brokers for commissions alleged to have been earned under an agreement providing that a stipulated commission should be paid if property was sold directly or indirectly by the brokers, but that if sold directly by the owner without any aid by the brokers the latter should be allowed only a certain sum for expenses, and such agency was terminable upon 30 days' notice, and the brokers, before the giving of such notice, produced a prospective buyer, who did in fact purchase the premises of the owner after the expiration of the period limited by such notice, held that it was a question for the jury whether or not plaintiffs indirectly sold the farm and whether defendant in good faith withdrew the property from sale and canceled the agency.—Warren v. Vandervelde, 193 Mich. 164.

¶ 224. A verdict for defendant is properly directed in an action by one broker against another for commission for the sale of real estate where the evidence shows that the written contract required a lease to be made satisfactory to the principal before a commission was payable and no lease was made and the prospective lessee was not willing to accept a lease on terms satisfactory to the principal.—Fleming v. James S. Holden Co., 200 Mich. 519.

§ 46. ——As to bad faith of broker.

See also ante ¶ 199.
Right to compensation as affected by fraud or misdoing, see ante §§ 27-29.

¶ 225. Whether an agent to sell land was guilty of bad faith towards his principal in leading a purchaser to understand the land could be secured for less than the asking price, held, to have been properly submitted to the jury on evidence that the prospective buyer offered it to others for a less price.—Harvey v. Lindsay, 117 Mich. 267.

¶ 226. Plaintiff testified that he listed his property for sale with defendant, a real estate broker, who agreed to handle it for him without an exclusive contract. Defendant testified that he told plaintiff he would consider the proposition of handling it this way. Defendant then sent his employee to secure an option on the property for four hundred dollars and defendant then immediately sold the same to a third person for five hundred dollars. Held, it was a question of fact for the jury whether defendant was plaintiff's agent so as to be bound to disclose to him all facts affecting his interest.—Walling v. Poulsen, 160 Mich. 392.

¶ 227. In an action by a real estate agency, which leased a building to several persons, one of whom was a member of the agency firm, for its commission, held that it was a question for the jury whether such member acted adversely to interests of lessor so as to bar plaintiff from recovering the commission.—Kirby-Sorge-Felske Co. v. Doty, 190 Mich. 553.

§ 47. Instructions in general.

Applicability of middleman theory, see ante ¶ 19.
As to employment, procurement of bargain, and value of services, see post §§ 48-50.
On effect of broker's knowledge that there were obstacles to bargain, see ante ¶ 94.
In action between brokers, see post § 51.
General law of instructions, see Instructions.
In actions on contracts generally, see Contracts, X.

¶ 228. In an action by a broker for commission for the sale of mining property, where the facts called for it, it is error to refuse to instruct as to the duty of the broker to bring the parties together and effect a deal in accordance with his agreement and that he is not entitled to commission for unsuccessful efforts to effect a sale.—West v. Demme, 128 Mich. 11.

¶ 229. In an action against a corporation to recover commissions for the sale of bonds and stock under a contract made with defendant's officers, plaintiff claiming that he was employed to sell bonds and stock of the defendant and to introduce prospective customers to the defendant, and that he was to be paid his commissions whether he personally closed any particular sale or not, an instruction that if the jury found that plaintiff was engaged as claimed by him, and that as a result of his labor bonds and stock were sold, whether those bonds and stock were out of the treasury or belonged to someone else, if the sale of them resulted from his having reported them to a superior, and the superior officer having taken advantage of his work, sold a different piece of property from what plaintiff was trying to sell, plaintiff would nevertheless be entitled to his commission, held proper.—Sorensen v. Charlevoix Rock Product Co., 191 Mich. 86.

¶ 230. In an action against a corporation to recover commissions for the sale of bonds and stock under a contract made with defendant's officers, and in which the evidence was conflicting as to the terms of the contract, plaintiff claiming that he was entitled to commission when he procured a purchaser, whether he personally closed the sale or not, held that a requested instruction that plaintiff would not be entitled to any commission for any sales of stock made to any person or persons after he left the employment of the company was properly refused.—Sorensen v. Charlevoix Rock Product Co., 191 Mich. 86.

¶ 231. An instruction that tender of performance by the opposite party to defendant, the principal of plaintiff broker, was in a reasonable time on June 20th in view of the signing of a "duplicate" contract by the principal to make the exchange on June 13th or 14th, was held properly refused on a record which did not contain such contract or show that it ever became binding by delivery to the opposite party.—Keating v. Haley, 147 Mich. 279.

¶ 232. In an action against commission merchants on the common counts in assumpsit and for goods sold and delivered, an instruction that the mere possession or receipt by defendants of goods under consignment made them prima facie liable for the value of the goods, held erroneous.—Hutchins v. Vinkemulder, 187 Mich. 676.

§ 48. ——As to employment of broker.

¶ 233. An instruction to the jury, in an action by the broker to recover a commission, that, if the owner referred the broker to her son when inquiry was made, she was liable, was misleading, the important issue being the character and effect of the reference depending on whether the broker represented himself as a buyer or a broker.—Hensel v. Maas, 101 Mich. 443.

¶ 234. In a suit by a real estate agent to recover commissions where the result turned upon the sole question whether or not the property was listed with plaintiff for sale, the following remarks, among others, were made by the court to the jury after they had announced that they were not likely to agree: "And the single question in this case, which should be solved readily, did the plaintiff by his subagent procure a customer for this property, and did they deal; and if so, he is entitled to his commission. If not, not guilty, or for the defendant. It is the simplest case ever presented to a jury." Held, that this statement of the issue by the court was error, being equivalent to the direction of a verdict for the plaintiff.—Ebert v. Wilcox, 155 Mich. 69.

§ 49. ——As to controlling cause of sale.

See also ante ¶¶ 100, 228.

¶ 235. In an action by real estate brokers for commissions for the sale of real estate an instruction that the plaintiff, in order to recover, must show by a fair preponderance of the evidence that the plaintiff was the procuring cause of the sale held correct.—Kinsey v. Barth, 192 Mich. 219.

¶ 236. In an action for compensation for services in a land sale, a request to charge that plaintiff could not recover unless the information by him given to the vendee was the controlling cause of the purchase, is substantially covered by a charge that the question is whether the solicitations and representations made by plaintiff in regard to the land determined the vendee to purchase or not. Any one who determines the action of the purchaser secures the purchase.—Ellsmore v. Gamble, 62 Mich. 543.

¶ 237. Where, in a suit for commissions on the sale of land, the testimony is conflicting as to plaintiff's having any real agency in bringing vendor and purchaser into relations of dealing, it is not error to instruct the jury that plaintiff cannot recover unless he procured a customer ready and willing to enter into a contract on the vendor's terms, whether those that were originally fixed, or such as defendant found acceptable.—Scribner v. Hazeltine, 79 Mich. 370.

¶ 238. In an action by brokers to recover commissions for the sale of real estate an instruction that if the jury was satisfied from a fair preponderance of the evidence that the purchaser abandoned all idea of

looking up the property that plaintiffs' representative had called his attention to, and he was led to examine the property through other and independent means, and he finally purchased it without any effort on the part of the plaintiffs, and did not buy it as the result of plaintiffs' calling his attention thereto, then the plaintiffs could not recover, held erroneous as the burden of proof was on plaintiffs to show that the sale was procured by them.—Kinsey v. Barth, 192 Mich. 219.

¶ 239. In an action by brokers to recover commissions for the sale of real estate, in which the issue was whether plaintiffs' representative was the procuring cause of the sale, an instruction to the effect that the purchaser's testimony as to the cause of the purchase should be disregarded, and that a broker has earned his commission by being the first to call the attention of the purchaser to the property held erroneous.—Kinsey v. Barth, 192 Mich. 219.

¶ 240. Plaintiff sued defendant for a real estate commission. Plaintiff testified that he sent the purchaser to the defendant, who negotiated the sale with him. Defendant testified that in a conversation with the plaintiff, after the sale, the plaintiff stated he did not know the purchaser. Held, that an instruction by the court that the plaintiff's testimony was undisputed was reversible error, since defendant's testimony tended to rebut it.—Barendsen v. Wilder, 158 Mich. 50.

¶ 241. In an action for a portion of commission for the sale of land alleged to have been procured by plaintiff, under an agreement with defendant, a real estate dealer, that they would divide the commissions on all sales procured by the plaintiff, the court directed the jury that the efforts of the plaintiff must be the procuring cause of the sale and then argued the case to the jury so as to destroy the effect of the instruction. Held, not error when the charge as an entirety was not misleading though parts thereof, if separated from the context, might have been.—Ketchell v. Keene, 171 Mich. 108.

§ 50. ——As to value of services.

¶ 242. In an action by the owner against a broker who had agreed to sell property for a consideration of not less than $35,000, where the jury had found that the agreement for a commission had been abandoned and the broker was to have all over $31,680, an instruction that the broker should receive a commission on the amount the owner claimed to be the real consideration and as much more as the actual consideration may be found to have been was not prejudiced, but rather favorable to the broker.—Yore v. Meshew, 146 Mich. 80.

¶ 243. In a suit for commissions for the sale of real estate, defendant's counsel in open court admitted defendant was liable for either $200 or $1,400. The court instructed the jury that defendant would in any case be liable for a reasonable commission, and that in such case its verdict should be $200. Defendant's said admission did not include any statements with respect to the matter of reasonable commission. Held, said instruction was not prejudicial.—Hoopengarner v. Stipe, 169 Mich. 307.

§ 51. Actions between brokers.

Actions on contracts generally, see Contracts, X.

¶ 244. In an action by one real estate broker against another on an alleged oral agreement for the sharing of commissions if plaintiff secured a purchaser for property which defendant had for sale, to recover one-half of the commissions received, defendant claiming no agreement existed, held that the charge as given fairly presented to the jury the conflicting theories of the parties and the issues involved.—Minds v. Keyes, 189 Mich. 629.

¶ 245. An instruction held not prejudicial to the defendant in an action for the recovery of compensation for the sale of land by the plaintiff under an agreement with the defendant, with whom the land was listed by the owner for sale.—Debo v. Gamble, 186 Mich. 583.

¶ 246. In an action by a third person to recover compensation for selling land under an agreement with the defendant, with whom it was listed by the owner for sale, the refusal to give an instruction requested by the defendant, held not prejudicial when considered with the instructions given.—Debo v. Gamble, 186 Mich. 583.

¶ 247. In an action by a third person to recover compensation for selling land under an agreement with the defendant, with whom it was listed by the owner for sale, it is competent for the defendant to be examined by the plaintiff as to whether the latter received compensation from the owner for making the sale.—Debo v Gamble, 186 Mich. 583.

¶ 248. In an action by one real estate broker against another, on an alleged oral agreement for the sharing of commissions if plaintiff secured a purchaser for the property for which defendant had the sale, to recover one-half of commissions received, held that as the evidence was conflicting as to whether such an agreement existed and as to whether plaintiff was the procuring cause of the sale, the questions were properly left to the jury.—Minds v. Keyes, 189 Mich. 629.

BROTHERS AND SISTERS to BUDGETS.

Cross-References.

Brothers and sisters—
Right to inherit, see Descent and Distribution.
As persons described in will, see Wills, VI.
Right to have letters of administration, see Estates of Decedents, III, A.
Implied contracts among, presumption as to gratuitous services, see Implied Contracts, II.
As dependents, see Death by Wrongful Act; Workmen's Compensation Law.
As cotenants, see Tenants in Common.
Bruises—
Allegation and proof of damages, see Damages, X, XI.
Opinions as to cause of, see Evidence, VI; Indictment, VIII, B.
Bucket shops—
Offense of betting and gaming, see Crimes, II; Indictment.
Gambling contracts, see Gambling Contracts.
Budgets—
Fiscal estimates of cities and villages, see Municipal Corporations, XIII.

BUILDING AND CONSTRUCTION CONTRACTS.

TREATS of the interpretation and performance of contracts for erection of buildings or the construction of permanently fixed improvements on land or the installation of fixed machinery, also including the same matter relating to subcontracts, the mutual rights of subcontractors and the principal contractor, the functions and duties of architects and superintendents and architects' contracts, and extra-work agreements. Matters of general contract law, such as offer and acceptance, consideration, legality, and public policy, and procedure on contracts are excluded and will be treated in Contracts. Mechanic's Liens is the subject of a specific topic.

Analysis.

I. In General; the Contract.

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II. Performance and Breach; Rescission and Abandonment.

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VI. Estimates, Measurements and Disputes; Arbitration and Reference.

§ 37. Scope of superintendent's or arbitrator's authority.
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§ 41. Certificates for amount payable.
§ 42. Agreement by parties on amount.
§ 43. Provisions for arbitration of disputes.

VII. Rights and Liabilities of Architects and Superintendents.

§ 44. In general; employment and selection.
§ 45. Duties and liabilities.
§ 46. Compensation.

VIII. Bonds and Indemnification.

§ 47. In general; interpretation of bond.
§ 48. Actions and defenses.

IX. Liens and Remedies.

§ 49. Liens in general.
§ 50. Actions and procedure.
§ 51. Right to sue on the contract; prerequisites.
§ 52. ——Liens outstanding.
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§ 54. Action on quantum meruit.

I. IN GENERAL; THE CONTRACT.

Building contractors as independent contractors, see Independent Contractors.

Liability for torts, see Highways, XII, G (to users of streets); Master and Servant, III (to servants); Buildings, §§ 4-6 (to licensees or third persons in building).

Contracts for purchase of materials, see Sales.

Agreements for loans and mortgages, see Mortgages; Contracts.

Building agreements in leases, see Landlord and Tenant.

Building regulations, see Buildings.

Agency to bind owner by contract, see Agency, I, A, C.

§ 1. The contract and its parts.

[Note. In respect to the fundamental elements of contracts, viz., their requisites

and parties, their formation by offer and acceptance, their legality and the public policy, and their consideration, it has been deemed by the editor better to treat all the decisions in the topic Contracts, I-V. For a similar reason questions of remedies and procedure are treated in Contracts, X, and in Mechanics' Liens, VIII.]

Certificate or assent to changes, see post § 36.

Contract and specifications as part of bond, see post § 47.

General law of public contracts, see Public Contracts,

Authority of corporate officers to make contract, see Corporations, XVII.

Contract as part of bond securing it, see also Bonds, § 2.

¶ 1. A contract for the erection of a specified number of houses on lots to be designated by the owner to be completed at a specified time, for a fixed price for each house, is a separable contract.—Barnard v. McLeod, 114 Mich. 73.

¶ 2. An original contract for grading and construction of a railroad and a supplemental contract whereby the railroad company gives further time to the contractor and advances him money, upon condition that a chattel mortgage of certain tools and implements is executed to the railroad to secure it, are to be regarded as one contract.—Brucker v. Manistee & G. R. R. Co., 166 Mich. 330.

¶ 3. In an action on a paving contract signed by the plaintiff and defendant and to which there was attached a copy of the specifications not signed by the parties, where the record shows that the specifications were drawn with the intention of being attached to and made a part of the contract to which they refer, and such reference is made in both the contract and specifications that neither can be understood without examination of the other, the specifications must be considered a part of the contract.—Central Bitulithic Paving Co. v. City of Mt. Clemens, 143 Mich. 259.

¶ 4. Conditions appearing in the general specifications for a building furnished for the guidance of bidders on the contract but not appearing in the "carpenter's specifications" attached to the contract for the guidance of the contractors, is not part of the contract.—Teakle v. Moore, 131 Mich. 427.

§ 2. Interpretation of plans and specifications in general.

Plans and specifications as part of contract, see ante § 1.

Deviation from specifications as breach, see post II.

Construction as respects sufficiency of performance or breach, time and delay, payment, extra work and changes, estimates and measurements, arbitration and reference see post II-VI.

Duty to furnish plans and estimates, see post § 14.

Custom as to charges as aid in interpretation, see also post § 25.

Custom as to measurement, see post ¶ 97.

¶ 5. Express stipulations as to the quality of materials and labor contracted for cannot be affected by any considerations relating to the uses to which they are to be put. Where a construction contract says "materials and labor first class," and defects in construction are complained of, it is no defense that the work may have been good enough for the purpose contemplated.—Clark v. Detroit Locomotive Works, 35 Mich. 82.

¶ 6. The term "more or less" as used in a tunnel construction contract in referring to the number of feet the tunnel is to be driven, is an expression which shows that the parties are to run the risk of gain or loss, as there might happen to be an excess or deficiency in the estimated quantity.—Township School Dist. of Wakefield v. MacRae, 198 Mich. 693.

¶ 7. Where the terms of a contract are ambiguous as to whether the masonry contractor shall incase certain cantilevers with concrete, the architect's letter approving the work without said cantilevers being incased, is properly considered.—Vaughan v. Ford, 162 Mich. 37.

¶ 8. In a railroad contract for an embankment to be thrown up from ditches alongside, a provision as to "cuttings on the line of the road," was held not to refer to such ditches, but to cuttings necessary to reduce the natural surface to the road level.—Grand Rapids & B. C. R. Co. v. Van Deusen, 29 Mich. 431.

¶ 9. The ordinary meaning of the term "grading" a street includes excavation and filling so as to make the surface conform to the grade line. Where, however, the contract which was inartificially worded provided that the grading should be done for $1.25 per linear rod, and immediately thereafter stated that the excavating should be done for twenty-six cents and the filling for twenty-five cents per cubic yard, held, that the grading to be done by the linear rod was intended to embrace all work of a preliminary character which the condition of the former street surface required to prepare it for excavating and filling, such as removal of obstructions, sidewalks, etc.—Davies v. City of East Saginaw, 66 Mich. 37.

§ 3. Rights of principals and subcontractor and assignees.

On refusal to furnish necessary plans, materials and supplies, see post §§ 14. 15.
Authority of disbursing subcontractor to charge contractor, see Agency, ¶ 205.
Subrogation to bond, see post § 47; and see also Subrogation.
Mechanics' liens and rights thereunder, see Mechanics' Liens.
Conflicting assignments, see Assignments, § 27.
Orders for payment and rights under them, see Nonnegotiable Paper.
Novation of contract and parties, see Novation.

¶ 10. The assignee for security of the percentage reserved under the assignor's contract as a subcontractor takes it subject to whatever defenses the principal contractor might urge with the exception of voluntary payments made by the principal after notice, and also takes subject to proper offsets and to whatever the principal contractor was obliged to pay in order to finish the contract in order to deliver the work free of liens or claims for materials and labor.—Fisken v. Milwaukee Bridge & Iron Works, 87 Mich. 591, affirming on rehearing 86 Mich. 199.

II. PERFORMANCE AND BREACH; RESCISSION AND ABANDONMENT.

§ 4. In general; substantial performance.

Owner's act or request causing deviation from contract, see post §§ 8, 17.
Provisions as to time and delay, price, and payment, see post III.
By architects, see post § 45.
General law as to performance or breach of contracts, see Contracts, VII.
Damages for breach or defective performance, see Damages.

¶ 11. A building contractor is bound by the specifications of his contract unless they are waived, and the other party to the contract cannot be forced to accept work that does not conform thereto, even though recoupment is allowed for deficiencies.—Martus v. Houck, 39 Mich. 431.

§ 5. Performance to satisfaction.

¶ 12. A provision in a building contract that the work shall be done to the satisfaction of the board of public works of the contracting city does not give such board arbitrary power to reject the work if it is done in accordance with and in substantial fulfillment of the contract.—Schliess v. City of Grand Rapids, 131 Mich. 52.

¶ 13. The unsatisfactoriness and insufficiency of roofs on houses to be constructed "to the entire satisfaction of the owner," who reserved power to reject materials and workmanship not according to specifications, and whose contract specified shingles of the quality furnished and laid, is not a ground for refusing acceptance, where it appears that the faultiness of the roofs is not due to the workmanship but to the poor quality of the materials specified, and that they were as well laid as roofs could be out of that material.—Gier v. Daiber, 148 Mich. 190.

§ 6. Acceptance of performance.

Waiver of defects, see also post § 7.
Acceptance as waiver of delay, see post § 23.

¶ 14. A building which is under construction is not accepted by the owner when he is forced to occupy it before it is completed if it is not completed for acceptance when it is so occupied.—Japes v. Harmon, 176 Mich. 1.

¶ 15. The owner of a building defectively constructed, who is compelled to move into it from necessity, does not thereby accept the building so as to be liable for final payments.—Frohlich v. Klein, 160 Mich. 142.

¶ 16. When one contracts with another to build or to do some part of the work in constructing buildings upon realty belonging to the owner the mere taking possession after the other has left the premises cannot be construed as an unequivocal acceptance; such an act and all the surrounding circumstances may be taken into consideration in determining whether there is an implied waiver of any conditions precedent.—Gier v. Daiber, 148 Mich. 190.

¶ 17. An owner of land who contracts for the erection of a dwelling house has a right to rely upon his contract, and can avoid liability upon the unperformed contract by refusing to accept the building, but he must decide within a reasonable time what he intends to do, and to keep the question open for a year and a month is not a reasonable time. During that time he has no right to recover for the rental value or for any deterioration in the building.—Eaton v. Gladwell, 121 Mich. 444.

§ 7. Waiver of defects.

Acceptance of performance, see ante § 6.

¶ 18. The owner of a building does not waive a substantial failure to comply with a contract for its erection, by remaining silent when asked by the contractor to tell him if there is anything not in accordance with the contract in order that he may fix it—especially where the defects are not such as can be readily seen and are not called to his attention.—Eaton v. Gladwell, 108 Mich. 678.

¶ 19. Minor defects in material and workmanship, not of a character evincive of any purpose to defraud and which might have been overlooked, and might have been remedied if attention had been called to them, will not be ground for refusing acceptance after the owner has been invited to point out further defects in addition to some that had been pointed out and remedied, and none was pointed out at that time.—Gier v. Daiber, 148 Mich. 190.

¶ 20. The owner, through his architect, may not observe work by the contractor going on from time to time and then complain when the work is done that it is not satisfactory.—Kunze v. Jones, 200 Mich. 453.

¶ 21. A city is estopped to set up that a contract for the construction of a wall was improperly performed where its inspectors and architect were present during the progress of the work and made weekly reports thereon to the board of public works upon which estimates were based and paid, and no objection to the manner of doing the work was made at any time.—Schliess v. City of Grand Rapids, 131 Mich. 52.

§ 8. Defective work required by owner.

As extra work, see post § 34.

¶ 22. Complainant, a building contractor, entered into a written contract with defendant to build a hotel according to plans and specifications prepared by an architect. Upon bill by complainant to foreclose lien for balance, defendant asked for damages for inferior construction due to defective plastering. Held, that inasmuch as defendant was not content to have the plastering done according to the contract, but insisted upon an entirely different contract with the plasterer, no allowance should be made to defendant.—Scheible v. Klenk, 171 Mich. 1.

¶ 23. Provisions in a city contract for sewer work, making the contractor "liable for defects in the material he has furnished or in his work," and making him responsible for repairs "by reason of faulty material or workmanship" did not apply to defective work performed at the express direction of the city engineer who was made the final arbiter.—Lamson v. City of Marshall, 133 Mich. 250.

§ 9. Reconstruction and reparation.

¶ 24. In an action on a city sewer contract, where the city engineer had refused to give a certificate and had directed the relaying of the sewer, it was repugnant to both equitable and legal principles to compel the contractors to again excavate and relay such sewer because the engineer had selected an improper method of laying it.—Lamson v. City of Marshall, 133 Mich. 250.

¶ 25. Under a subcontractor's contract which provided that "The contractors shall cover, protect, and secure the work from injury, any damage happening thereto shall be repaired, replaced or made good by such contractors," and that inspection and certificate by the architects "shall not release the contractor from any obligation to perform the work in a good and workmanlike manner, and in case of any default or defects being found at any time either in workmanship or materials, the same, with all damages due thereto, shall be repaired, replaced or made good by the contractors at their own cost and expense," a subcontractor who had, in accordance with specifications, placed pipes within four inches of the outside wall, is not bound to replace them in another place where, after his work was completed and accepted, the pipes were damaged by frost due to failure of other contractors to supply steam to be turned into them as intended, and the architect thereupon ordered new pipes to be put in in another location, and where they are so replaced he may charge therefor as extras.—Creswell v. Robertson, 139 Mich. 416.

§ 10. Certificate of performance and conclusiveness on the parties.

Refusal or waiver of certificate, see post §§ 12, 13.

Certificate to sanction extra work or changes, see post § 36.

Conclusiveness and presumptions as to estimates and measurements, see post §§ 38, 39.

¶ 26. A building contract with a school district provided that in case of discharge of the architects, the school board itself should act in their stead. Held, upon such discharge the plaintiff contractor was relieved of the necessity of producing the architects' final estimate.—Germain v. Union School Dist. City of Stanton, 158 Mich. 214.

¶ 27. Where a contract for the construction of a school building provides that the work shall be executed "agreeably to such directions as may be given from time to time by the architect or his assistant" (the local superintendent appointed by the district), "and to his full and entire satisfaction, without reference thereon to any other person"; that all claims for alterations or extras be adjusted "solely by the superintendent," and that payment be made for the full completion of the building on the certificate of the architect or superintendent, it was held that whatever passed under the inspection of the superintendent as the work progressed, and was in good faith approved by him, expressly or by implication, was not open to objection

on the part of the district afterwards, and that the certificate of the architect was not a condition precedent to the right of the contractor to recover for the work so approved. —Wildey v. Paw Paw & Antwerp Fractional School Dist. No. 1, 25 Mich. 419.

¶ 28. When so declared by contracting parties, the decision of an engineer or arbitrator as to the sufficiency of the performance of a contract may be final and conclusive so as to preclude an appeal to the courts, except where he acts fraudulently or in bad faith.—Algate v. City of Lansing, 180 Mich. 484.

¶ 29. Where a building contract makes the determination of the architect conclusive as to what is required of the contractor, the architect's decision is also conclusive upon the owner.—Young v. Stein, 152 Mich. 310.

¶ 30. Where a building contract provides that the architect, as agent of the owner, shall certify as to the performance of the contract upon which payment is to become due, another clause specifying that the house shall be acceptable to the owner and the architect, does not enable the owner to withhold payment after the architect has approved the work, but the owner is bound by the certificate of the architect.—Young v. Stein, 152 Mich. 310.

¶ 31. Where a building contract provides that the certificate of the architect shall not relieve the contractor from doing the work in a good and workmanlike manner, the owner, despite the architect's approval, is entitled to show, in a suit for the contract price by the contractor, that there was faulty workmanship, and it is a question for the jury whether the owner is estopped to claim damages by his acceptance of the work. —Young v. Stein, 152 Mich. 310.

¶ 32. The terms of a contract for the construction of a sewer held not to make the decision of the inspector as to whether materials used complied with the contract, final and conclusive so as to preclude an appeal to the court.—Algate v. City of Lansing, 180 Mich. 484.

¶ 33. A building contract provided that the architect's decision as to the fulfillment of the contract should be final. The architect gave his final certificate before the building was completed, upon the promise of the contractor to finish certain parts of the work. Held, this certificate was not conclusive on the owner so as to make him liable for final payment.—Frohlich v. Klein, 160 Mich. 142.

§ 11. ——Impeachment of certificate.

¶ 34. A finding that the decision of the architects against the right of the contractor to extra compensation was fraudulent, cannot be based upon the mere fact that they drew the plans and specifications, and were to receive from the owner as their compensation a certain percentage of the total cost of the building.—Kelly v. Public Schools of Muskegon, 110 Mich. 529.

¶ 35. Where a plaintiff contractor and a defendant owner have made an architect the final judge as to accounts between them, a sufficient fraud to set aside the architect's decision is not established by the fact that the architect has not found to be due plaintiff as much as he claims, and the fact that a jury has agreed with the plaintiff's contention.—Fisher v. Burroughs Adding Machine Co., 166 Mich. 306.

§ 12. ——Refusal to grant certificate.

¶ 36. A building contract held not to justify the refusal of an architect to furnish the contractor with a certificate of completion, on the ground of his liability for stipulated damages resulting from failure to complete the structure within the time limit.—Maurer v. School Dist. No. 1, 186 Mich. 223.

§ 13. ——Waiver of certificate.

¶ 37. Where payments are made to a contractor from time to time during the construction of a building, without the production of an architect's certificate, which the contract required, until demand for final payment was made, when the architect refused to give a final certificate, held that there had been a waiver of such requirement.—Maurer v. School Dist. No. 1, 186 Mich. 223.

¶ 38. In an action on a city sewer contract, where the engineer had refused a certificate and directed the relaying of the sewer, but where the city knew of the method adopted by the contractor with the consent of the city engineer, and failed to object but on the contrary continued to pay monthly estimates, the contractor was entitled to recover without the engineer's certificate.—Lamson v. City of Marshall, 133 Mich. 250.

§ 14. Furnishing plans and estimates.

¶ 39. The refusal of an inspector to furnish an estimate of work done on a sewer by a contractor in compliance with the terms of his contract, constitutes a breach thereof, where such refusal was because of the use of improper materials in another portion of the work.—Algate v. City of Lansing, 180 Mich. 484.

§ 15. Furnishing materials and supplies.

Use of materials and tools in completing work, see post § 29.

¶ 40. One who, having contracted to erect a building, sublets part of the work by contract expressly providing that the subcontractor is to furnish no material, and that the work shall be done without delay, is bound to see that material is supplied as needed, and his neglect to do so renders him liable to the subcontractor for the loss of time occasioned thereby, notwithstanding the fact that, as between the contractor and the owner, the latter was to furnish all material, of which fact the subcontractor had knowledge.—Perine v. Standfield, 107 Mich. 553.

¶ 41. A contract whereby railroad contractors sublet a portion of the work, to be completed to the satisfaction of the engineers at a time specified, reserving the right to end the contract and retain the sums withheld from the monthly estimates, and to pay the laborers directly, payment to be made when the work is completed, provided the railroad company had then paid them, and which provided that until the work was finished no money should be paid the subcontractor except for labor actually performed and materials furnished on said work, and that all moneys received upon estimates as the work progressed should be used to pay for such labor and materials, and that the subcontractor should stand, in respect to such work, as disbursing agent for his contractors, and be liable, as for a breach of trust, for any misapplication of such moneys, was held not to authorize such subcontractor to pledge the credit of his contractors for supplies furnished to him by third persons.—Wells v. Martin, 32 Mich. 478.

§ 16. Protection from elements or other danger.

See also post ¶ 49.

¶ 42. A contractor building a foundation wall for a city in accordance with the plans and specifications furnished by it, and doing the work in the manner and at the time directed by the city, is not an insurer of the work and is not responsible for defects due to freezing.—Schliess v. City of Grand Rapids, 131 Mich. 52.

¶ 43. Where a construction contract does not require a contractor to heat a building erected in cold weather, he is not answerable for defects in the plastering due to the absence of heat.—Johnson v. O'Neill, 181 Mich. 326.

¶ 44. The owner of a building under construction in cold weather and not the contractor must, in the absence of an agreement to the contrary, furnish necessary heat to protect it.—Johnson v. O'Neill, 181 Mich. 326.

¶ 45. It is the duty of the owner of a building to dry it out, especially where the building specifications cover such question, and the owner is consequently liable for the expense of drying out the building.—Malcomson-Houghten Co. v. Gregorian Bldg. Co., 191 Mich. 678; Wadham v. Gregorian Bldg. Co., Id.

¶ 46. Where the heating specifications of a written contract for building a church provide that the pipes underground must be deep enough to prevent freezing and must be covered with magnesia and felt, the court should rule as a matter of law, that said provision does not require the contractor to put asbestos on pipes which are under the church but not under the ground.—Wenzel v. Kleruj, 168 Mich. 92.

¶ 47. A provision in a contract for the construction of a sewer, requiring the contractor, in all cases where blasting is necessary, to cover the blast with brush or timber sufficiently to prevent injury to persons or property, is designed to prevent injury from fragments which might otherwise be thrown from the trench, and does not cover a case where one is injured by a horse which was frightened by the explosion.—Mitchell v. Prange, 110 Mich. 78.

§ 17. Causing needless work.

Extra work, see post V.

¶ 48. Where an engineer starts a tunnel-contractor's foreman at what he erroneously believes is the correct point, and, as a result, it is necessary to construct a longer tunnel than that covered by the contract, such act of the engineer does not constitute a breach of the contract.—Township School Dist. of Wakefield v. MacRae, 198 Mich. 603.

§ 18. Earth work; digging and filling contracts.

Mode of measurement, see post §§ 38, 39.

¶ 49. Where a city contracted with one whose lands adjoined its limits to enlarge and straighten a ditch on his premises so that it would be a sufficient outlet for city drainage, and so to do the work that the ditch would carry off all water without overflowing or saturating the adjoining premises, it was held the contract could not be construed to bind the city to make provision for extraordinary and unexpected floods, or to put the proprietor in any better condition than he would have been with the ditch as it was before, with the extra city flowage excluded.—City of Coldwater v. Tucker, 36 Mich. 474.

¶ 50. A provision in a railroad construction contract that borrowed earth for embankments shall be paid for at embankment prices, does not preclude a recovery for material which sank below the surface.—Brucker v. Manistee & G. R. R. Co., 166 Mich. 330.

¶ 51. Where a contract between adjacent owners to build a box drain bound each to build one end, and required the lower proprietor to keep his end of the drain open, such lower proprietor was liable on this contract if his neglect to open an outlet on his land below the proposed drain, to carry off the water, made it impossible to begin work on the drain itself.—Britten v. Dunning, 55 Mich. 158.

§ 19. Termination and abandonment.

Privileges to take over and complete work, see post IV.

Rights under contracts generally, see Contracts, VII, D; and see also Rescission.

¶ 52. A stipulation in a railroad construction contract that the company may terminate the contract when in its opinion the work is not progressing favorably or the contractor is not duly complying with the provisions of the contract, is binding upon the contractor, unless the action of the arbiter is successfully assailed for fraud or gross error implying bad faith.—Brucker v. Manistee & G. R. R. Co., 166 Mich. 330.

¶ 53. The fact that there is a dispute between a tunnel contractor and a school board and its engineer as to whether certain work should be done is no excuse for the failure of the contractor to go ahead and complete the work under the terms of the contract as claimed by him where such work would merely mean an extension of the tunnel.—Township School Dist. of Wakefield v. MacRae, 198 Mich. 603.

III. TIME AND DELAY AND PAYMENT.

§ 20. Time provisions generally.

In contracts generally, see Contracts, VI, D, VII, C.

Liquidated damages clauses, see Damages, VI.

¶ 54. Where a grading contract provided that the contractors should "proceed with such diligence and with such force of laborers as the executive committee of said company may direct to perform the work," etc., it was held that this provision was subordinate to one directly following it requiring the work to be completed by a day named, and was intended to enable the company to compel completion by the day specified.—Grand Rapids & B. C. R. Co. v. Van Deusen, 29 Mich. 431.

¶ 55. A., for whom B. was building a house under a contract to finish it by Sept. 15, 1885, accepted B.'s draft payable on that date to C., who was furnishing B. lumber for the house, and for whose lumber bill, to a certain extent, A. had agreed to become responsible, the acceptance being qualified thus: "It is understood that the dwelling shall be completed before this draft is p id." Quære, whether the fixing of Sept. 15 as the day of payment, qualified by the condition, would not make the completion by that date essential to any recovery.—Ferguson v. Davis, 65 Mich. 677.

¶ 56. On a contract to furnish "elevator fronts" for a building in process of construction, a stipulation in the contract that the seller "agrees to execute this contract with all diligence and to have all the fronts ready to put in place when the stairs are being put in—they do not furnish the stairs," the meaning is that the time limit was not later than when the stairs were ready to put in, and if there at that time it was sufficient, and it cannot be construed to obligate the seller "to deliver the inclosures when the stairs were ready to put in at all events, and to deliver them at an earlier date if by the exercise of all diligence he could do so."—Powell v. Champion Iron Co., 144 Mich. 540.

§ 21. Delay in performance.

Delay as breach in general, see Contracts, VII.

¶ 57. A contractor is not liable for a penalty under a building contract for failure to complete a building within the period of eleven months where he is hampered during the first five months of the period because of the lack of a formal contract and because he has no definite source for money supplies, and he is further hindered because of changes in the work.—Malcomson-Houghten Co. v. Gregorian Bldg. Co., 191 Mich. 678; Wadham v. Gregorian Bldg. Co., Id.

§ 22. Excuses for delay.

In contracts generally, see Contracts, VII, C.

¶ 58. A sewer contractor who sublets a part of the work for which he is to furnish the necessary material cannot escape liability for delay because of the failure of another subcontractor to deliver material and because of the rejection by the sewer inspector of a part of the material delivered.—Boston v. Henderson, 92 Mich. 606.

¶ 59. Complainant, a building contractor, entered into a written contract with defendant to build a hotel according to plans and specifications prepared by an architect. Upon bill by complainant to foreclose lien for balance, defendant asked for liquidated damages for failure to complete on time. Held, that inasmuch as the delays in the completion of the building were caused by the owner and the architect, complainant was not responsible for them.—Scheible v. Klenk, 171 Mich. 1.

§ 23. Waiver of time limit and delay.

See also generally Contracts, VII, C.

¶ 60. Where an owner who had contracted for the erection of five houses, to be completed by October 1, agreed September 17 to a modification of the contract to three houses under circumstances indicating that he contemplated that the buildings might not be completed until the following spring, and acquiesced in the continuation of work until late in December, he waived the right to insist that time was of the essence of the contract.—Barnard v. McLeod, 114 Mich. 73.

¶ 61. Where a paving contract with a city provided for stipulated damages for each day's delay in completing the work and that it should be paid before the work was accepted by the city, the fact that the work was accepted without any claim for such damages is a waiver thereof.—Central Bitulithic Paving Co. v. City of Mt. Clemens, 143 Mich. 259.

¶ 62. The right of a city to insist on the payment of stipulated damages for delay was not waived by its permitting the contractor to proceed with the work after the time provided for completion, and by receiving and paying estimates for the work.—Lamson v. City of Marshall, 133 Mich. 250.

¶ 63. Where a property owner was given an option by a contract to permit a contractor to complete a second story of a building, and the former did not exercise his option until a week before the expiration of the time limited for the completion of the structure, held, that such conduct amounted to an abandonment of the time limit so as to excuse the other party to the contract.—Maurer v. School Dist. No. 1, 186 Mich. 223.

§ 24. Extension of time.

See also ante § 23.

¶ 64. The time for the completion of a city sewer contract was not extended by the action of the council in recommending that the contractor's application for an extension of time be laid on the table until the completion of the contract.—Lamson v. City of Marshall, 133 Mich. 250.

§ 25. Price, advances and payment.

Rights of principal and subcontractors, see ante § 3.
Clauses for withholding payment, see post § 27.
Extra work, see post V.
Certificate for amount payable, see post § 41.
Agreement on amount payable, see post § 42.
Compensation of architect, see post § 46.

¶ 65. Where a contract to grade a street specifies the price of excavation and removal of earth a distance of five hundred feet, and provides that for every foot over five hundred the contractor is to receive the same price pro rata, the contractor cannot be confined to the reasonable worth of such removal for a distance over five hundred feet.—Davies v. City of East Saginaw, 66 Mich. 37.

¶ 66. Evidence of a custom among contractors and builders furnishing labor to be charged for by the day to charge for each man working an advance over the price paid him by the contractor is admissible in interpreting the contract, where it appears that the men were general employees of the contractors, and that their labor was worth the price charged therefor.—McDonnell v. Ford, 87 Mich. 198.

¶ 67. A contract for the construction of a driveway of a specified width, and of "about" a designated length, for a given price per square foot, "payment to be a good and sufficient note, at 60 days, upon completion of work," does not make the giving of the note a condition precedent to the right to demand a performance of the work.—Armstrong v. Andrews, 109 Mich. 537.

¶ 68. Failure to pay monthly, as agreed, on a contract for grading a proposed railroad, would not, of itself, and in the absence of any showing that any delay was authorized by the company, entitle the contractors to recover extra compensation for the labor performed on account of the delay occasioned by such default in payment, and the consequent increased cost of the work.—Grand Rapids & B. C. R. Co. v. Van Deusen, 29 Mich. 431.

§ 26. Damages and penalty clauses.

See also ante ¶¶ 57, 62.
Liquidated damages clauses as measures of damages or as penalty, see Damages, VI.

¶ 69. In an action by the owner of a building against the contractor and the corporate surety on a bond to recover excess

payments made to the contractor because of the failure of the contractor to satisfy liens and perform the work according to the contract, necessitating the cancellation of the contract and the completion of the work by the owner, held, that a clause in the contract for damages at the rate of a certain sum per day to be paid if the work was not completed at a specified date, should be read with another provision allowing material alterations.—Doyle v. Faust, 187 Mich. 108.

§ 27. Clauses for withholding money.

¶ 70. In letting a contract for laying a patent pavement, the city of Detroit stipulated that it might withhold a certain fixed sum per square yard to protect itself from claims for royalty, and the bids were to include that sum. The city assessed and collected a paving tax amounting to the entire contract price including the royalty, which it had made a separate contract to pay, but it afterwards appeared that the patent was void. Held, that the contractors were not concerned in the city's liability for royalty, and were not entitled to receive the sum withheld to pay it.—City of Detroit v. Robinson, 42 Mich. 198.

¶ 71. Where one member of a firm of paving contractors makes an individual contract to pave a street, the fact that the firm as a firm has already made an agreement by which they are to receive a certain royalty upon the kind of pavement used, does not make any difference with the construction of the individual contract.—City of Detroit v. Robinson, 42 Mich. 198.

¶ 72. Under a contract to do the carpenter work on a building for a specified sum, payments to be made from time to time as the work progressed, reserving 10% until 10 days after the work is completed, a contractor may recover for work done though before its completion it is damaged by the fall of the roof caused by improper designs and careless supervision by the agents of the owner.—Teukie v. Moore, 131 Mich. 427.

IV. COMPLETION AFTER BREACH OR ABANDONMENT.

§ 28. Notice and election to complete.

Right of assignees for security to assume performance, see also Assignments, ¶ 89.

¶ 73. A railway contractor made a subcontract for building a section of road, and stipulated therein that if the work should not be carried on with sufficient force and energy the chief engineer of the road might, on giving written notice to the subcontractor, declare the subcontract forfeited, or might take possession of the work and carry it on at the subcontractor's expense and for his benefit. Held, that as the chief engineer was a stranger to the agreement he could not be compelled to give the notice, and that a written notice from the contractor to the subcontractor was sufficient where the engineer had already orally notified both that the work was not advancing satisfactorily.—Hendrie v. Canadian Bank of Commerce, 49 Mich. 401.

¶ 74. Defendant accepted an order in favor of plaintiffs, drawn on him by contractors for sinking a salt well, and payable when a certain depth was reached, subject, however, to the conditions of the contract. The contractors being unable to complete the contract, defendant assumed its performance, after which the contractors had nothing to do with the job except to oversee it, and defendant furnished everything, and paid the men. Held, that defendant did not, by such conditional acceptance, obligate himself to notify plaintiffs of any breach of the contract by the contractors, and if he was compelled, as the only means of securing the completion of the work, to take upon himself the burden of paying the men and for the materials, he had a right to deduct these payments from the contract price, whether he gave such notice or not, and without reference to whether the transaction was called an "abandonment" of the contract or not.—Jenks v. Wells, 90 Mich. 515.

§ 29. Use of materials and tools.

¶ 75. Where a contract for railroad construction provided that if the work did not go on fast enough the chief engineer of the road could take charge of it and carry it on at the contractor's expense and for his benefit, it seems that he would be entitled to take the teams and tools of the contractor for the purpose, especially if there was not time enough to get others. Whether the contractor would have a right to so mortgage them as to prevent this, quære.—Hendrie v. Canadian Bank of Commerce, 49 Mich. 401.

V. EXTRA WORK OR EXPENSE, ADDITIONS AND CHANGES.

§ 30. In general; what is extra work or materials.

Particular causes for necessity of extra work, see post §§ 31-34.
Extra expenses, see post § 35.
Presumption as to gratuitousness of inclusion in contract, see also Implied Contracts, II.

¶ 76. Where a contract between a contractor and a subcontractor for the grading of a road-bed gave the engineer of the railroad the right to change the line at discretion, the contractor would not be liable for

an additional cost of overhaul unless changes had been made fraudulently by the contractor's procurement or collusion.—Bush v. Brooks, 70 Mich. 446.

¶ 77. In an action for extra services furnished under a contract under which plaintiff undertook to move a beet sugar factory to a new location and to pay certain enumerated expenses in connection therewith, the claims sued on were held not to be within the terms of the contract.—Hapke v. Davidson, 180 Mich. 138.

¶ 78. The exhibition to a contractor, before making a bid for sewer excavation work, of original blue prints prepared by a city engineer, does not constitute a warranty that the exact amount of excavation there delineated would be done in the actual carrying on of the work, where the contractor is to be paid for whatever excavation is done in each particular class at price named in such class, and the contract itself contemplates that there may be changes in the plans and work done.—Schneider v. City of Ann Arbor, 195 Mich. 599.

¶ 79. Where the contractors who were about to erect a building, and the owner of the lot on which it was to be placed, jointly bound themselves for all brick delivered for the building, and nothing indicates that no change in plans was contemplated, their liability extended to brick delivered for additions to the first plan of the building though the party delivering was not notified of any change in the plan.—Goldner v. Finn, 67 Mich. 340.

§ 31. ——Preparatory work.

¶ 80. A contract by a railway company to "pave" its track, held not to cover the excavation necessary to prepare for the paving. —Fort Street & E. R. Co. v. Schneider, 15 Mich. 74.

¶ 81. In a contract to grade and pave a street the contractor agreed to furnish and lay the stone curb at a certain price per lineal foot. To properly set the curbstones it was necessary to excavate a trench to a specified depth. Held, that such work was included in the bid for furnishing and laying the curbstones, and could not be recovered for as excavation under other provisions of the contract.—Davies v. City of East Saginaw, 66 Mich. 37.

§ 32. ——Unforeseen work.

¶ 82. Under a contract to construct a sewer which provided that no tunneling should be done without permission or unless the plan stated that it was to be a "tunneled sewer," and that all loss or damage from unforeseen difficulties or obstructions should be borne by the contractor, the latter cannot recover extra compensation because the ground was found to be such that tunneling was impossible, though the plan had printed thereon "May be tunneled," since this was a mere permission and not a representation that it could be tunneled.—Gartner v. City of Detroit, 131 Mich. 21.

¶ 83. Plaintiff agreed to erect for defendant a mausoleum for $22,000, with a foundation at a depth of ten feet. Neither party at the time of entering the contract knew of the condition of the soil under the surface. Plaintiff, after digging ten feet, found quicksand, and had to go to a depth of twenty feet to secure a firm foundation. Held, that no new promise having been made by defendant to pay for the extra work during the course of its performance, plaintiff could not recover for same.—Harrison Granite Co. v. Stephens, 160 Mich. 51.

§ 33. ——Needless or improper work.

¶ 84. Under a contract to grade a street the contractor was to receive a certain price per cubic yard for filling. He filled in so that the slope of the embankment extended outside of the street lines, and upon private property. Held, that he could not recover for such filling outside of the street lines.—Davies v. City of East Saginaw, 66 Mich. 37.

¶ 85. Under a contract to construct a sewer which provided that no tunneling should be done without permission or unless the plan stated that it was to be a "tunneled sewer," and that all loss or damage from unforeseen difficulties or obstructions should be borne by the contractor, but that he should be paid for extra work resulting from changes or additions made at the direction of the city, the contractor cannot recover extra compensation because the ground was found to be such that tunneling was impossible, though the plan had printed thereon "May be tunneled," since the city made no change in the plan nor did it dictate the mode of construction.—Gartner v. City of Detroit, 131 Mich. 21.

§ 34. ——Work made necessary by owner.

¶ 86. Failure to pay monthly, as agreed, on a contract for grading a proposed railroad, would not of itself, and in the absence of any showing that any delay was authorized by the company, entitle the contractors to recover extra compensation for the labor performed on account of the delay occasioned by such default in payment, and the consequent increased cost of the work.—Grand Rapids & B. C. R. Co. v. Van Deusen, 29 Mich. 431.

¶ 87. A sewer excavation contract by a city held not breached by it, so as to author-

ize a recovery by the contractor for an extra amount of excavation and refilling by gravel necessitated by seepage of water into trenches dug by him, by its delay of 20 or 30 minutes in laying the pipe in the trenches.—Schneider v. City of Ann Arbor, 195 Mich. 599.

§ 35. Extra expenses.

Caused by delay in payments, see ante ¶ 68.

¶ 88. Where a plaintiff contractor upon the demand of an architect has given to defendant owner a surety bond, he cannot in the settlement of the account recover the premium paid by him on such bond on the ground that his contract with defendant did not call for said bond.—Fisher v. Burroughs Adding Machine Co., 166 Mich. 396.

§ 36. Provisions as to sanction or certification.

Agreement to change as implying extension of time, see ante ¶ 60; and see also Contracts, VII, C.

¶ 89. A provision in a building contract that "The contractors shall make no claim for additional work unless the same shall be done in pursuance of an order from the architects, and notice of all claims shall be made to the architects in writing within 10 days of the beginning of such work," does not make notice in writing a prerequisite to the validity of a claim where the order for the work was given by the architect who knew of its commencement and progress, and afterwards certified that it was done in accordance with the plans and specifications.—Teakle v. Moore, 131 Mich. 427.

¶ 90. A contractor for the erection of a lighthouse sub-let part of the work under a contract which provided that the work should be performed under the direction and to the satisfaction of the government engineer or his agent, that alterations should be made in the work as required by the contractor, and that the value of extra work should be fixed by the engineer, or some competent person appointed by him. The engineer named in the contract was at no time present, but the contractor instructed the subcontractor to do whatever the government inspector, appointed by the engineer, wished him to do. The subcontractor performed additional work under the direction of such inspector, but the latter, on application, refused to make any valuation thereof. Held, that upon such refusal the subcontractor was entitled to maintain an action for the extras so furnished.—Moran v. Schmitt, 109 Mich. 282.

¶ 91. Where the supervising architect of a building was given authority to order extra work and was referred to in the contracts as the agent of the owner, he had authority to arrange that a necessary scaffold be built by one of the contractors, though under the several contracts each was required to build his own scaffolds, where this was done to expedite the building which had been delayed, and he had power to bind the owner to pay therefor, the other contractors agreeing to a deduction of their share from the amounts to be paid to them.—Teakle v. Moore, 131 Mich. 427.

¶ 92. In an action for materials and labor in plastering, plaintiff may show that after he began work the specifications attached to the original contract were produced, and that he was told by defendant to do the work according to them, and he should have his pay, and that pursuant thereto he did three-coat plastering work instead of two, as he had at first agreed to do.—Evans v. Montgomery, 95 Mich. 497.

¶ 93. Where a contract for sewer excavation work with a city provides that a written order by the board of public works for extra work must be obtained, there can be no recovery for extra work and material except by compliance with such provisions.—Schneider v. City of Ann Arbor, 195 Mich. 599.

¶ 94. There is no waiver of the provisions of a contract for sewer excavation work requiring a written order by the board of public works for the doing of extra work before a claim for such work shall be allowed where, when the contractor was directed to do the work involved, he asked for a written order from the board on the ground that it was an extra, and the city engineer insisted that it was within the specifications.—Schneider v. City of Ann Arbor, 195 Mich. 599.

VI. ESTIMATES, MEASUREMENTS AND DISPUTES; ARBITRATION AND REFERENCE.

§ 37. Scope of superintendent's or arbitrator's authority.

Effect of unauthorized estimate, see post § 40.

¶ 95. Contractors doing city sewer work were bound to obey the orders made in good faith by the city engineer, whether they were advantageous or detrimental to their interests, and they were not exempt from obedience because they believed such orders to be unwise.—Lamson v. City of Marshall, 133 Mich. 250.

¶ 96. A building contract providing for the determination of any questions arising between the parties as to the meaning of the plans and specifications, by an architect

or superintendent, is not broad enough to convey authority to decide a disputed question of the method of measurement of brick used in walls.—Walker v. Syms, 118 Mich. 183.

§ 38. Estimates and measurements and their conclusiveness.

Price provisions depending on quantity of work, see ante § 25.
Sinkage as included, see also ante ¶ 50.
Unauthorized estimates, see post § 40.
Certificate for amount payable, see post § 41.

¶ 97. A custom as to the method of measuring brick furnished and laid in walls will govern where a building contract is silent as to such method.—Walker v. Syms, 118 Mich. 183.

¶ 98. A contract for grading and preparing for ties the bed of a railroad held to contemplate that the road bed should be an embankment thrown up from ditches on either side; and where the term "cuttings on the line of the road" was not to refer to those ditches, but to the cuttings necessary where the natural surface of the ground was above the road level, and that all earth thrown into embankments, whether from ditches or cuttings, should be measured in the embankment and not as excavation according to the space it occupied before removal, but that all the earth thrown into spoil banks should be measured as excavation; a ruling below that the contractors were to be allowed for all shrinkage of the earth arising from its being thrown into embankments, and measuring less there than where it was taken from, held erroneous. —Grand Rapids & B. C. R. Co. v. Van Deusen, 29 Mich. 431.

¶ 99. Where a great fire swept over the line of a proposed railroad after it had been surveyed, but before the contract for grading was made, and burned away the soil so that more earth was needed for fills and embankments than was shown by the engineer's profile and table of cuts and fills made before the fire, it was held not error to permit a jury to take this fact into account in determining the amount of work done under the contract.—Grand Rapids & B. C. R. Co. v. Van Deusen, 29 Mich. 431.

¶ 100. A contractor for city sewer work had no right to be present at a conference between the city engineer and his assistant, when they determined how they would classify the material excavated by the contractor, where the contract made the engineer the final arbiter in the matter of such classification.—Lamson v. City of Marshall, 133 Mich. 250.

¶ 101. The provisions of a sewer excavation contract providing that all estimates, measurements and determinations of quantity shall be made by the city engineer and that his estimates and measurements shall be final and conclusive between the parties are binding in the absence of fraud or bad faith.—Schneider v. City of Ann Arbor, 195 Mich. 599.

¶ 102. A municipality cannot avail itself of the advantage of having a supervising architect, with powers to decide on every detail as it may arise, without taking the consequences of his making an erroneous decision.—Lamson v. City of Marshall, 133 Mich. 250.

§ 39. ——Presumption of good faith.

Impeachment of certificate of performance, see ante § 11.
Conclusiveness of estimate or measurement, see ante § 38.

¶ 103. The rule applicable to a provision in a city sewer contract making the engineer's estimate as to whether excavated stones or boulders were to be classified as rock or earth final, was that the estimate was binding if honestly made, and not binding if it did not accord with honest judgment, and the burden to prove dishonesty was upon the party attacking the estimate. —Lamson v. City of Marshall, 133 Mich. 250.

¶ 104. In an action by a contractor on a city sewer contract, where the contract made the engineer's estimate as to the classification of excavations final, and there was dispute as to whether the engineer's estimate was his honest judgment, testimony that the engineer declined to make an estimate on the ground that "it might scare the city fathers," saying that he would "wait until we got scattered around on the outside trenches, and then they wouldn't know where we were, or what the estimate was for" together with the fact that rock was not anticipated, justified the inference that the estimate in question was not the honest judgment of the engineer.—Lamson v. City of Marshall, 133 Mich. 250.

¶ 105. In an action by a contractor against a city to recover for extra work done and material furnished on a sewer excavation contract, held that the burden of proof was upon plaintiff to show fraud or bad faith on the part of the engineer in making his estimates and computations.—Schneider v. City of Ann Arbor, 195 Mich. 599.

§ 40. Unauthorized estimates.

¶ 106. An estimate as to the amount due upon a building contract made by an architect who is not authorized by the contract to

make estimates is not binding upon the party for whom the building is being erected.—Schuler v. Eckert, 90 Mich. 165.

§ 41. Certificates for amount payable.

Certificate of performance, see ante §§ 10-13.

¶ 107. An advisory letter recommending payment to contractor is not an architect's certificate.—Doyle v. Faust, 187 Mich. 108.

§ 42. Agreement by parties on amount.

¶ 108. Where a plaintiff contractor and defendant owner have agreed as to the balance due plaintiff, and there is no evidence of fraud on the part of the architect in refusing to approve parts of plaintiff's claim, the trial court properly directs a verdict for defendant in a suit for a sum in excess of the amount agreed upon, based on a claim of mistake on the agreed sum. (Bird, J., dissenting.)—Fisher v. Burroughs Adding Machine Co., 166 Mich. 396.

¶ 109. The fact that a plaintiff contractor and a defendant owner have agreed that a certain sum is due plaintiff does not constitute a waiver by defendant of the agreement making the architect the final arbitrator between the parties, where the sum agreed to be paid by plaintiff consisted of items previously approved by the architect.—Fisher v. Burroughs Adding Machine Co., 166 Mich. 396.

§ 43. Provisions for arbitration of disputes.

Dispute as ground for abandonment of work, see ante § 19.

Arbitration in common form, and arbitrations not provided for by contract but submitted by independent agreement, see Arbitration.

Arbitration distinguished from umpirage, see Arbitration, § 1.

Construction of terms providing for arbitration, see also Arbitration, § 4.

Construction of agreement for arbitration in contract, revocability, see also Arbitration, ¶ 24.

Validity of judgment on statutory arbitration, see Arbitration, ¶ 69.

¶ 110. A provision in a building contract that, if any apparent discrepancy should be found to exist between the plans, working drawings, and specifications, the decision as to the fair construction and the true intent and meaning thereof should be made by the architects, whose decision should be binding, is reasonable, and binds both parties; especially where the plans and specifications, an examination of which would have revealed apparent discrepancies, were accessible to the parties before the contract was made.—Kelly v. Public Schools of Muskegon, 110 Mich. 529.

¶ 111. A dispute arose between the parties to a contract for the erection of a building as to the damage caused by a failure to construct the cellar according to the specifications. The architect professed to be satisfied, and issued his final certificate as to the amount due. The owner demanded a reference to arbitrators, and named one who should act in his behalf. The contractor, contending that the architect was the agent of the owner under the terms of the contract, and that his decision was final, refused to appoint an arbitrator, and brought suit for the amount certified by the architect. Held, that the action was premature, and could not be maintained.—Weggner v. Greenstine, 114 Mich. 310.

¶ 112. Where a contract provides that if either party to a contract for building dissents from the architect's valuation of work added or omitted such valuation shall be referred to three arbitrators, an action before such reference is premature.—Weggner v. Greenstine, 114 Mich. 310.

VII. RIGHTS AND LIABILITIES OF ARCHITECTS AND SUPERINTENDENTS.

§ 44. In general; employment and selection.

¶ 113. Under the ordinance of the City of Grand Rapids, § 85, providing that any person who shall be engaged in the planning or supervision of the erection, enlargement or alteration of buildings for others and be constructed by other persons than himself shall be regarded an architect, a contractor and builder who submits a proposition whereby he is to oversee the construction, if the contract is awarded to another, is an architect.—Wedgewood v. Jorgens, 190 Mich. 620.

¶ 114. An invitation to architects to submit designs to a board of trustees of a museum for a building, the submitted designs to be submitted to and passed on by a "competent board of experts," and stating that the examining board will not be bound to make any award if none of the designs be deemed worthy, does not make the function of the board of experts that of arbitrators, where they were not named, no number of them was specified, and they were appointed entirely by the trustees as advisers to them.—Donaldson v. Detroit Museum of Art, 72 Mich. 32.

¶ 115. Reasonableness of time in submitting to experts a design for a building in competition with other architects is immaterial, where the particular design when submitted was considered and rejected.—Donaldson v. Detroit Museum of Art, 72 Mich. 32.

§ 45. Duties and liabilities.

As estimator or arbiter of dispute, or as agent to measure work, see ante § 37.
Estimates and measurements and their conclusiveness, see ante §§ 38-40.
Certifying performance, see ante §§ 10-13.
Duty to furnish plans, see also ante § 14.
Certifying necessity for or agreement to extra work or change, see ante § 36.
Authority of superintendents and the like as agents, see Agency, II, and especially § 34.

¶ 116. An architect who has the ordinary skill and knowledge of his profession, and who, in the exercise thereof, uses ordinary skill and care, is not liable to his employer for damages resulting from an error of judgment in drafting plans.—Chapel v. Clark 117 Mich. 638.

¶ 117. The responsibility of an architect does not differ from that of a lawyer or physician, and he is not a warrantor of the plans and specifications and he does all that is required by the law, when he possesses the requisite skill and knowledge, if he uses his best judgment in the exercise of such knowledge.—Bayne v. Everham, 197 Mich. 181.

¶ 118. A property owner cannot recover damages from an architect for acts amounting to dereliction on the latter's part which were consented to by or were the result of the owner's negligence.—Johnson v. O'Neill, 181 Mich. 326.

§ 46. Compensation.

Persons entitled to mechanics' liens, see Mechanics' Liens, II.
Implication against promise to pay contractor for superintending his own work, see Implied Contracts, II.

¶ 119. An architect may recover for his services where he has substantially performed his contract, and the defendant has received a benefit therefrom.—Johnson v. O'Neill, 181 Mich. 326.

¶ 120. An architect may recover for making material alterations at his client's request in plans after the letting of a contract for a building.—Johnson v. O'Neill, 181 Mich. 326.

¶ 121. A usage among architects to charge for preliminary sketches and estimates of cost on the basis of a percentage on such estimates cannot bind the customer if unknown to him and not assented to.—Scott v. Maier, 56 Mich. 554.

¶ 122. An architect who submitted a design, rejected by a majority of the experts chosen by the corporation which invited the design in competition, cannot recover in assumpsit for the value of his services on a showing that the advice of the experts was not followed but that the trustees of the corporation chose a design themselves, where the invitation merely promised that designs would be passed on by the experts selected by the trustees and prizes awarded for those three selected, the first choice to carry employment as architect for the building, and where the invitation was merely to invite competitive designs, and did not promise to select any.—Donaldson v. Detroit Museum of Art, 72 Mich. 32.

VIII. BONDS AND INDEMNIFICATION.

§ 47. In general; interpretation of bond.

Clauses for withholding payments, see ante § 27.
Premium on bond as extra expense, see ante ¶ 88.
Bond of public contractor for protection of materialmen and subcontractors, see Public Contracts, VII.
General right of subrogation, see Subrogation; Suretyship.

¶ 123. Where a bond signed by a building contractor and a surety company refers to the contract it must be read with the contract and specifications.—Doyle v. Faust, 187 Mich. 108.

¶ 124. A building contractor's indemnity bond limited in terms to material claims which "are valid liens against his property" does not extend to one which is defective.—Herpolsheimer v. Hansell-Elcock Co., 141 Mich. 367.

¶ 125. A building contractor's bond expressly providing that "the surety shall not be liable under this bond to any one except the owner," but also providing that the owner in estimating his damages under the bond may include the claims of mechanics and materialmen, is a private obligation giving no rights to a materialman on which it can invoke the aid of equity as a subrogee.—Herpolsheimer v. Hansell-Elcock Co., 141 Mich. 367.

§ 48. Actions and defenses.

On bonds generally, see Bonds.
Intervention of parties, see Parties.

¶ 126. In a suit on a building contractor's bond to recover the price of materials furnished by a third party for which the owner of the building had become liable, and against which liability the bond indemnified him, defendants may show, under a plea of the general issue, that plaintiff has in his hands money due under the contract as pleaded to

the contractor sufficient to satisfy the demand.—Marquette Opera House Building Co. v. Wilson, 109 Mich. 228.

¶ 127. Under the general issue to a bond of indemnity to a building owner to hold him harmless against liens and amounts he should be compelled to pay, defendants cannot show that the owner has in control and might apply to a material-claim money owing the contractor for extras, the contract requiring an architect's estimate for such extras which does not appear to have been made so as to earn the money under the contract and the bond being collateral to the contract; such defense on the bond is equivalent to a plea of breach of the principal contract in that no architect's estimate was exacted and must be specially noticed under the general issue.—Marquette Opera House Building Co. v. Wilson, 109 Mich. 223.

IX. LIENS AND REMEDIES.

§ 49. Liens in general.

See generally Mechanics' Liens.
Necessity of discharging liens or furnishing statement before action on contract, see post §§ 51-53.
Common law liens, see Liens.

§ 50. Actions and procedure.

[Note. The general practice and procedure in actions on contracts is treated in Contracts, X. For convenience and in order to have the benefit of a complete collection of the cases on that subject, including pleading, evidence, instruction, jury questions, etc., in one place, all matter relating to actions on building contracts has been there treated excepting only the matters indicated in the sections here following.]
Actions on bond, see ante § 48.
Damages for breach, and pleading, evidence and instructions on damages, see Damages.
See also generally Pleading; Evidence; Instructions; Trial; Verdicts; Judgments; etc.
Dismissal of suit including claim for extra work, see Discontinuance, III.

§ 51. Right to sue on the contract; prerequisites.

Prematurity of action without resort to arbitration, see ante § 43.
Discharge of outstanding liens as condition precedent to action, see post §§ 52, 53.
Authority of attorney of contractor to cause notice from contractor of names of laborers and subcontractors, see Attorneys, ¶ 63.

¶ 128. When, in respect to the construction of a building the owner and a person engaged to do the plastering work have deliberately entered into a written agreement in which the certificate of the architects is made a condition precedent to a right of action, such condition must be performed, or its requirement waived.—Hanley v. Walker, 79 Mich. 607.

¶ 129. Even though no lien has been effected an action cannot be brought against the owner of land by a contractor who has built a house on such land and has furnished work and material for others, unless the statement required by the statute as to the amounts due to subcontractors, laborers, etc., has been furnished to the owner; nor can the contractor's assignee bring such action; but the neglect to serve this statement is not fatal in all cases and may be waived or overlooked where the absence of other liens is conceded or obvious.—Barnard v. McLeod, 114 Mich. 73.

¶ 130. A suit by a contractor to recover for constructing a large factory building cannot be prevented because a statement of subcontractors, laborers and materialmen is not furnished as required by Pub. Acts 1891, No. 179, § 4, it appearing that the plaintiff is not attempting to assert a lien, and that none of the laborers, subcontractors or materialmen are in good condition to assert a lien or to subject the defendant to litigation, because of the expiration of the time for such proceedings.—Walker v. Syms, 118 Mich. 183.

¶ 131. In assumpsit for the work and labor done and materials furnished on a building, where an ordinary judgment is sought and no lien is claimed, it is immaterial that no sworn statement of the amount due laborers and materialmen was furnished, especially where the time when a lien could attach had long passed when the case was tried.—Morton v. Eaton, 141 Mich. 444.

§ 52. ——Liens outstanding.

Necessity of furnishing statement of amounts due, see ante § 51.

¶ 132. The assignee of the balance due on a building contractor's claim, was entitled to maintain an action at law although when such action was commenced there were liens of record; it appearing that the time for filing liens had expired and that all the liens of those which had been so filed had also been assigned to plaintiff.—Cady v. Fair Plain Literary Ass'n, 135 Mich. 295.

¶ 133. The discharge of existing liens against premises was not a prerequisite to the commencement of suit by the assignee of the contractor's claim, where the time for

filing liens had expired and plaintiff had become the owner of the liens which had been filed.—Cady v. Fair Plain Literary Ass'n, 135 Mich. 295.

§ 53. ——Waiver and estoppel to assert lien as defense.

¶ 134. The existence of claims for materials against contractors for a city sewer, at the time of his commencement of suit against the city, was not a ground for defense where prior to the suit, and after plaintiffs claimed to have completed their contract, they had received written notice from the engineer that he would decline to accept the work until certain repairs had been made, and where no reference was made in the notice to such claims although their existence and condition were known to the engineer, and where the city was protected against such claims by an indemnity bond.—Lamson v. City of Marshall, 133 Mich. 250.

§ 54. Action on quantum meruit.

See also generally Assumpsit; Contracts, X.

By architects for value of services, see ante § 46.

Common counts against principal contractor assuming subcontractor's debt, see Assumpsit, § 24.

Common assumpsit for services outside of contract or after modification of it, see also Assumpsit, §§ 36, 37.

General rules as to implication of contract, see Implied Contracts.

¶ 135. The value not exceeding the contract price and less the damages for improper performance may be recovered on a quantum meruit, where the defendant has taken possession of a building which cannot be made to comply with the contract unless by entire demolition and which is worth less than the one contracted for.—Eaton v. Gladwell, 121 Mich. 444.

¶ 136. An instruction, in an action by a contractor on a quantum meruit for a dwelling house, that no right of action accrued until the defendant took possession of the building as it was, the failure to complete being the fault of the plaintiffs, and that the defendant was not bound to take possession until the building was completed according to contract, is properly modified by stating that the defendant was either bound to take the building, when it became apparent that the plaintiffs were not going to complete it according to the terms of the contract, or to abandon it entirely to the plaintiffs, and to have the structure removed, if he desired the use of the land.—Eaton v. Gladwell, 121 Mich. 444.

BUILDING AND LOAN ASSOCIATIONS.

TREATS of mutual associations for co-operative saving and loaning for the principal object of enabling members to purchase and pay for real property. It excludes Fraternal Beneficiary Associations, which see, and saving banks (see Banking), and the general law of Corporations (see Corporations).

Analysis.

I. The Association or Corporation.

§ 1. In general; formation and incorporation.
§ 2. Regulations and by-laws.
§ 3. General powers; ultra vires.
§ 4. Officers and agents.
§ 5. Foreign associations.

II. Membership and Stock Rights.

§ 6. In general; membership or stock contract.
§ 7. Withdrawal, or calling in and retirement.

III. Loans, Security and Repayment.

§ 8. Validity and construction of contract.
§ 9. ——Loans by foreign associations.

§ 10. Awarding loans; bidding.
§ 11. Rate of interest and premiums.
§ 12. Dues and application of payments; deductions.
§ 13. Mortgages and foreclosure.
§ 14. Fraud upon members.

IV. Insolvency and Winding up.

§ 15. In general.
§ 16. Application of assets; preferences.
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§ 18. Of foreign associations.

I. THE ASSOCIATION OR CORPORATION.

§ 1. In general; formation and incorporation.

Membership and stock, see post II.
Loans and mortgages and repayment, see post III.
General law of corporations, see Corporations.
Exemption of association from general tax laws, see Taxes, III.
Incorporation and regulation in general, see Comp. L. 1915, §§ 9995-10023.

¶ 1. Laws 1887, Act No. 50, providing for the incorporation and regulation of these associations is valid and not class legislation.—People's Building & Loan Ass'n v. Billing, 104 Mich. 186.

¶ 2. The object of the statute providing for the incorporation of co-operative savings associations, How. St., chap. 119, (Laws of 1877, No. 206), is not that such associations shall be investment companies for the profit of capitalists, but to encourage habits of frugality among the laboring and industrial classes by affording them the opportunity of purchasing a certain number of shares of stock in such association and of paying therefor in regular instalments, and out of the earnings of such associations; and providing for the sale to the corporation at any time by any member, of his shares of stock, upon an equitable basis of discount.—Michigan Bldg. & Sav. Ass'n v. McDevitt, 77 Mich. 1.

§ 2. Regulations and by-laws.

By-laws as part of contract of member, see post § 6.
As to premiums, see post § 11.
Of corporations generally, see Corporations, X.

¶ 3. A by-law of a building and loan association fixing a minimum premium, could not be said to have damaged the borrowers in question who paid a larger premium, where the loans were made after competitive bidding, and where the loans made up to the time such borrowers' loans were effected, had been made by competitive bidding and at a per cent considerably above the minimum fixed by the rules.—Dailey v. Saginaw Bldg. & Loan Ass'n, 133 Mich. 403.

§ 3. General powers; ultra vires.

See also post ¶ 39.
Mode of retaining premiums, see post ¶ 23.
Of corporations generally, see Corporations, XI-XIV.

¶ 4. Co-operative savings associations organized under How. St., chap. 119 (Laws of 1877, No. 206), by whatever name they adopt, are creatures of the statute, and the rights, duties and obligations of members are such as the statute prescribes. Such associations have very few of the common-law powers of corporations, and very little, or none, of the characteristics of partnerships.—Michigan Bldg. & Sav. Ass'n v. McDevitt, 77 Mich. 1.

¶ 5. The withdrawal of stock from a building and loan association incorporated under Comp. L. 1897, chapter 206, under a charter permitting a withdrawal upon the existence of certain conditions, cannot be ratified by the association, where the conditions prescribed by the charter have not been complied with, and where the right of withdrawal in any event was suspended because of the insolvency of the association.—Aldrich v. Gray, 147 Fed. 453.

¶ 6. The defense of ultra vires by a foreign building and loan association unless very clearly established will not be tolerated to defeat recovery in an action for the return of monthly payments made by a share holder under a privilege granted to him under the printed literature furnished to him with his certificate wherein the purchaser was informed in substance that he might rely upon such printed literature.—Peterson v. People's Bldg. Loan & Sav. Ass'n, 124 Mich. 573.

¶ 7. A stockholder in a building and loan association cannot set up irregularities in the conduct of the business of the association or that the contract was ultra vires as a defense to a proceeding to foreclose a

mortgage given by him to secure a loan from the association.—Menominee Loan & Bldg. Ass'n v. Lovell, 131 Mich. 449.

§ 4. Officers and agents.

Right of withdrawal as affected by officer's embezzlement, see post ¶ 17.
Relation to borrower as element in fraud on borrower, see post § 14.
Of corporations in general, see Corporations, XVII.
Liability of member as auditing agent for neglect, see Agency, ¶ 487.
Inferable neglect of auditing agent, see also Agency, ¶ 529.

§ 5. Foreign associations.

Validity and construction of loan agreements, see post § 9.
Applicability of laws regulating interest, see post § 11.
Contract made after ceasing business in state, see post ¶ 20.
Insolvency and winding up, see post § 18.
Foreign corporations in general, see Foreign Corporations.
Regulations obnoxious to provision respecting privileges and immunities of citizens, see Constitutional Law, X.
Foreign associations and regulation of their admission, see Comp. L. 1915, §§ 10024-10033.

¶ 8. Payments made by a Michigan member of a foreign building and loan association, to agents of such association in Michigan, were payments to such association.—Hoskins v. Rochester Sav. & Loan Ass'n, 133 Mich. 505.

II. MEMBERSHIP AND STOCK RIGHTS.

§ 6. In general; membership or stock contract.

Fraud of officers on borrowers, see post § 14.
On winding up, see post §§ 15, 16.
General law of stock and stockholders, see Corporations, XXIV.
Exemption of stock in lieu of homestead, see Exemptions, II.

¶ 9. Where a building association induces the purchase of stock by a person who relies upon printed statements giving the right to withdraw after a stated period the instalments paid in, such statements were part of the contract and the defendant was bound thereby, though the conditions on the back of the certificate state that the articles of the associations, by-laws, terms and conditions, together with the application, are to be construed together as the contract, and they do not contain the withdrawal privilege as claimed, but the back of the certificate also stated that "the association assumes no other obligation than contained in its printed literature."—Peterson v. People's Bldg. Loan & Sav. Ass'n, 124 Mich. 573.

¶ 10. Although it was necessary for the applicant to become a stockholder in the corporation and to agree to become bound by its by-laws and charter, one who, to secure a loan from a mutual building and loan association, subscribes for stock therein, and in good faith without being shown the by-laws takes the loan relying upon the representation of the association's secretary that the association would and did construe its by-laws as the secretary then construed them, in regard to time and basis of payment, is entitled, after seventeen quarterly payments, to have the contract construed in the light by the by-laws as they were represented to him.—Sawyer v. Menominee Loan & Bldg. Ass'n, 103 Mich. 228.

§ 7. Withdrawal, or calling in and retirement.

Ultra vires withdrawals, see ante § 3, ¶¶ 5, 6.
Printed advertisements as part of contract right to withdraw, see ante ¶ 9.
Foreclosure of shares pledged to association for loan, see post § 13.
Insolvency as suspending right, see post § 15.
Suit to recover withdrawal from insolvent association, see post ¶ 53.

¶ 11. A member of a co-operative savings association organized under How. St., chap. 119 (Laws of 1887, No. 206), continues a member of such association until the corporation has run its course, although he has sold his shares to such corporation, and as such member is liable for the periodic dues and fines, and contribution in case of loss.—Michigan Bldg. & Sav. Ass'n v. McDevitt, 77 Mich. 1.

¶ 12. Recovery of the amount due as a withdrawal stockholder cannot be defeated on the ground that the stock has not been transferred to plaintiff on the books of the association, where he was a member when the shares came to him, and where he has been treated throughout by the association as the owner of the shares.—Denison v. Alpena Loan & Bldg. Ass'n, 117 Mich. 98.

¶ 13. An association on changing its plans by ceasing to auction its loans for premiums bid and abandoning the issuance of stock in series, cannot, as against one who has taken a loan at a premium and paid his dues and other charges, return to the borrowers the premiums paid by them, differing in percentage; and thereby deprive him of the participation of profits made under the old system, according to which his payments had

been computed, while compelling him to continue paying on the face of his loan from which the premium had been deducted.—Myers v. Alpena Bldg. & Loan Ass'n, 117 Mich. 389.

¶ 14. When shares of a member of a co-operative savings association organized under How. St., chap. 119 (Laws of 1887, No. 206), are sold to the corporation at a certain discount, they thereby become liquidated; that is, the amount the seller consents to receive as his share in the final distribution becomes fixed and certain, being the amount of his shares at par value, less the discount offered in the sale. This amount he receives at once, and the shares sold are ipso facto extinguished for all purposes, except for computing "profits and losses," in the apportionment of each member's pro rata share.—Michigan Bldg. & Sav. Ass'n v. McDevitt, 77 Mich. 1.

¶ 15. How. St., § 3981f, excepting from the right to withdraw stock "held in pledge for security," does not prohibit a withdrawal merely because instalments upon the stock remain unpaid; but a stockholder who has borrowed from the corporation and pledged his stock as security cannot withdraw until he has redeemed his stock by paying the loan or unconditionally tendering payment.—Denison v. Alpena Loan & Bldg. Ass'n, 117 Mich. 98.

¶ 16. Recovery for the amount due a withdrawal stockholder cannot be denied on the ground of want of funds where it is shown that the association has on hand more than three times the sum claimed by plaintiff.—Denison v. Alpena Loan & Bldg. Ass'n, 117 Mich. 98.

¶ 17. In an action to recover the amount due plaintiff as a withdrawal stockholder the question whether he can be held personally liable for funds embezzled by the secretary while he, plaintiff, was a member of the auditing committee of the association, cannot be litigated.—Denison v. Alpena Loan & Bldg. Ass'n, 117 Mich. 98.

III. LOANS, SECURITY AND REPAYMENT.

§ 8. Validity and construction of contract.

By-laws as part of contract with construction given by parties, see ante ¶ 10.
Fraud in the contract, see post § 14.
Rescission of contract, duty of promptness, see Rescission, III.

¶ 18. Money paid in advance by a co-operative savings association to a member in full of his shares is not a loan, although so called in the by-laws of such association, but is a sale to the corporation of such shares under the statute; subject to the payment by the seller of the regular periodic dues and such additional periodic sums, not exceeding the rate of 7 per cent. per annum on the nominal amount of the shares, as may be prescribed by the by-laws, and security for the payment of these periodic sums must be taken upon unincumbered real estate.—Michigan Building & Savings Ass'n v. McDevitt, 77 Mich. 1.

¶ 19. A contract of a building and loan association with one of its members, providing for a loan of money to the member who bids for the loan and pays a premium, is not unconscionable, it being in the ordinary form of contracts made by building and loan associations, which are supposed to afford benefits to the poorer classes of society, and such associations are frequently given advantages over other corporations, such as immunity from taxation and usury laws.—Phelps v. American Sav. & Loan Ass'n, 121 Mich. 343.

§ 9. ——Loans by foreign associations.

Effect of payments made within Michigan, see ante ¶ 8.
Place of contract for purpose of determining what law governs, see Conflict of Laws, II.

¶ 20. A contract made by a building and loan association which had already substantially ceased to do business within the state by a failure to comply with Pub. Acts 1895, Act No. 269, was void, and no action could be maintained upon such contract (Comp. L. 1897, § 10467).—Hoskins v. Rochester Savings & Loan Ass'n, 133 Mich. 505.

¶ 21. Where a note and mortgage was executed by residents of this state to a savings, loan and building association, organized under the laws of a foreign state, through its local representative, on property located here, and the payments were to be made to such local agent, although the local board was not expressly provided for in the articles of association of the building and loan company, nevertheless the contract is a Michigan contract and governed by our laws.—Cobe v. Summers, 143 Mich. 117.

§ 10. Awarding loans; bidding.

Premiums and computation of same, and rules as to minimum receivable, see post § 11.
Sale of shares as distinguished from loan, see ante ¶ 18.
Validity of bid for premiums payable by instalments at fixed per cent, see post ¶ 29.
Evidence as to competition in bidding, see post ¶ 31.

§ 11. Rate of interest and premiums.

Effect of by-laws fixing minimum, see also ante § 2.

Deduction of premiums on early repayment, see post § 12.
Computation of premium instalments to accrue on foreclosure, see post ¶ 42.
General law of usury, see Usury.

¶ 22. The contention that the premium should have been computed upon the amount of money received, and not on the face of the loan, is untenable, where the borrower understands in advance that the latter mode of computation is to be followed, and accepts the money and executes the securities after the premium has been so computed, and the amount thereof deducted from the face of the loan.—People's Bldg. & Loan Ass'n v. Billing, 104 Mich. 186.

¶ 23. The receipt or retention by the association of a premium out of the loan is not a bank discount in excess of the powers of the corporation under Laws 1887, Act No. 50, § 8, which provides that "the board of directors shall hold such stated meetings as may be provided by the by-laws, at which the money in the treasury, if more than the amount fixed by the by-laws as the full value of a share, shall be offered for loan in open meeting, and the stockholder who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan of not more than the amount fixed by the by-laws as the full value of a share of stock (less the premium bid) for each share of stock held by said stockholder."—People's Bldg. & Loan Assn. v. Billing, 104 Mich. 186.

¶ 24. A rule of an association requiring a bid of twenty per cent minimum premium for money violates How. St., § 3981h, which provides that the money to be loaned shall be offered for loan in open meeting, and that the stockholders who shall bid the highest premium for the preference or priority of loan shall be entitled to receive a loan for the amount stated in the by-laws.—Myers v. Alpena Loan & Bldg. Ass'n, 117 Mich. 389.

¶ 25. To entitle a building and loan association to charge more than the rate of interest fixed by the general law of the state, it must comply strictly with the statute whereunder it is organized.—Myers v. Alpena Loan & Bldg. Ass'n, 117 Mich. 389.

¶ 26. A contract with a member of a building and loan association providing for the purchase of stock payable monthly, and a loan of money made to a member at six per cent interest, there being a bid for the loan, and the total amount loaned including the premium paid for the loan, is not usurious.—Phelps v. American Sav. & Loan Ass'n, 121 Mich. 343.

¶ 27. Where a mortgage to a New York building and loan association, upon lands in Michigan, would be usurious under Comp. L. 1897, § 4856, relating to usury, it is not saved by the provisions of the Building and Loan Association Act, Comp. L. 1897, § 7584, providing that neither premium, fines nor interest on premiums accruing under the act shall be deemed usurious, as that act relates only to corporations organized in Michigan thereunder.—National Mutual Bldg. & Loan Ass'n v. Burch, 124 Mich. 57.

¶ 28. Comp. L. 1897, § 7584, governing building and loan associations and providing that premiums, fines or interest on premiums shall not be considered as making the contracts usurious, does not permit the interest rate on a loan to be in excess of that limited by statute and if it is so fixed the contract is usurious.—Estey v. Capitol Inv. Bldg. & Loan Ass'n, 131 Mich. 502.

¶ 29. Under Comp. L. 1897, § 7581, governing building and loan associations and providing that premiums bid on loans may be paid in one lump sum or in instalments, the premium need not be bid in a specific sum but may be in the form of a stated per cent to be paid on the loan.—Estey v. Capitol Inv. Bldg. & Loan Ass'n, 131 Mich. 502.

¶ 30. A contract with a building and loan association for a loan, is not usurious though the borrower bid the loan at 25%, where the bid was voluntary and the evidence failed to show that the association would not consider bids at a lower rate.—Menominee Loan & Bldg. Ass'n v. Lovell, 131 Mich. 449.

¶ 31. Testimony by a borrower that prior to a meeting of a building and loan association he was informed by the secretary that bids under 26½% would not be accepted and that he bid 26½% with no competitors, and evidence of the minutes of the meeting showing no competition is sufficient though contradicted by defendant association, to show a violation of the law requiring competitive bidding.—Stoddard v. Saginaw Bldg. & Loan Ass'n, 138 Mich. 73.

¶ 32. A Minnesota contract between a building and loan association and one of its members is not usurious under the Minnesota statutes providing that premiums for loans made by an association shall not be considered or treated as interest.—Phelps v. American Sav. & Loan Ass'n, 121 Mich. 343.

¶ 33. A contract whereby a person subscribes for shares in a building and loan association, agreeing to pay for the same monthly, also paying a membership fee, and borrowing money, paying a large premium

for the privilege of obtaining the loan, the entire amount bearing interest at 6 per cent, is not usurious, on the ground that the stock subscription and loan are one transaction, even though the laws of the foreign state where the contract is made are not proven.—Russell v. Pierce, 121 Mich. 208.

¶ 34. A contract, whereby a note and mortgage were given by residents of Michigan on property in this state to secure a loan to a building and loan company organized in another state in which more than the legal rate of interest was provided, and where there is no record in the proceedings of the company that the by-laws requiring the making of competitive bids which shall be opened at specified times and notice when they are opened sent to the applicant, have been complied with, is usurious where it is shown that the parties have paid more than the legal (6%) rate of interest on the loan.—Cobe v. Summers, 143 Mich. 117.

¶ 35. Building and loan associations are not entitled to the benefits and immunities conferred upon them by statute without complying with the provisions of such statutes; and where therefore a borrower was led to believe that in order to procure a loan he must bid a premium, which was done by the secretary on his behalf, knowing there was more money to loan than there were applicants therefor, and where the competitive bidding was not in fact competitive as required by the statute, a loan made in excess of the legal rate of interest will be deemed usurious.—Bechtel v. Saginaw Bldg. & Loan Ass'n, 143 Mich. 599.

¶ 36. A building and loan association mortgage which bears interest at the highest legal rate is not usurious because of the fact that it provides that the borrower shall pay any tax assessed upon the mortgage, such provision, in view of Comp. Laws 1915, § 10011, which exempts such mortgages from taxation, being mere surplusage.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

§ 12. Dues and application of payments; deductions.

Necessity of payment in order to withdraw stock pledged to association, see ante ¶ 15.

Payments and deductions made as recognition of method of computing premiums, see ante ¶ 22.

Among members on winding up, see post § 16.

On foreclosure by receiver, see also post ¶¶ 50, 51.

¶ 37. Under the statute (Laws 1887, Act No. 50, § 10), which provides that in the event of the repayment of a loan by a borrower before the expiration of the eighth year after the organization of the association, or the date of issue of the series of stock in association on which the loan may have been made, there shall be refunded to such borrower one-eighth of the premium paid for every year of the said eight years then unexpired, a borrower has no right to a deduction on account of premium paid, except in case of a voluntary payment of his debt before maturity.—People's Bldg. & Loan Ass'n v. Billing, 104 Mich. 186.

¶ 38. Where the contract for a loan from a building and loan association is usurious, all sums paid thereon whether as principal or as interest should be applied on the principal debt and recovery had only for the balance, since Comp. L. 1897, §§ 4857, 4858, provide that the debtor shall not be compelled to pay interest and that the interest shall be void.—Estey v. Capitol Inv. Bldg. & Loan Ass'n, 131 Mich. 502.

§ 13. Mortgages and foreclosure.

In general, see Mortgages; Foreclosure of Mortgages.

Defense of ultra vires, see ante § 3.

Exemptions of mortgages from taxation, see Taxes, XIV.

¶ 39. The fact that, on making a loan, the joint obligation of the member to whom the loan is made, and another, who is not a member, is taken, or that the loan is secured by a mortgage executed by a third person, will not open the defense of ultra vires, under Laws 1887, Act No. 50, § 8, which provides that "no loan shall be made by said corporation except to its own members, nor in any sum in excess of the amount of stock held by such members borrowing."—People's Bldg. & Loan Ass'n v. Billing, 104 Mich. 186.

¶ 40. The bond given by a member of a building and loan association, on taking a loan from the association, provided that, in case of default in its conditions, the shares of stock held by the member, which were transferred as collateral to the bond, might be declared forfeited to the association as for non-payment of dues, and should thereupon revert to the association as forfeited stock, and the withdrawal value thereof, at the option of the association, might be applied to the satisfaction of the indebtedness secured by the bond. Held, that no formal foreclosure is necessary for the purpose of making such application; that it is contemplated that the payments on the stock, together with its earnings, shall remain in the hands of the association, and be applied, without foreclosure, to the reduction of the claim—at least, at the option of the association.—People's Bldg. & Loan Ass'n v. Billing, 104 Mich. 186.

¶ 41. A defendant in a suit by a building and loan association to foreclose a mortgage cannot defend on the ground that he is not in default where all stockholders, including the defendant, acquiesced in a plan of liquidation and the defendant stopped payments on his stock; defendant was bound to make his election when he learned of the plan of liquidation.—Home Sav. & Loan Ass'n v. Mason, 127 Mich. 676.

¶ 42. Where an association had abandoned the premium system of making loans, substituting a flat rate of 8 per cent, and against the right of a borrowing member had readjusted outstanding loans by returning premiums and charging 8 per cent on the loans but crediting only 6 per cent on dues paid in, it was proper on computing the balance due on the mortgage to take 8 per cent monthly on the exact amount received by him, adding it to the principal, then deducting the monthly payment to establish a new principal on which the next month's interest should be computed, and so on.—Myers v. Alpena Bldg. & Loan Ass'n, 117 Mich. 389.

¶ 43. A bill to foreclose a mortgage by a building and loan association showing that the stock of the association could not be paid in full, is sufficient to show insolvency of the association as under its plan of association the stock could not be matured.—Home Sav. & Loan Ass'n v. Mason, 127 Mich. 676.

¶ 44. In a suit to foreclose a building and loan association mortgage against a stockholder, where the association is not financially able to mature its stock, it is proper to treat it as a suit for an accounting and to decree that the defendant pay the amount of the loan plus interest less the sums paid by the defendant as interest and premium but not allowing payments on stock to reduce the mortgage debt.—Home Sav. & Loan Ass'n v. Mason, 127 Mich. 676.

¶ 45. There is no more necessity for an accounting on the foreclosure of a building and loan mortgage than in any other case where money is borrowed and partial payments made from time to time.—Flax v. Mutual Bldg. & Loan Ass'n of Bay County, 198 Mich. 676.

§ 14. Fraud upon members.

Withdrawal or retirement of issue as inequity to borrowers, see ante ¶ 13.
Unconscionableness of contract, see ante ¶ 19.
Right to preference in insolvency, see post ¶ 52.

¶ 46. The borrower of a building and loan association is not on an equal plane with the officers of the association so as to make representations by them as to the amount of interest required and the advantages of making a loan with them, mere statements of opinion and not affecting the validity of the transaction.—Stoddard v. Saginaw Bldg. & Loan Ass'n, 138 Mich. 73.

¶ 47. A lawyer who becomes a member of a building and loan association, and obtains stock in such association, and who, before giving a mortgage, receives applications and other papers describing the scheme of business and terms of borrowing money, is chargeable with notice that amounts paid for monthly dues are payments upon the stock, especially when the notice given upon his application for loan expressly states that the borrower is to pay interest on the loan and make his monthly payments on the stock; and accordingly he cannot rely on representations to the contrary.—Phelps v. American Sav. & Loan Ass'n, 121 Mich. 343.

¶ 48. Fraudulent representations by an officer of a building and loan association in inducing a loan are made out by testimony by the borrower that he was importuned to borrow the money upon the promise that it would cost not more than 7%, contradicted by testimony of the association but supported in part by a printed advertising circular and evidence that the bidding on the loan was not competitive and that a certain minimum price for the loan was fixed by the directors.—Stoddard v. Saginaw Bldg. & Loan Ass'n, 138 Mich. 73.

IV. INSOLVENCY AND WINDING UP.

§ 15. In general.

Continued liability of stockholder after sale of shares, see ante ¶ 11.
Liquidation by agreement as putting loans in default, see ante ¶ 41.
Agreement to protect impaired assets as offensive to public policy, see Contracts, IV, B.
Of corporations generally, see Corporations, XXIII.

¶ 49. Where the charter of a building and loan association organized under Comp. L. 1897, chapter 206, provides that any stockholder wishing to withdraw from the corporation shall have the power to do so upon giving 30 days' notice in writing and subject to certain other conditions, any right of withdrawal is suspended by the insolvency of the association.—Aldrich v. Gray, 147 F. 453.

§ 16. Application of assets; preferences.

Of payments by borrowers on loans and premiums, see ante § 12.

¶ 50. Payments made by a member of a building and loan association, such as a payment of dues on stock, interest, or premiums, will not be applied on the mortgage debt, to work an extinguishment of the mortgage, when foreclosure is sought by a receiver of the insolvent association.—Russell v. Pierce, 121 Mich. 208.

¶ 51. A member of a building and loan association is not entitled to have amounts paid as stock dues applied to the payment of a mortgage, when the association becomes insolvent, as such application would operate to make the member a preferred creditor, to the disadvantage and injury of other stockholders.—Phelps v. American Sav. & Loan Ass'n, 121 Mich. 843.

¶ 52. A stockholder in a building and loan association who claims to have been defrauded by a contract entered into, has no right of preference over other stockholders, when the association becomes insolvent.—Phelps v. American Sav. & Loan Ass'n, 121 Mich. 843.

§ 17. Actions and suits.

Foreclosure suits, see also ante § 13.
Allegations of insolvency, see also ante ¶ 43.
Foreclosure suit treated as one for accounting, see ante ¶ 44.
By or against corporations in general, see Corporations, XIX.

¶ 53. The receiver of an insolvent association is the proper party complainant to a suit against a stockholder to recover the value of stock illegally withdrawn while the association was insolvent and contrary to the charter of the association.—Aldrich v. Gray, 147 F. 453.

§ 18. Of foreign associations.

¶ 54. The requirements of the General Building Association Act as amended in 1895, relating to preference given to local creditors and stockholders of a foreign association as to state assets upon the revocation of its authority to do business in the state and the appointment of a receiver, are complied with, so far as valid, where the whole corporation is being wound up in the state of its incorporation by the collection of local assets by a local receiver and the direction to him to turn the same over to the foreign assignee, less the cost of collection, on the latter's giving a sufficient bond to secure the local stockholders their pro rata of the total assets.—Maynard v. Granite State Provident Ass'n, 92 Fed. 435.

BUILDINGS.

TREATS of the general law of buildings as structures, the construction and regulation thereof, liability for their condition and use, and restrictions by covenant as to buildings. It excludes building contracts (see Building and Construction Contracts), buildings as fixtures appertaining to the land (see Fixtures), and matters of real property law in general (see topics Deeds; Landlord and Tenant; Life Estates; Homesteads; and the like); also contracts of insurance on buildings (see Insurance).

Analysis.

§ 1. In general.
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§ 15. Building restrictions.
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§ 1. In general.

As accessions to land, see Accession and Confusion.
As fixtures on land, see Fixtures.
Right to recover for improvements in ejectment or in suit to quiet title, see Ejectment, VI; Quieting Title, III.
Allowance for in partition, see Partition, IV.
As encroachments on highways or as nuisances, see Highways, XI; Nuisances.
Liability of adjoining owner in making excavations, see Adjoining Owners.
License of person to enter, see Licenses to Enter.
Crimes against or relating to, see Crimes, II (arson, burglary); Indictment.
Contracts for construction or repairs, see Building Contracts.
Leases of buildings or of space therein, see Landlord and Tenant.

§ 2. Public regulation and inspection.

Persons regarded as architects within building regulations, see Building Contracts, ¶ 113.
Of buildings used for theaters and shows, see Exhibitions and Shows.
Right of city to restrain building in violation of regulations, see Injunctions, II.
Building inspectors as city officers, see Municipal Corporations, XV; Officers.
General regulations concerning buildings used for dwellings, see Pub. Acts 1917, No. 167.

¶ 1. It is a proper exercise of the police power for a city under its charter to regulate the erection of buildings or the reconstruction and repair of buildings within established fire limits and to forbid reconstruction of wooden buildings damaged or destroyed by fire.—Brady v. Northwestern Ins. Co., 11 Mich. 425.

¶ 2. A building permit issued without legal authority confers no rights whatever.—Building Commission of Detroit v. Kunin, 181 Mich. 604.

§ 3. Fire precautions and devices.

Generally see Fires; and as to negligence in respect to fires involving want of proper safe-guards, see Fires; Railroads, VIII, F.
General fire protection regulations concerning buildings used for dwellings, see Pub. Acts 1917, No. 167.

§ 4. Injuries to persons in or near building.

See also post §§ 5, 6.
Contributory neglect, see post §§ 7, 8.
Evidence and instructions, and questions for jury, see post §§ 10-14.
Duty and liability of proprietors of theaters, shows and exhibitions to which public is invited, see Exhibitions and Shows.
General liability of agricultural societies for negligence, see Agriculture, § 4.
Liability for condition of building or for injury therefrom as involved in duty to servant or other person in a special relation to owner or occupant, see Master and Servant; Workmen's Compensation Law; Carriers (injury in building incident to common carriage); Landlord and Tenant; Nuisance; and the like.
Liability to person in street adjoining building as involving duty of abutter towards users of way, see Highways, XII, G.
Liability for encroachment on highway, see Highways, XI.

¶ 3. The proprietor of a grain elevator is not liable for injuries to a customer occasioned by the giving way of a railing about an elevated platform, even though he had knowledge of its defective condition, where the customer, at the time of the accident, was, without invitation, leaning against it for support, a use for which it was not designed and for which because of recent weakening it was not fitted.—Kinney v. Omsted, 113 Mich. 96.

¶ 4. Under the principle that an occupier of premises is required to use reasonable care to protect one doing business with him

on those premises by his invitation against unusual danger which he knows or ought to know about, such occupier is responsible for defects not known to him, if due diligence on his part would have discovered and remedied them.—McIntyre v. Pfaudler Vacuum Fermentation Co., 133 Mich. 552.

¶ 5. In an action for personal injuries to a driver caused by the giving away of a platform scale under a load of steel being hauled by a teaming company, the duty of inspection of a platform scale is imposed upon either the defendant owner of the scale or the party using it and employing the teaming company where the relationship of the two defendants is not clear by the evidence.—McIntyre v. Detroit Safe Co., 129 Mich. 385.

¶ 6. Where merchants invite their customers to walk over their floors in front of their counters for the purpose of examining their goods and making purchases, such customers have a right to rely upon the safety of the floors.—Brown v. Stevens, 136 Mich. 311.

Application of attractive nuisance doctrine to walls, buildings and like structures, see note, 9 N. C. C. A. 76-84.

§ 5. ——From elevators, stairways and openings.

Contributory negligence, see post § 8.
Evidence as to negligence, see post §§ 10, 11.
Jury questions and instructions, see post §§ 12-14.
Stairways and passages in theaters and show places, see Exhibitions and Shows.
General regulations concerning stairways, elevators and the like and passages in buildings used for dwellings, see Pub. Acts 1917, No. 167.

¶ 7. The owner of a building owes no common law duty to trespassers to maintain guards about an elevator shaft.—Flanagan v. Sanders, 138 Mich. 253.

¶ 8. Section 714 of the Detroit charter (1893), requiring elevator shafts to be protected by substantial railing and automatic trap doors, does not impose a duty so as to create a liability for injuries to trespassers caused by the absence of appliances mentioned.—Flanagan v. Sanders, 138 Mich. 253.

¶ 9. A customer who, without invitation or permission, attempts to enter a freight elevator located in the back part of a store, and designed for freight and the use of employees only, and who is injured by falling down the shaft, cannot recover for his injuries against the proprietor.—Bennett v. Butterfield, 112 Mich. 96.

¶ 10. The owner of a freight elevator who permits or invites another person to ride thereon does not guarantee that it is equipped with the most approved appliances in use on passenger elevators, and is not liable for an injury caused by the fall of the elevator if he has provided appliances in common use in freight elevators, and has exercised reasonable care in inspecting, repairing, and managing it.—Hall v. Murdock, 114 Mich. 233.

¶ 10a. The mere fact that an operator of a freight elevator, after the loading of beer from a brewery wagon by employees of a brewery company, receives instructions to go ahead from the superior of two employees of the brewery company, who is a passenger and has nothing to do with the operation of the elevator, does not relieve him from the duty of exercising care in starting the elevator so as not to injure the other employee who attempts to get on the elevator.—Sikora v. Fellowcraft Club, 195 Mich. 49.

¶ 11. The mere fact that the occupants of a business block occasionally ride upon a freight elevator, which has nothing in its construction or appearance to indicate that it was intended for the conveyance of passengers, does not impose upon the proprietor the duty to equip it with safety appliances with the same care that would be required in the case of a passenger elevator.—Hall v. Murdock, 114 Mich. 233.

¶ 12. The proprietor of a freight elevator, who ought to have known of a defect in the cable rendering it dangerous for use, is not relieved from liability for an injury to one whom he invited to ride, by the mere fact that he also was riding at the time of the injury, and exercised the same care for the passenger's safety that he did for his own.—Hall v. Murdock, 114 Mich. 233.

¶ 13. Shopkeepers are entitled to keep and use a trap door in the floor of their shop, subject to the duty on their part to guard it properly so as to avoid injury to those (other than employees about the premises or persons having notice of the existence of such door) who may lawfully, upon their express or implied invitation, and upon their business, enter the part of the shop where it is located.—Pelton v. Schmidt, 104 Mich. 345.

¶ 14. To leave unguarded a hatchway-opening in the floor of a store, such hatchway being near a door freely used by the public, and there being no one stationed at the opening to give warning, is negligence.—Engel v. Smith, 82 Mich. 1.

¶ 15. Under ordinary circumstances an open door and a stationary elevator constitute an invitation to all persons desiring to do so to enter or leave at will.—Roulo v. Minot, 132 Mich. 317.

¶ 15a. The pushing or jostling of the conductor of a passenger elevator by a third person, causing the elevator to drop and injure a passenger, does not constitute negligence either of the conductor or of the owner of the building.—Elsey v. J. L. Hudson Co., 189 Mich. 135.

¶ 16. The owner of a factory building in which plaintiff workman's master was doing work under a contract owes no duty to such workman to keep a hatchway or shaft through a floor of the building guarded, where the workman's duties do not call him near it and where his presence there was due to his following his foreman for instructions, and the foreman had no duties that called him there.—Hutchinson v. Cleveland-Cliffs Iron Co., 141 Mich. 346.

¶ 17. The projection of the brass nose pieces which fastened the rubber strips on the stairs of a hotel from one-sixteenth to three-eighths of an inch above the edge of such strips, cannot be said as matter of law not to be an actionable defect, in an action for injuries from a fall caused by tripping on such projections.—Braman v. Stewart, 145 Mich. 548.

¶ 18. Defendant theatre owner gave permission to plaintiff and other musicians to occupy gratis the balcony in front of said theatre for the purpose of giving public evening concerts. The balcony was reached by means of the gallery entrance and stairs. After the concert was over plaintiff descended the steps and, while attempting to cross to the side where the railing was, lost his balance, fell and was injured. The sole negligence charged was the failure of defendant properly to light said stairs. Held, under the circumstances, defendant owed no duty to light same.—Gleich v. Detroit Free Press, 169 Mich. 247.

Liability for injuries to passengers and persons other than employees through negligent maintenance or operation of elevators, see note. 5 N. C. C. A. 505-523; 9 N. C. C. A. 76-84.

§ 6. ——During construction or alterations.

Jury questions and instructions, see post §§ 12-14.

Liability for acts of independent contractors for injuries resulting from negligence during construction, see Independent Contractors.

Liability of owner of building for injuries to pedestrians on highway, see Highways, XII, D.

¶ 19. A construction company which is engaged in construction work in a power plant is not liable to an employee, who is a mere licensee on the premises during the dinner hour, for injuries sustained by such employee during the dinner hour due to a fall caused by a defective ladder on the premises while such employee was ascending such ladder to get upon a boiler to eat his dinner, unless the construction company is so far in control of the plant that its possession may be considered as a joint one with that of the operating company.—Boner v. Eastern Michigan Power Co., 193 Mich. 629.

¶ 20. The operator of a power plant which has no notice or knowledge of a defect in a ladder on the premises during the course of construction work by a construction company is not liable for injuries to a mere licensee and employee of such construction company due to a fall because of such defective ladder, where such ladder had been purchased of a reputable manufacturer and placed in position by the owner of the premises from whom the operating company had obtained possession.—Boner v. Eastern Michigan Power Co., 193 Mich. 629.

¶ 21. Where the owner of a new building under process of construction has knowledge or notice of the absence of a bolt in a beam in the steel framework of the building constructed by an independent contractor, the absence of which bolt causes the falling of a scaffold placed on the beam for use by carpenters in the employ of the owner in the construction of a cupola, and the injury of a carpenter results, and he neglects to take proper precautions for the protection of the carpenters, he is responsible for the resulting injuries.—Porth v. Cadillac Motor Car Co., 198 Mich. 501.

¶ 22. One injured by the falling of a building in process of construction may join in one action for damages the parties interested in the land by contract or lease, the owners of the fee, the agents supervising the erection, the architects, and the contractors.—McBride v. Scott, 125 Mich. 517.

§ 7. Contributory negligence.

Evidence, instructions and jury questions as to, see post §§ 10-14.

¶ 22a. One, who by arrangement with the owners of a planing mill has the right to carry on his own work therein and who knows the manner in which their business is carried on, cannot recover for an accidental

injury resulting from being hit by timber thrown from an upper story by the owner's servant in the course of his work.—Allen v. Johnston, 76 Mich. 31.

¶ 23. A teamster who, having delivered goods at the back door of defendant's store, goes, without an express or implied invitation, towards a desk in the middle of the store to get a receipt, and falls through a trap door into the cellar, cannot recover for the consequent injury.—Pelton v. Schmidt, 97 Mich. 231.

¶ 24. An applicant for work on the first floor of a manufacturing establishment who is directed by the watchman to the place where a light is burning in the toolroom where he expects to find the foreman, and, while going unattended towards the light and looking ahead falls into an unguarded pit occasioned by the preparation of a foundation for a heavy and unusual type of press, is not guilty of negligence, as a matter of law.—Faulkner v. Parish Mfg. Co., 201 Mich. 182.

¶ 25. Where an employee of the defendant in delivering plaster at a building in course of construction, piled five tons thereof in one place, and the great weight caused an accident, his employer is not relieved from liability by reason of the fact that the contractor did not discover and remove the danger between the time of delivery and the occurrence of the accident.—Schneider v. C. H. Little Co., 184 Mich. 315.

¶ 26. Persons who stray about other people's factories at their own will must look out for their own safety, since there are always places in such premises which, whether generally safe or not, are liable to be unsafe at times for any one who is not acquainted with them.—Bedell v. Berkey, 76 Mich. 435.

§ 8. ——In respect of elevators, stairways and openings.

Jury questions and instructions, see post §§ 12-14.

¶ 27. One who in broad daylight heedlessly steps under a descending elevator is guilty of contributory negligence.—Hutchins v. Priestley Exp. Wagon & Sleigh Co., 61 Mich. 252.

¶ 28. No one has any right to endanger himself, or to disturb other people's arrangements, by moving around in the dark in a strange room, into which he has entered of his own accord and without direction, and if hurt by falling into an opening while so doing, he is himself responsible for his own misfortune.—Bedell v. Berkey, 76 Mich. 435.

¶ 29. Plaintiff could not recover for injuries from falling down an unguarded elevator shaft in defendant's factory, where he entered such premises in the day time by an entrance with which he was not familiar, to deliver a machine, and did not first seek instructions from defendant as to where such delivery should be made, and where there was sufficient light in the room to reveal the larger objects therein; since a stranger coming on business or otherwise, has no right to choose for himself his means of ingress and egress, and to determine where bulky articles shall be unloaded, or to unload them without inquiry and notice.—Bedell v. Berkey, 76 Mich. 435.

¶ 30. A customer with defective hearing and eyesight and of impaired intellect, who was directed to the rear part of the store in question for the purchase he intended making, and in doing so fell into an opening left by an open trap door around which others were standing, was not guilty of contributory negligence even though he might have seen the opening had he looked, and warning was given to him in an ordinary voice that the trapdoor was open and to look out, as under the circumstances and in view of plaintiff's disabilities it was the duty of the storekeepers to do something more than to tell him in an ordinary tone of voice to look out for the trap door.—Brown v. Stevens, 136 Mich. 311.

¶ 31. Plaintiff on a visit to defendants tenement flat borrowed a key to a closet, and without inquiry as to where the closet was located, erroneously assumed he would find one on the fourth floor, in the same relative position as one which he had previously used on the lower floor. He opened the door and fell through a shaft to the basement, receiving injuries. Held, he was guilty of contributory negligence barring a recovery. —Steger v. Immen, 157 Mich. 494.

¶ 32. Plaintiff in shopping in defendant's store was invited by a clerk to the back part of the store, and in passing beyond the end of a counter fell down a stairway. The evidence showed that there was plenty of light; that the stairway was in plain sight; and that the accident was due to plaintiff's inattention. Held, plaintiff was guilty of contributory negligence.—Larned v. Vanderlinde, 165 Mich. 464.

¶ 33. Plaintiff musician, in ascending the gallery stairs of defendant's theatre for the purpose of reaching the balcony in front of some to assist in giving a public evening concert, noticed that said stairs were not lighted and also noted their construction and the position of the rail. He was affected with a disease of the eyes making it difficult for them to adjust themselves readily to

sudden changes of light. On going downstairs after the concert, he lost his balance, fell and was injured. Held, he was precluded from recovery on the ground of contributory negligence in failing to ask for more light, or for assistance, and in failing to take hold of the handrail in starting down said stairs.—Gleich v. Detroit Free Press, 169 Mich. 247.

¶ 34. Where the plaintiff, a teamster, sent to get a load of hops, was injured by falling into an elevator shaft in a warehouse owned by defendant, while loading bales of hops onto his wagon as lowered by the elevator from an upper story, held, that no negligence could be imputed to the defendant or its servants, where the injury resulted from the negligence of the plaintiff or his companion, or both, or from pure accident, and a verdict should have been directed for the defendant.—Moll v. Riverside Storage and Cartage Co., 82 Mich. 389.

¶ 35. Defendants were proprietors of a five-story building, and had provided, as a conveyance by which persons could reach the upper floors, a passenger elevator, which started from the street floor, while a freight elevator ran from the basement to the upper floors. Plaintiff, who was an agent for the sale of lubricating oil, being desirous of seeing the defendants' engineer, went from the street floor, via a stairway, to the basement, and, upon finding that the engineer was upon the fifth floor, without any invitation so to do, took passage on the freight elevator, and was injured. Held, that the invitation from defendants to take the passenger elevator was express; that the situation negatived any possible inference of an invitation to take the freight elevator; and that the trial court did not err in directing a verdict for defendants.—Amerine v. Porteous, 105 Mich. 347.

§ 9. Pleading duty and negligence.

Joinder of parties for injury by falling of a building during construction, see ante ¶ 22.

General law of procedure and evidence, see topics like Evidence; Pleading; etc.

¶ 36. In an action against a manufacturer of an elevator for an injury received from it while still in his possession, it was objected that the declaration did not sufficiently show that it was in defendant's possession. It did aver, however, that plaintiff went upon it "by command and at the request of said defendant," and the pleading was considered sufficient.—Necker v. Harvey, 49 Mich. 517.

¶ 37. In an action for personal injuries sustained in a falling building, where, while the declaration does not show very clearly the respective shares owned by the defendants, it does show that they owned the premises and proposed to erect a building thereon and then in detail describes what was done and with what result, it will be sustained on demurrer.—McBride v. Scott, 125 Mich. 517.

¶ 38. In an action for personal injuries a declaration which is not clear or well drawn will be sustained on demurrer urging that plaintiff is alleged to be dead, where it cannot be read without reaching the conclusion that what the pleader meant was that, when the roof and walls of a building fell in, many were killed, some were wounded including the plaintiff, who at that time and from the same cause received the injuries thereafter described.—McBride v. Scott, 125 Mich. 517.

§ 10. Evidence as to negligence and duty.

General law of evidence, see Evidence.

Conclusion or fact as to whether one had any apprehensions of danger, see Evidence, VI, A.

¶ 39. In an action for injuries received from falling through an unguarded trapdoor in the floor of defendant's store, a part of which store was used as a postoffice, evidence that the people were in the habit of waiting about the trap door for their mail, and of the extent to which the part of the store opposite the postoffice was used by the public, was admissible on the issue of negligence.—Engel v. Smith, 82 Mich. 1.

¶ 40. In an action for negligence by one lawfully upon the premises where the injury complained of resulted from the negligence of defendant's employees in not properly guarding an open trap door which they were using, it is not error to exclude testimony showing instructions from defendants so to guard it.—Engel v. Smith, 82 Mich. 1.

¶ 41. In an action by a tenant against a landlord for personal injury alleged to have been caused by a defective stairway, it is not error to admit testimony of successive witnesses as to the condition of the stairway from the time of the accident to 10 or 12 days thereafter, the stairway being one but little used.—Arndt v. Bourke, 120 Mich. 268.

¶ 42. In an action for personal injuries sustained by plaintiff while on defendant's premises and weighing a load consigned to the defendant, on certain scales which were used in common by defendant and another company, the question of the ownership of the scales was immaterial, as defendant owed plaintiff the obligation which an occupier of premises owes to one doing business with him on those premises by his invitation, to prevent damage from unusual

danger of which he knows or ought to know.—McIntyre v. Pfaudler Vacuum Fermentation Co., 133 Mich. 552.

¶ 42a. In an action against the tenant of a building having sole charge of a freight elevator operated by its own employee, subject only to the occasional use by tenants of lower floors, for the death of an employee of a brewery company engaged in delivering beer to the tenant and due to the alleged negligence of the elevator man in starting the elevator before decedent was safely upon it, and in which the issue was whether the decedent was rightfully upon the elevator when injured, or whether he had been directed to stay with the team by the one in charge of the delivery, held that evidence of such superior as to telling the operator to "let it go," after the superior was inside and after the operator had heard the superior direct decedent to stay with the team was admissible as bearing upon the negligence of the operator.—Sikora v. Fellowcraft Club, 189 Mich. 235.

§ 11. ——Sufficiency of evidence.

¶ 43. In an action against the owner of a building, the contractor and a materialman, to recover damages for the death of a carpenter due to the collapse of the portion of a reinforced concrete garage upon which deceased was employed, evidence held to show that the second floor was not constructed according to the plans and specifications.—Payne v. Everham, 197 Mich. 181.

¶ 44. In an action by a carpenter against the owner of a new building to recover damages for personal injuries due to the falling of a scaffold because of the absence of a bolt in a beam in the steel framework, which was constructed by an independent contractor, and on which the platform was put preparatory to erecting the cupola on top of the building, evidence held sufficient to go to the jury on the question whether a foreman in charge of the carpenters had direct notice of the defect in the steel work so as to bind defendant.—Porth v. Cadillac Motor Car Co., 198 Mich. 501.

¶ 45. In an action for personal injuries, testimony that the plaintiff, a business visitor, stepped into an open elevator shaft when the defendant opened the gate and called "elevator" is sufficient to go to the jury on the question of negligence and contributory negligence.—Burgess v. Stowe, 134 Mich. 204.

¶ 46. A general verdict for plaintiff in an action for injuries received from an elevator in defendant's store, and a special finding that the elevator came to a stop at the second floor and was started again by some person other than plaintiff, to plaintiff's injury, are supported by the evidence, where it is shown that one of defendant's clerks, intending to send plaintiff to third floor, put him upon such elevator and told him to get off where it stopped, that it stopped at the second floor, that plaintiff thereupon started to leave the elevator, that it started again and injured plaintiff as alleged; and where the whole record disclosed that the elevator could not start automatically from a position of rest but required human intervention to put it in operation.—Moerman v. Clark-Rutka-Weaver Co., 145 Mich. 540.

¶ 47. There is sufficient evidence for submitting the case to the jury, in an action for injuries received from a fall caused by defective stairs of defendant's hotel, where there is evidence that such defect existed, and where the proprietor of such hotel and her servant testified that they used such stairs many times daily and that if there had been such defect they would have noticed it.—Braman v. Stewart, 145 Mich. 548.

¶ 47a. In an action on the case for damages occasioned by the alleged negligent dropping of an elevator in the store of the defendant causing injury to the plaintiff, evidence held insufficient to establish an inference of negligence.—Elsey v. J. L. Hudson Co., 189 Mich. 135.

§ 12. Questions of law and fact as to negligence.

Duty of owner of building to guard openings near walk, see also Negligence, II, C.

¶ 48. In an action for an injury received from falling through a trap door in defendant's shop, plaintiff, who was a truckman delivering goods for his employer to defendants, testified he had been instructed by defendants to deliver goods at the back door of the shop, and that it had been his custom to pass through the shop to get his receipts. Held, that if defendants permitted this practice to grow up without protest, so that it became the usual course of dealing, plaintiff was justified in supposing that it was expected that he should so enter the shop, and, as the testimony was conflicting on this branch of the case, the question was properly left to the jury.—Pelton v. Schmidt, 104 Mich. 345.

¶ 49. In an action by one who was injured by the falling of an elevator, due to the breaking of the cable, evidence that the cable was considerably worn when purchased for use in the elevator in question, that it had been in use there for two years, and that the proprietor had made statements to the effect that the cable was worn out, and that he would have to get a new one, was

sufficient to go to the jury on the question of the proprietor's negligence.—Hall v. Murdock, 114 Mich. 233.

¶ 50. Where a woman sued jointly with her husband by a person injured by the falling of a freight elevator on premises of which she was owner claimed that she was not liable because her husband, the owner of a life interest in the premises, put in the elevator and controlled the property, and where, when called as a witness for plaintiff, she testified that after the property was conveyed to her her husband was to have charge of the business and collect the rents, but was not to have the rents, and where, further, when cross-examined by her own counsel, she testified she was mistaken in giving such testimony, and that the rents belonged to her husband, held, that in view of her contradictory statements the question of her liability was properly submitted to the jury.—Hall v. Murdock, 114 Mich. 233.

¶ 51. A directed verdict for the defendant is erroneous where the evidence shows that the plaintiff's intestate, a business visitor, fell through an unprotected elevator shaft and was killed, there being evidence to show that the passageway was poorly lighted and that the deceased was 63 years old and wore glasses and notwithstanding testimony of several witnesses that the open shaft could be plainly seen.—McCrum v. Weil & Co., 125 Mich. 297.

¶ 52. Plaintiff entered an elevator which had two doors, and asked to be let off at a certain office, which was in fact on the 12th floor though plaintiff did not know where it was. Upon reaching the ninth floor the elevator stopped and the doors were opened to let on another passenger. Not seeing the other passenger, plaintiff decided that it was his floor and started out when the elevator started up and the operator started to close the door. Plaintiff was caught in the door and before the elevator could be stopped, was crushed against the overhead framework. Held that the questions of negligence and of contributory negligence were for the jury.—Roulo v. Minot, 132 Mich. 317.

¶ 53. In an action by an employee of an owner of a moving van against a warehouse owner to recover for personal injuries sustained by falling into an aperture between an elevator platform and the floor in the building while assisting his employer in removing a box from the platform preparatory to carrying it to the van, where it appeared that a rule had been laid down by the warehouse foreman that outsiders should not be permitted to come into the warehouse, that one of the defendant's checkers was in charge of the movement of the goods, in the absence of other employees at lunch at noontime, when the accident occurred, that plaintiff and his employer were invited on the premises to assist in the removal of the goods, and that plaintiff and his employer did not know of such rule, held that it was a question for the jury whether defendant's checker had the apparent authority which he exercised so as not to constitute plaintiff a trespasser.—Haines v. Leonard Warehouses, 199 Mich. 580.

¶ 54. Whether it was negligence for an employee of the defendant in delivering bags of plaster at a building in course of erection, to pile five tons of plaster in one place after being warned not to do so, and which caused an injury to a person employed on the building, is a question for the jury.—Schneider v. C. H. Little Co., 184 Mich. 315.

¶ 55. The question of the negligence of the defendant bank is for the jury, where a two-year-old child who accompanied its mother on a business trip to a bank, was injured by the fall of a large unsecured sign resting on the inside ledge of a window, which another child pulled over as he stood on tip-toes with his hands on the top of the sign, endeavoring to look over it.—Harris v. Royal Oak Sav. Bank, 187 Mich. 407.

¶ 56. In an action for personal injuries to a driver caused by the giving away of a platform scale under a load of steel being hauled by a teaming company, on conflicting evidence as to the condition of the timbers of the scale-pit, and the date and extent of repairs, the question of negligence of the defendant in not making inspection is erroneously taken from the jury.—McIntyre v. Detroit Safe Co., 129 Mich. 385.

¶ 57. In an action for personal injuries to a driver caused by the giving away of a platform scale under a load of steel being hauled by a teaming company, the question of whether or not the scales were overloaded or improperly loaded is for the jury, where the load was testified to have been within capacity if rightly loaded and placed on the scale, which was disputed.—McIntyre v. Detroit Safe Co., 129 Mich. 385.

¶ 58. The question of negligence was properly left to the jury in an action for personal injuries sustained by a traveler on a sidewalk as the result of glass falling from a building, where there was testimony that there was a broken window 50 or 60 feet from the ground in such building which stood back a few feet from the street, that a window or pane of glass was heard to rattle and that triangular pieces of glass were seen to fall to the sidewalk immediately before the accident to plaintiff.—Detzur v. B. Stroh Brewing Co., 119 Mich. 282.

¶ 59. In an action against the owner of a building, the contractor, and a materialman to recover damages for the negligent killing of plaintiff's intestate by the collapse, while under construction, of a portion of the floor of a reinforced concrete garage upon which deceased was employed as carpenter in making and setting up forms and shoring, used in connection with concrete work, held, on conflicting evidence that it was a question for the jury whether the design of the concrete beams furnished by the materialman were insufficient, and the floor likely to collapse.—Bayne v. Everham, 197 Mich. 181.

¶ 59a. In an action against the tenant of a building having sole charge of a freight elevator operated by its own employee for the death of an employee of a brewery company engaged with his superior in delivering beer to the tenant, due to the starting of the elevator before deceased was safely upon it, and in which the evidence was conflicting as to whether or not deceased had been told by his superior to stay with the team, and it appeared that the operator and the superior had their backs turned to the door of the elevator when it started and that the operator started the elevator upon the superior telling him to go ahead, held that it was a question for the jury whether defendant was guilty of negligence.—Sikora v. Fellowcraft Club, 195 Mich. 49.

¶ 59b. In an action for damages for personal injuries sustained as a result of an elevator starting before a passenger got off, held that the question of negligence of defendant was properly left to the jury.—Rogers v. Ford, 188 Mich. 62.

§ 13. ——As to contributory negligence.

¶ 60. Plaintiff was injured by falling through an unguarded hatchway in the floor of defendant's store, having entered the store through a door near the hatchway without stopping to see whether the hatchway was open or not. He knew of the location of the hatchway and that it was customary to use it at the time the accident happened; but it was also customary to keep the door locked when the hatchway was open. Held, that the question of his contributory negligence was for the jury.—Engel v. Smith, 82 Mich. 1.

¶ 61. Where a truckman was injured by falling through a plainly visible trap door in the floor of defendant's shop, his testimony that he did not know of the existence of the door, and that he did not look in the direction of the opening, upon which he came suddenly as he came around a pile of goods, made the question of his contributory negligence one for the jury.—Pelton v. Schmidt, 104 Mich. 345.

¶ 62. In an action against builders, for personal injuries sustained by the foreman of an independent contractor through the fall of an elevator, evidence that it was intended as a freight elevator, that a notice was posted warning all persons not to ride on it and that the defendants repeatedly warned persons who used it, is sufficient to justify a directed verdict for the defendant; no waiver is shown by the fact that some of the men used it without remark by the defendant, that the defendant himself rode on it and that it was sometimes necessary for a man to ride with the materials being hoisted.—Ball v. Hauser, 129 Mich. 397.

¶ 63. Plaintiff was employed by a third person to install an electric motor for the lessee of the building of which defendant was lessor. In performing this work plaintiff used the elevator several times and knew that it was not equipped with an automatic gate, and that the fact of the gate being open did not necessarily indicate the elevator was standing at the opening. The shaft was dark and plaintiff stepped through the open gate into the same and was injured. The elevator floor had been covered with white powder, making it appear very light, and plaintiff mistook a light coming up the elevator shaft for the elevator floor. Held, plaintiff was not guilty of contributory negligence as a matter of law; the question was for the jury.—Barfoot v. White Star Line, 170 Mich. 349.

¶ 64. Where plaintiff's intestate fell through an elevator, which had not been provided with an automatic gate, as required by statute, and one witness testified that decedent had worked there three or four days, held, this fact would not necessarily charge him with knowledge of the lack of such gate, and that the question of his contributory negligence was properly left to the jury.—Noack v. Williams, Davis, Brooks & Hinchman Sons, 175 Mich. 15.

¶ 65. Whether a person exercised a proper degree of care in stepping into an elevator which, by reason of being stopped lower than the floor, caused her to fall, held a question for the jury.—Blair v. Seitner Dry Goods Co., 184 Mich. 304.

¶ 65a. In an action for damages for personal injuries sustained as a result of an elevator starting before a passenger got off, held that the question of contributory negligence was properly submitted to the jury.—Rogers v. Ford, 188 Mich. 62.

¶ 65b. In an action against the tenant of a building having sole charge of a freight elevator operated by its own employee for the death of an employee of a brewery com-

pany engaged with his superior in delivering beer to the tenant, due to the starting of the elevator before deceased was safely upon it and in which the evidence was conflicting as to whether or not deceased had been told by his superior, who was on the elevator with the operator, to stay with the team, held that the contributory negligence of deceased was a question for the jury.—Sikora v. Fellowcraft Club, 195 Mich. 49.

¶ 66. In an action by an employee of the owner of a moving van against a warehouse keeper to recover damages for personal injuries received as the result of stepping into an aperture 5½ inches in width between an elevator platform in the building and the floor while assisting his employer in removing a box from the platform, evidence held to present a question for the jury whether plaintiff was guilty of contributory negligence in not seeing the aperture.—Haines v. Leonard Warehouses, 199 Mich. 580.

¶ 67. In an action by a tile setter against one selling and delivering plaster to a plaster contractor for damages for personal injuries sustained as the result of the collapse of the porch on which plaintiff was working for the tile contractor due to placing heavy bags of plaster upon a bay window sill and on the floor inside the building, where the evidence was clear that plaintiff had no knowledge with reference to the strength of the structure, held that the contributory negligence of plaintiff was a question for the jury.—Schneider v. C. H. Little Co., 200 Mich. 361.

¶ 68. In an action against the owner of a reinforced concrete building, the contractor, and a materialman furnishing material and plans for the concrete work, for the death of a carpenter due to the collapse of a portion of the floor of the building which plaintiff's decendent and others were attempting to shore up to prevent it from falling, held that the questions of assumption of risk and of contributory negligence were for the jury.—Payne v. Everham, 197 Mich. 181.

§ 14. Instructions as to negligence.

General law of instructions, see Instructions.

¶ 69. In an action for injuries from the falling of an elevator, an instruction permitting the jury to find that defendant's maintenance of the elevator was negligent otherwise than in respect to the particular appliances claimed to have been defective was erroneous.—Hall v. Murdock, 114 Mich. 233.

¶ 70. An instruction in an action for personal injuries sustained in an elevator, which unqualifiedly stated that the owner of the elevator was required by law to test the strength of its cable from time to time, and afterwards left it to the jury to determine whether tests of strength should have been made, but failed to point out a rule by which such necessity could be determined, was erroneous.—Hall v. Murdock, 119 Mich. 389.

¶ 71. In an action for personal injuries sustained by the giving way of the platform timber while plaintiff was weighing a load on certain scales, an instruction stating that if the jury found that if ordinary experience ought to have advised a reasonably prudent man that sticks of timber of the character in question would not remain sound for a period a little more than four years, the negligence of the defendant was established, constituted reversible error, where all the testimony in the case tended to prove that such timber would last at least five years.—McIntyre v. Pfaudler Vacuum Fermentation Co., 133 Mich. 552.

¶ 72. In an action for personal injuries caused by falling down an elevator shaft, it is not erroneous to refuse to instruct that it was not negligence for the defendant, who was with the plaintiff, to raise the gate and call "elevator" in a loud tone to warn anyone using the elevator on the floor above.—Burgess v. Stowe, 134 Mich. 204.

¶ 73. In an action for personal injury caused by the plaintiff stepping into an elevator shaft on the supposed invitation of the defendant, when he opened the gate and called "elevator" to the floors above, it is not error to refuse to instruct that the plaintiff could not recover if he could have seen that the elevator was not there.—Burgess v. Stowe, 134 Mich. 204.

¶ 74. In an action for personal injury caused by plaintiff stepping into an elevator shaft when the defendant opened the gate and called "elevator," it is not error to refuse an instruction that the plaintiff cannot recover on account of defective elevator or lack of special skill in defendant where the court made it clear that the plaintiff could not recover unless he received his injury by acting on the supposed invitation of the defendant.—Burgess v. Stowe, 134 Mich. 204.

¶ 75. In an action for personal injuries caused by the plaintiffs falling down an elevator shaft, in the belief that he had received an invitation to enter the elevator when the defendant opened the gate and called "elevator" to the floors above, it is error to instruct that the defendant was "bound to exercise the highest degree of care and diligence of a cautious person, so far as human care and foresight can go."—Burgess v. Stowe, 134 Mich. 204.

¶ 76. It was immaterial whether the failure to send an attendant with, or giving warning to, plaintiff was the proximate cause of an injury received from a fall from an elevator in defendant's store, where the evidence warranted the jury in attributing negligence to the defendant, in that plaintiff was put upon the elevator by defendant's clerk (intending to send him to the third floor), who told him to get off when the elevator stopped, and that the elevator stopped at the second floor and that plaintiff attempted to leave the elevator and that the elevator, started again by some person other than plaintiff, caught and injured plaintiff as alleged; and instructions of the court upon such point, if erroneous, were harmless.—Moerman v. Clark-Rutka-Weaver Co., 145 Mich. 540.

¶ 77. Refusal to charge the jury that defendant owner of a building containing a passenger elevator was not a common carrier with the liabilities of such is not erroneous where the charge as given was favorable to defendant in that the degree of care which an ordinarily prudent person would have bestowed under the circumstances was given as the measure of defendant's duty.—Pascieszny v. Boydell Bros. White Lead & Color Co., 146 Mich. 223.

¶ 78. In a suit by a customer against a storekeeper for personal injuries arising from her falling down a stairway, the court properly instructs that it is not negligence to omit to bar or warn a customer against a stairway where it is in plain sight and out of the place where customers are expected or asked to go.—Larned v. Vanderlinde, 165 Mich. 464.

¶ 79. In a suit against a storekeeper for injuries to a customer arising from her falling down a stairway, the court properly refuses a requested instruction that plaintiff cannot be guilty of contributory negligence, even though she might have seen the opening had she looked, since the situation is one where plaintiff has the right to assume that the floor of the store is perfectly safe.—Larned v. Vanderlinde, 165 Mich. 464.

¶ 80. In a suit by a customer against a storekeeper for personal injuries arising from her falling down a stairway, the court properly instructs that plaintiff is contributorily negligent if she allows such a flight of stairs to escape her notice from no other reason than mere inattention to her surroundings.—Larned v. Vanderlinde, 165 Mich. 464.

¶ 81. In a suit against the owner of a store for injuries to plaintiff arising from her falling down a stairway, the court properly refused to charge that it was the duty of defendant to guard the stairway by a railing or bar, or warn plaintiff by actual notice, and that if the jury should find that the defendant did neither, and the stairway was located where a person trading might step into it unawares, they should render a verdict for the plaintiff, inasmuch as such charge imposes no duty of care on the plaintiff.—Larned v. Vanderlinde, 165 Mich. 464.

¶ 82. In a suit by a customer against a storekeeper for personal injuries arising out of her falling down a stairway, where the plaintiff testifies that her eyesight was good, it is proper for the court to instruct the jury that the plaintiff herself admitted such good eyesight despite the fact that it was shown that she told defendant a week after the accident that the light blurred her eyes when she went into the store.—Larned v. Vanderlinde, 165 Mich. 464.

¶ 83. In an action against the tenant of a building having sole charge of a freight elevator operated by its own employee for the death of an employee of a brewery company engaged in delivering beer to the tenant due to the alleged negligence of the elevator operator in starting the elevator before decedent was safely upon it, and in which the issue was whether decedent was rightfully upon the elevator or whether he had been directed by his superior who was also on the elevator to stay with the team, held that an instruction on the degree of care required of the operator of the elevator and on the care required of deceased to make observations before entering the elevator was erroneous where it required testimony that deceased was told to remain with the horse.—Sikora v. Fellowcraft Club, 189 Mich. 235.

¶ 84. In an action for personal injuries sustained by the giving way of the platform timber while plaintiff was weighing a load on the scales in question, the question whether the load was too heavy or improperly distributed, was a question for the jury.—McIntyre v. Pfaudler Vacuum Fermentation Co., 133 Mich. 552.

¶ 85. In an action for personal injuries sustained by plaintiff through the giving way of platform timber while he was weighing a load on certain scales, where the age of the timber was in dispute, the question as to whether proper diligence on the part of the defendant should have led to an examination of the timber and discovery of the defect, was properly submitted to the jury.—McIntyre v. Pfaudler Vacuum Fermentation Co., 133 Mich. 552.

¶ 86. In an action against the owner of a reinforced concrete building, the contractor and a materialman furnishing material and plans for the concrete work, for the death

of a carpenter due to the collapse of a portion of a floor of the building, an instruction that it was the duty of the materialman to use due care to furnish reasonably safe and accurate designs, plans and specifications and describe in detail the necessary and proper sizes and dimensions of the beams, panels and columns used in the construction of the building so that they would hold the required weight and to specify proper steel bars and rods to be used in anchorage, held to be incorrect.—Bayne v. Everham, 197 Mich. 181.

¶ 86a. In an action against the tenant of a building having sole charge of a freight elevator operated by its own employee, for the death of an employee of a brewery company engaged in delivering beer to the tenant, due to the alleged negligence of the elevator operator in starting the elevator before decedent was safely upon it, and in which the issue was whether decedent was rightfully upon the elevator or whether he had been directed by his superior to stay with the team, held that an instruction that the person operating the elevator was required, under the circumstances of the case, to exercise a high degree of care to prevent injury to a passenger, was erroneous as placing too high a duty upon defendant.—Sikora v. Fellowcraft Club, 189 Mich. 235.

¶ 86b. In an action against the tenant of a building having sole charge of a freight elevator operated by its own employee, for the death of an employee of a brewery company engaged in delivering beer to the tenant, due to the alleged negligence of the elevator operator in starting the elevator before decedent was safely upon it, and in which the issue was whether decedent was rightfully upon the elevator, or whether he had been directed by his superior to stay with the team, held that an instruction that decedent, owing to the fact that the door was open and at a standstill, had a right to assume that he could enter the elevator safely and that, under the circumstances, decedent was not charged with the duty of stopping to look, listen, and make a special examination, was erroneous as placing too little responsibility upon decedent.—Sikora v. Fellowcraft Club, 189 Mich. 235.

§ 15. Building restrictions.

Character of use of land allowable, see post §§ 17-19.
Restrictions not found in all deeds in vicinity, see post § 20.
Acquiescence in restriction, see post § 20.
How released, see post §§ 22-24.
Regulations of summer resort associations, see Associations, § 3.
Mutual restrictions as consideration for restrictive covenants, see Contracts, V, A.

¶ 87. So long as the vendor of a city lot owns other lands upon the street, conditions in his contract and deed in regard to house-line and building restrictions are of substantial benefit to him and their observance will be compelled.—Abraham v. Stewart, 83 Mich. 7.

¶ 88. It is of no consequence that a building restriction for which there is valuable consideration moving to and from the signers and binding on assignees is created by an instrument independent of the deed conveying title.—Erichsen v. Tapert, 172 Mich. 457.

¶ 89. Restrictions in deeds will be construed strictly against the grantors and those claiming to enforce them, and all doubts resolved in favor of the free use of the property.—Casterton v. Plotkin, 188 Mich. 333.

§ 16. ——Running with the land.

¶ 90. A restrictive building covenant as to the character of the structure which may be erected on a city lot and its distance from the street, runs with the land.—Zoller v. Goldberg, 183 Mich. 197.

¶ 91. A building restriction in a deed to land, inserted for the benefit of the land retained by the grantor, may be enforced by subsequent purchasers inter se.—Hartwig v. Grace Hospital, 198 Mich. 725.

¶ 92. The character of a building restriction in a deed to land held to be evidence of the fact that such restriction was intended for the benefit of subsequent purchasers, especially when the quantity of the land affected and its general location are considered.—Hartwig v. Grace Hospital, 198 Mich. 725.

§ 17. ——Covenants for private dwellings.

Dwellings at stated distance back from lot line, see post § 18.
Private dwellings of stated value, see post § 19.
Effect of change in neighborhood, see post § 22.
Laches, estoppel and waiver, see post §§ 23, 24.

¶ 93. A building restriction confining structures erected to dwelling houses for single families prohibits the erection of a four-family flat.—Misch v. Lehman, 178 Mich. 225.

¶ 94. A restriction in a deed that nothing but a two-story dwelling house shall be erected on a lot, prohibited the erection of a photograph gallery or studio.—Frink v. Hughes, 133 Mich. 63.

¶ 95. Erection of a two-story building designed for two dwellings, one to occupy each floor, may be enjoined where the deed to the lot contains a condition against occupying the premises except "for one dwelling house to each lot."—Harris v. Rorabeck, 137 Mich. 292.

¶ 96. A restriction of the use of lots for residence purposes exclusive of business uses, if one existed, is not incompatible with erection of double houses, where several double houses had been built on the plat without objection and which a complainant does not regard as objectionable, or with the erection of a house to be occupied by one family on each floor.—James v. Irvine, 141 Mich. 376.

¶ 97. A building restriction in a deed prohibiting the erection on the front of a city lot of any building except a dwelling a certain distance back from the street line, extends to and covers the whole lot so as to prevent the erection of a building for business purposes on the rear portion thereof.—Zoller v. Goldberg, 183 Mich. 197.

¶ 98. The grantee of land on which a dwelling house is standing at the time of the making of his deed violates the restrictive covenant in such deed against the erection of anything but a residence and buildings pertaining thereto by using the dwelling house as a hospital.—Hartwig v. Grace Hospital, 198 Mich. 725.

¶ 99. The deed to the lot of defendant contained a restriction from erecting any building other than "any dwelling house of less than $2,000.00." Twenty-one lots of the subdivision, containing seventy lots, had been sold subject to the restricting clause, and all the buildings erected conformed with the restriction as construed by complainants. Held, that the plan was to have one residence for one family only upon each lot, and the erection of a two-family residence would be enjoined.—Kingston v. Busch, 176 Mich. 566.

¶ 100. Where a building restriction provides that only single dwellings and buildings appurtenant thereto can be erected on certain lots, the erection of flat buildings or stores cannot be justified as a necessary appurtenance.—Erichsen v. Tapert, 172 Mich. 457.

¶ 101. Where single dwellings and buildings appurtenant thereto only are allowed by a contract restricting the buildings on certain lots, whether a store building on the rear of one of the lots would be less objectionable than a barn constructed without protest, has no bearing on the question of the right to enjoin the construction of the store.—Erichsen v. Tapert, 172 Mich. 457.

¶ 101a. It cannot be said that the construction of a store or flat building on the back of a residence lot contrary to a contract restricting the character of buildings on certain lots would not be injurious to two adjoining lots where the rear end thereof would abut on one of the adjoining lots for nearly half its length and would be within fifty feet of the other lot.—Erichsen v. Tapert, 172 Mich. 457.

¶ 102. A house for hospital nurses is not a residence within the meaning of a building restriction in a deed to land.—Hartwig v. Grace Hospital, 198 Mich. 725.

§ 18. ——Covenants as to building lines.

¶ 103. A condition that "no building other than dwelling houses shall be built within 25 feet of any street line," is not unreasonable.—Stewart v. Stark, 181 Mich. 408.

¶ 104. A store building cannot be erected within 25 feet of a street line under a restriction that no buildings other than dwelling houses may be built within such limit.—Stewart v. Stark, 181 Mich. 408.

¶ 105. A restrictive covenant that "no building other than dwelling houses shall be built within 25 feet of any street line" within a subdivision, applies to and prevents the construction of all kinds of buildings within the prohibited distance.—Stewart v. Stark, 181 Mich. 408.

§ 19. ——Covenants as to value.

¶ 106. Where a deed of a lot provides that it shall be used for residence purposes only and that no residence shall be erected thereon of less than a certain value, so long as the restrictions are complied with no objection can be made to a building because it is unsightly or offensive to aesthetic taste, nor because its erection may have a tendency to render adjacent property less valuable.—Maine v. Mulliken, 176 Mich. 444. (Kuhn and Moore, JJ., dissenting.)

¶ 107. A building restriction in deeds against the erection on lots in a plat of any building costing less that a stated sum and against any but single dwellings for one family on one lot, would be valid.—James v. Irvine, 141 Mich. 376.

§ 20. Persons bound by restrictions.

Who may sue to redress violation, see post § 26.
Estoppel of grantee to land to invoke the statute of frauds, see Frauds, Statute of, III, B.

¶ 108. Lot owners in a plat who have by acquiescence placed a construction on build-

ing restrictions relative to the kind of houses to be allowed are bound by it.—James v. Irvine, 141 Mich. 376.

¶ 109. A grantor may restrict the use which a purchaser under contract may make of a lot in a subdivision regardless of whether other lots previously sold were sold with such restriction.—Sherrard v. Murphy, 193 Mich. 352.

¶ 110. The fact that a building restriction expressly provides that it is for the purpose of maintaining a street as a desirable residence street and that a contract signed by some of the lot owners so providing is so executed as to entitle it to record, clearly demonstrates that it was intended to be binding on signers and their successors in title.—Erichsen v. Tapert, 172 Mich. 457. (Ostrander and McAlvay, JJ., dissenting.)

¶ 111. An agreement restricting the character of buildings to be erected on certain lots is binding on those who hold title from one who signed the agreement where it specifies, "In consideration of the mutual covenants herein contained (we) do hereby agree to and with each other and for our and each of our heirs, executors, administrators and assigns, as follows."—Erichsen v. Tapert, 172 Mich. 457. (Ostrander and McAlvay, JJ., dissenting.)

¶ 112. A contract restricting the character of buildings to be erected on a certain subdivision where the parties are described as "owners of one or more lots in Chandler Ave.," is binding on those who execute it where there is nothing therein to indicate that all must sign to make it operative and the testimony shows that the owners knew that it would probably be impossible to get all to sign.—Erichsen v. Tapert, 172 Mich. 457. (Ostrander and McAlvay, JJ., dissenting.)

¶ 113. The rule of restrictions resting in parol as to certain lots in a subdivision under a general plan developed and consistently maintained cannot be applied to previously acquired titles not so restricted, held by nonparticipants and their grantees who are strangers to the plan with antedating rights.—Casterton v. Plotkin, 188 Mich. 333.

¶ 114. On a bill to enforce a building restriction it was shown that defendant was the owner of a subdivision, part of which was originally subject to the restriction imposed upon the plat. Defendant's grantor who was the owner of the remainder of the property at the time of the formation of the subdivision did not join in the restriction but later purchased the portion subject to the restriction, one of the considerations of the transfer being his agreement set out in the deed that the entire tract should be subject to the restriction. Held, that defendant was bound thereby although his grantor did not sign the deed imposing the restriction.—Hartz v. Kales Realty Co., 178 Mich. 560.

¶ 115. Where a valid contract restricting the character of buildings on part of the lots in a subdivision is entered into binding on "heirs, executors, administrators and assigns," violation thereof may be prevented by injunction by and against the grantees of the signers.—Erichsen v. Tapert, 172 Mich. 457.

§ 21. ——Necessity of notice.

Evidence to establish notice, see post § 27.
Possession or appearances as notice of restrictions, see Notice and Record of Title, I, B.

¶ 116. A purchaser of land is not guilty of the violation of building restrictions where he has no knowledge of restrictions not mentioned in the deed which are claimed to have been known and observed by other lot owners in the vicinity before the purchase of the lot.—Detroit Cavalry v. Ranney, 193 Mich. 472.

§ 22. Effect of change of circumstances on covenants.

Laches and estoppel and waiver, see post §§ 23, 24.
Evidence relating to change of circumstances, see post § 27.

¶ 117. While no building restrictions were contained in the recorded plat of a residential subdivision, all contracts of sale and deeds of lots contained covenants that the property should be used for residential purposes only. A lot owner proposed to erect a store and invoked the doctrine that it would be inequitable to enforce the restriction when conditions had changed, and that lots would sell for more with the restrictions removed. There had been some change in the condition, but the locality as a whole remained a suburban, residential village. Held, that at the present time the building restrictions should be enforced.—Moore v. Curry, 176 Mich. 456.

¶ 118. Where the character of a neighborhood is such that equity will enforce a restriction as to the kind of buildings erected, it is proper to grant permission to subsequently move for a modification of the injunction in anticipation of possible changes in the character of such neighborhood.—Misch v. Lehman, 178 Mich. 225.

¶ 119. Where the entire portion of a block fronting on a certain street was subject to

restrictive covenants against use for other than residence purposes, there is no change in the character of the neighborhood through the encroachment of business rendering enforcement of the covenants inequitable, where both sides of the street up to and including the property in question are residential in character, some of the residences being very costly, and to permit the erection of store buildings would be an injury to residence owners, although the part of the block not subject to the restrictions has become business in character.—Andre v. Donovan, 198 Mich. 256.

§ 23. Waiver of restriction and estoppel.

To what restrictions estoppel extends, see post § 24.

Evidence relating to waiver or estoppel of restriction, see post § 27.

¶ 120. A restriction in a deed restricting construction to dwellings was enforced upon the application of a lot owner as against his neighbor, although some of the lands in the plat had passed out of the original grantor by conveyances not containing the restrictive clause, but where there had been no substantial departure from the original scheme as to the entire plat.—Frink v. Hughes, 133 Mich. 63.

¶ 121. Equity will enjoin the violation of a condition in a deed that no saloon should be erected on the premises conveyed, where the grantor purchased such property with a view to protecting other property in the neighborhood from depreciation in value by the proximity of a saloon, although, before the execution of the deed, he had conveyed adjoining property without such restriction, and had also leased other premises in that locality for the purposes of a saloon.—Reilly v. Otto, 108 Mich. 330.

¶ 122. Delay in bringing an action to enjoin the violation of a restrictive covenant will not raise an estoppel, where the defendant has been put to no extra expense by reason of the delay, and will be put to no more annoyance and expense than if suit had been sooner begun.—Longton v. Stedman, 182 Mich. 405.

¶ 123. Long acquiescence in the violation of a building restriction in a deed to land will defeat the right to enjoin such violation when only by the making of expensive changes in the structure on the land could the restriction be complied with.—Hartwig v. Grace Hospital, 198 Mich. 725.

¶ 124. The previous construction of a double house in a certain subdivision without protest from complainant if in violation of restrictive covenants as to dwellings therein does not constitute waiver of the restrictions by him where such house is over 1,400 feet from complainant's home, and in another block approaching a business district separated by a street 60 feet wide and near a car line.—Schadt v. Brill, 173 Mich. 647.

¶ 125. That there may have been some violations of a restriction that none but dwelling houses may be erected in a subdivision within 25 feet of any street line, does not justify a subsequent violation of such restriction, where there has been no radical change in the environments and character of the neighborhood as a residential district.—Stewart v. Stark, 181 Mich. 408.

¶ 126. That a building has been erected on one lot of a plat in violation of building restrictions will not estop the property owners from enjoining a similar breach by another party, where such single breach has not resulted in a subversion of the original scheme of development.—Misch v. Lehman, 178 Mich. 225.

¶ 127. On a bill to enjoin the violation of a restrictive covenant in a land contract for and deed to a lot in a residence subdivision that all buildings erected on such lot should face a certain street and that no building should cost less than a certain sum, by the erection of a building of lesser value facing a river which bordered on the back of the lot, held that as the restriction was still of value, considering the number of lots still owned in the subdivision, although it had been violated prior to the making of such land contract in many instances, relief should be granted.—Sherrard v. Murphy, 193 Mich. 352.

¶ 128. Restrictive covenants in a deed against the use of the land for other than residence purposes were not waived by permitting a barn on a portion of the premises to be used for a time as a garage and repair shop and a house to be used for a rooming house without objection being offered by other property owners or their predecessors in title.—Andre v. Donovan, 198 Mich. 256.

¶ 129. There was no abandonment of mutual covenants in a deed of one-half of all the portion of a block fronting on a certain street restricting the use of the premises conveyed "only for residence purposes" by subsequent deeds of each of the owners of a portion of the land of each, the two strips sold adjoining, where, although the covenants were not in all respects similar, they were essentially similar, it being asserted in each deed that the property conveyed was to be used "only for residence purposes."—Andre v. Donovan, 198 Mich. 256.

¶ 130. A single or occasional breach of the original plan of a subdivision in some distant part of the plat or under circumstances such as not to injuriously affect a party's property, or where there is no radical or material change in the general conditions or surroundings, will not estop such party from asserting his rights under a restrictive covenant in his deed to an adjacent owner against such owner whose breach of such covenant threatens to materially diminish the value and desirability of such party's property.—Davison v. Taylor, 196 Mich. 605.

¶ 131. Deeds without restrictive covenants as to the premises conveyed executed prior to the date of a deed containing such covenants would not work an estoppel against the enforcement of the latter covenants.—Davison v. Taylor, 196 Mich. 605.

§ 24. ——Extent of estoppel.

¶ 132. A grantee of a lot in a residence subdivision may, in an action by the owners of remaining unsold lots to enjoin the violation of a restrictive clause in the deed and land contract, urge as estoppel only such acts or omissions on the part of the plaintiffs affecting the restrictive clause as have occured since the making of a land contract between the plaintiffs and another person which was, by assignment, the basis for his title.—Sherrard v. Murphy, 193 Mich. 352.

¶ 133. In a suit to enforce a restrictive covenant in a deed designed to maintain the street whereon the premises conveyed were located as a single residence street, where plaintiff had consented to defendants so remodeling their residence as to make it a two-family flat and had consented to other similar flats on the street, held that if plaintiff was estopped by such consent the estoppel could go no farther than the consent and defendants could claim no further benefit than a continuance of their residence as remodeled.—Davison v. Taylor, 196 Mich. 605.

¶ 134. It does not follow from the fact the grantor in a deed containing restrictive covenants, by permitting the grantee to expend money in departing in one respect from such restriction by remodeling the house on the premises into a two-family flat and using it as such for a number of years may be estopped from claiming the grantee cannot continue such use, that the grantee may use the premises without restrictions of any kind.—Davison v. Taylor, 196 Mich. 605.

§ 25. Remedies and defenses for breach of restriction.

See also ante ¶ 121.

General practice on injunctions, see Injunctions.

¶ 135. The violation of building restrictions will be enjoined.—Stewart v. Stark, 181 Mich. 408.

¶ 136. The enforcement in a court of equity of restrictive covenants contained in a deed on the sale of land is not a matter of absolute right, and is governed by the same general rules which control equitable relief by specific performance.—Davison v. Taylor, 196 Mich. 605.

¶ 137. Equity will compel the removal of a structure erected in violation of a restriction in a deed from a common grantor, prohibiting the erection of any building within five feet of a joint right of way between two city lots.—Longton v. Stedman, 182 Mich. 405.

§ 26. ——Who may sue.

Persons bound by restrictions, see ante § 20.

¶ 138. The owners of property in whose interest a building restriction was imposed are proper parties to its enforcement.—Hartz v. Kales Realty Co., 178 Mich. 560.

¶ 139. A deed with a building restriction or covenant is not available to the owner of another lot in the same plat, also subject to restriction, where neither the plat nor any of several deeds preceding the one in which the restriction appeared contained any restrictions whatever, and where only one deed among 98 in the plat had a covenant binding the grantor to exact similar restrictions from other grantees in the plat.—James v. Irvine, 141 Mich. 376.

¶ 140. A restriction in deeds to lots that they shall be used only for one dwelling house to each lot, is for the benefit, not of the grantor alone, but for every owner of property and resident on the street which was intended to be benefited thereby.—Harris v. Rorabeck, 137 Mich. 202.

¶ 141. The erection of a four-family flat or establishment of a business place on a lot adjoining plaintiff's premises on which she had erected for her personal use a house worth $12,000, held to so materially affect the desirability of her premises as a home and decrease its value as to give her a peculiarly personal interest in the enforcement of a restrictive covenant in her deed to the owner of such adjoining lot designed to maintain such lot for single-residence purposes, in a suit to enforce such covenant against such owner.—Davison v. Taylor, 196 Mich. 605.

¶ 142. That the complainant has not suffered any injury from the violation of a covenant prohibiting the erection of any

building within five feet of a common right of way between adjoining lots, does not prevent the enforcement of such a restriction in equity.—Longton v. Stedman, 182 Mich. 405.

§ 27. ——Evidence.

General law of evidence, see Evidence.

¶ 143. The intention to restrict buildings in a certain subdivision to single dwelling houses and their appurtenances is sufficiently shown, and the erection therein of a double house with one entrance may be enjoined; where the restrictions provide that no building other than a dwelling house with its appurtenances shall be erected and that such dwelling must cost at least $5,000.00, and the testimony shows that the platters intended and advertised to make the subdivision an exclusive residential section occupied by attractive private homes, and the restrictions were generally understood in private application as permitting only single dwellings and were strictly observed with the exception of one double house near a car line.—Schadt v. Brill, 173 Mich. 647.

¶ 144. On a bill to enjoin the owner of land on the north side of a residence street, the lots on the south side of which were subject to residence building restrictions, from building an apartment building, evidence held insufficient to establish that defendant had any notice of the fact that his lot or the other lots on the north side of the street were restricted to residence purposes, as a part of a general plan for the street.—Williams v. Lawson, 188 Mich. 88.

¶ 145. In an action by the owner of a lot in a residence subdivision purchased subject to building restrictions against the first purchaser under contract of a lot out of the then undeveloped and unrestricted subdivision to enjoin the threatened violation of alleged building restrictions, evidence held insufficient to show any conduct upon the part of the first purchaser after taking possession under his contract to constitute an estoppel to claim freedom from such restrictions.—Lambrecht v. Gramlich, 187 Mich. 251.

¶ 146. In a suit to enforce a restrictive covenant in a deed providing that no building should be kept, operated or maintained upon the premises conveyed, except the necessary buildings for single-residence purposes, evidence held to show no such deviation from the original plan of plaintiff in platting the subdivision and selling other premises therein on the same street as to estop her from insisting upon compliance with the covenant sued on.—Davison v. Taylor, 196 Mich. 605.

¶ 147. In a suit to enforce a restrictive covenant in a deed, designed to maintain the street whereon the premises conveyed were located as a residential street, the evidence held to show business had not so far entered the street as to deprive it of its residential character or release defendants from the covenant sued on.—Davison v. Taylor, 196 Mich. 605.

BULKHEADS to CADAVERS.

Cross-References.

Bulkheads—
To reclaim submerged land, see Navigable Waters, II.
Bulk Sales Law—
Sales deemed fraudulent under, see Fraudulent Conveyances.
Bunco game—
As crime, see Crimes, II (false pretenses); Indictment.
Burden of proof—
See Evidence, II; Indictment, VIII, A; and see specific topics for the burden of proving particular facts involved.
Burglary—
See Crimes, II; Indictment.
Burials—
See Corpses and Burial; Cemeteries.
Burned papers—
Secondary evidence, see Evidence, IV.
Proceedings to restore, see Restoration of Papers.
Burning—
As crime, see Crimes, II (arson); Indictment.
Liability for negligence, see Fires; Railroads, VIII, G.
Insurance against, see Insurance.
Business—
Matters pertaining to particular businesses or occupations, see topics treating of the occupation or of the subject to which it is incident, e. g., Attorneys; Auctions; Banking; Brokers; Carriers; Inns; Medicine and Surgery; Railroads; Street Railways; Warehousing.
Constitutionality of regulative laws, see Constitutional Law; Commerce.
Municipal regulation, see Municipal Corporations, IX.
Taxes and licenses, see Taxes; Licenses.
Torts affecting business, see Libel and Slander; Fraud, I (unfair competition); Combinations; Conspiracy.
Use of trade names or trade marks, see Trade Names and Trade Marks.
Contracts in restraint of trade, see Contracts, IV; Combinations and Monopolies.
Damages to business, see Damages.
Restrictions on use of property for specified business, see Buildings; Landlord and Tenant; Deeds; Dedication.
Business or secular days or time, see Sunday; Time; Negotiable Instruments, VIII (time for presentment).

Nuisances by or to business, see Nuisances.
Wife's separate business, see Husband and Wife, II, IV.
Business interest or connection as disqualification, see Judges, III; Jury, III; Agency, I, II; Attorneys, II.
Business corporations—
See Corporations; Foreign Corporations.
Butchering and slaughter houses—
See generally Health; Municipal Corporations, IX; Nuisances.
Butter and butterine—
See Adulteration; Food; Commerce.
Buying and selling—
See generally Sales; Vendors and Purchasers.
Involuntary sales, see Executions; Estates of Decedents, VII, A; Foreclosure of Mortgages; Judicial Sales; Partition; etc.
Agencies to buy or sell, see Agency; Brokers and Factors; Corporations, XVII; Partnership; Trusts.
By-laws—
See Corporations, X; Associations; Fraternal Associations.
Ordinances, see Municipal Corporations.
Pleading and proof of, see Evidence, IV, VIII; Pleading, I; Municipal Corporations, VI, XVI.
Cables—
Across navigable waters, see Navigable Waters, II; Ferries.
Caboose—
Liability as to passengers or servants, see Carriers, IV; Master and Servant, III.
Cadavers—
See Corpses and Burial.

CALENDAR.

TREATS of the calendar of civil causes for trial or hearing in courts of record.

Analysis.

§ 1. In general; time, term and state of cause.
§ 2. Notice for trial or hearing.
§ 3. ——Time and mode of service.
§ 4. ——Persons to be served.
§ 5. ——Proof of notice.
§ 6. Motion to strike or other objections.
§ 7. Advancement or transfer of cause.
§ 8. Calling cases for trial.

Calendar on appeal, see Appeal, § 134.
Criminal docket, see Indictment, IX, A.

§ 1. In general; time, term and state of cause.

Advancing order of trial, see post § 7.
When to be placed on calendar, see Jud. Act, Chap. XVIII, § 1; Comp. L. 1915.
Making up calendar in circuit courts, see 1916 C. C. Rule 40.

¶ 1. When the time has expired for answering the amendments to a bill the case can be noticed for hearing.—Munch v. Shabel, 37 Mich. 166.

¶ 2. Chancery Rule 64 allows cases not ready for hearing in time to be noticed for the first day of term to be noticed for a subsequent day, and placed at the foot of the calendar; this does not apply to cases in which the witnesses are to be examined in open court; these must be noticed for the first day in term in accordance with the other provisions of the rule.—People ex rel. Dunn v. Detroit Superior Court Judge, 29 Mich. 228.

¶ 3. Where proofs are taken in the regular way, by deposition, the case cannot be noticed for hearing until they are closed.—Goodrich v. Goodrich, 66 Mich. 522.

¶ 4. If the cause is not in readiness as to one defendant, but is as to another, the latter cannot notice it for hearing, but may, if complainant does not proceed with the case, move to dismiss it for want of prosecution.—Graham v. Elmore, H. 265.

¶ 5. Issues of law may be placed on the docket and heard by the court at any time, even though there is an issue of fact in

the same case.—Miles v. Seitz, How. N. P. 57.

¶ 6. It is within the discretion of the circuit judge to fix the time for hearing a petition in an ancillary matter.—Barker v. Wayne Circut Judge, 117 Mich. 325.

§ 2. Notice for trial or hearing.

Objections to notice or service, see post § 6.

¶ 7. R. S. § 1846, p. 463, § 4 (How. St., § 7551), requiring written notice of trial of issues in the circuit court, was not repealed by the act of April 3, 1848, entitled "An act to regulate and define the jurisdiction of the circuit and county courts."—Storey v. Child, 2 Mich. 107.

¶ 8. Under the statute (How. St., § 7551), requiring "written notice of trial" to be served, a notice in proper form, subscribed "Attorneys for Plaintiff," without giving their names, is insufficient, although personally served by one of the attorneys for plaintiff upon one of defendant's attorneys.—Hathaway v. Marquette Circuit Judge, 117 Mich. 323.

¶ 9. A notice of hearing for any time after the opening of term, but specifying no day, is irregular, and would not authorize an ex parte hearing; but the irregularity can be waived.—Munch v. Shabel, 37 Mich. 166.

§ 3. ——Time and mode of service.

General mode of serving notices, on person or by mail, see Notices.

¶ 10. At least fourteen full days must elapse between the day of service of notice of trial and the first day of the next term. —Arnold v. Nye, 23 Mich. 286, 293.

¶ 11. Parties stand on the same footing, under the rules for serving notice of trial, as attorneys, if they employ no attorneys.—People ex rel. Greenwood School District v. St. Clair Circuit Judge, 41 Mich. 549.

¶ 12. Service of notice of trial by mail is sufficient if made on an attorney or on a party who appears in person in an appeal case at the circuit.—People ex rel. Greenwood School District v. St. Clair Circuit Judge, 41 Mich. 549.

¶ 13. Under Circuit Court Rule 28, sub. (e) relating to service of notice of trial by an attorney on the adverse attorney no attempt need be made to make personal service, before service by mailing may be resorted to, though thereunder the specified time of service may be curtailed by part or all of a day.—Palmer-Stevenson Const. Co. v. Mason Circuit Judge, 176 Mich. 326.

§ 4. ——Persons to be served.

¶ 14. A judgment in an action against several defendants wherein only a joint judgment is permissible cannot, unless the right to notice of trial is waived, be rendered without giving such notice to a defendant who is not served, but who appears and files and serves a plea of the general issue.—Penfold v. Slyfield, 110 Mich. 343.

¶ 15. Service of notice of trial upon an attorney who has appeared for all of the defendants, and pleaded the general issue, is good as against all, in the absence of any order of substitution, although in the meantime two of the defendants have appeared by another attorney, and filed a like plea.—Landyskowski v. Lark, 108 Mich. 500.

¶ 16. Notice of trial of an appeal from an order dissolving a circuit court writ of attachment is properly served upon the attorneys of record in the attachment suit who appeared and defended for the appellant in the dissolution proceeding, and one of whom made the affidavit for appeal in which he stated that he was one of the attorneys for the appellant in that proceeding and that he made the affidavit for him.—Roskopp v. Macomb Circuit Judge, 97 Mich. 628.

§ 5. ——Proof of notice.

¶ 17. Where a notice of trial is required to be posted "in some conspicuous place" in a certain office, the affidavit should state that it was put in a conspicuous place, and should mention the place.—People ex rel. Barrett v. Bacon, 18 Mich. 247.

¶ 18. A judgment rendered on issue joined without notice of trial or appearance at the trial should be set aside on motion. And if no proof of notice appears on the files the defendant is entitled to have judgment set aside unless the plaintiff proves notice. —People ex rel. Barrett v. Bacon, 18 Mich. 247.

§ 6. Motion to strike or other objections.

¶ 19. Cases not properly on the docket of the circuit court for trial should be brought to the court's attention on the first day of the term, and objection is not to be raised for the first time after the trial has begun. —Peninsular Stove Co. v. Osmun, 73 Mich. 570.

¶ 20. A motion to continue or to strike the case from the docket, as not properly on it, must be made on the first day of the court.—Marvin v. Bowlby, 135 Mich. 640.

¶ 21. An action based in part on a charge of conspiracy was noticed for trial without bringing in a portion of the defendants. A defendant who had pleaded asked that the case be set down for trial on a day certain, and at the day fixed objected that the others had not been brought in. On motion the plaintiff was allowed to discontinue as to those who had not been brought in. Held, that the right to object to the irregularity in noticing the case for trial was cut off by consenting to go to trial and by the order of discontinuance, and that it was of no consequence that the discontinuance was not entered on the record, and that there was no formal amendment of the declaration.—Cook v. Perry, 43 Mich. 623.

¶ 22. A defendant who goes to trial on a note of issue served before the filing of a bill of particulars which he has demanded and to which he is entitled waives the right to insist that the case is not on the docket for trial.—Peninsular Stove Co. v. Osmun, 73 Mich. 570.

¶ 22a. The irregularity in noticing an action in tort for trial before all the defendants are brought in is waived by appearing and asking that the cause be set down for trial for a day certain.—Cook v. Perry, 43 Mich. 623.

§ 7. Advancement or transfer of cause.

Transfer on appeal from law to equity or equity to law, see Appeal, § 498.
Regular order of preference on calendar, see 1916 C. C. Rule 40.
Provisions as to transfer to other side, see Jud. Act, Chap. XI, § 2; Comp. L. 1915, § 12351.
Transferring to jury calendar, see 1916 C. C. Rule 39.

¶ 23. The supreme court cannot make an order advancing a cause upon the calendar of the circuit court even where plaintiff has been wrongfully deprived of his right to have the case tried in its regular order.—Burt v. Wayne Circuit Judges, 90 Mich. 520.

¶ 24. A motion in the circuit court in chancery to transfer the case to the law side under the Judicature Act. Chap. XI, § 2, is properly denied where a decree dismissing the bill was rendered by the supreme court prior to January 1, 1916, when the act took effect.—Schook v. Iron Circuit Judge, 192 Mich. 103.

§ 8. Calling cases for trial.

See generally Trial, I; and see also Equity, VIII.

CALL OF CALENDAR to CAMPAIGN CONTRIBUTIONS.

Cross-References.

Call of calendar—
See Trial, I; Equity, VIII; Indictment, IX, A.
Calls and options—
See Gambling Contracts.
Calls for assessments on insurance—
See Fraternal Associations, III; Insurance, VI.
Calls for boundaries—
See Boundaries.
Calls for stock subscriptions—
See Corporations, VII, XXIV.
Calling elections—
See Elections.
Calling witnesses—
See Witnesses, I; and see Trial, V; Indictment, IX, B.
Calumny—
See Libel and Slander.
Camp grounds—
Associations for control, see Associations; Corporations.
Criminal disturbance of meetings, see Crimes, II; Indictment.
Restrictions in deeds and leases, see Deeds, III, E; Landlord and Tenant, IV; Buildings.
Campaign contributions—
See Elections; Crimes, II.

CANALS.

TREATS of artificial waterways for transportation and navigation, excluding drainage (see Drains) and power (see Mills; Waters) canals.

Analysis.

§ 1. In general; right to sue.
§ 2. Public title, control and regulation.
§ 3. Tolls and charges.

§ 1. In general; right to sue.

Public control, see post § 2.
Canal corporations, see generally Corporations.
Land grants in aid of canals, see Public Lands, VI.
Exemptions from taxation of canal lands, see Taxes, III.

¶ 1. A canal through a marsh in which a stream is lost, cut by private individuals through the land of one of them, for the purpose of affording floatage for timber and lumber through the same in connection with the stream—there being no evidence that the waters of the stream ever ran along its line, or that it was the improvement of an existing water channel—is a private way, and the public are not entitled to use it unless it be dedicated to their use.—Ward v. Warner, 8 Mich. 508.

¶ 2. The Sault Ste. Marie canal is an independent waterway, like a turnpike, which can only be used upon such conditions as the state, under the congressional grant, may lawfully impose.—Ryan v. Brown, 18 Mich. 196.

§ 2. Public title, control and regulation.

Public control of navigable waters in general, see Navigable Waters, II.

¶ 3. The canal board has such a control over the Sault Ste. Marie canal and its approaches that it is authorized to remove unlawful obstructions to the legitimate use of the canal; but the board's finding is not conclusive as to illegality, and its interference with private rights may be enjoined.—Ryan v. Brown, 18 Mich. 196.

¶ 4. A trust for the United States in the possession of the state was not created by the provision in the act of Congress requiring the Portage ship canal to be a public highway free of toll for United States vessels, or by the provision limiting the tolls that should be imposed after reimbursement.—People ex rel. Attorney General v. Lake Superior Ship Canal, Railroad & Iron Co., 32 Mich. 233.

¶ 5. The action of the state fixed a contract right in said company with the right of possession, and it is not competent for the state to violate its contract and to assume to manage the canal—a work of internal improvement—for itself; but the Act of 1873 (How. St., §§ 5505-5516), constituting a board of control, etc., does not undertake to do this.—People ex rel. Attorney General v. Lake Superior Ship Canal, Railroad & Iron Co., 32 Mich. 233.

§ 3. Tolls and charges.

¶ 6. The right of the Lake Superior Ship Canal, etc., Company, under the legislation of Congress and of state legislature to the possession of the Portage ship canal, and to collect tolls, sustained as against the claim of the state as trustee of the United States.—People ex rel. Attorney General v. Lake Superior Ship Canal, Railroad & Iron Co., 32 Mich. 233.

CAPITAL.

Cross-Reference.

Capital—
Of banks and corporations, see Banking § 51; Corporations, XXIV, A.

CARRIERS.

TREATS of the law of common carriage of goods, animals, passengers and baggage. The law of Railroads and of Street Railways outside of their functions as carriers is treated in Railroads and Street Railways, respectively; while their rights and liabilities as employers are treated in Master and Servant; Workmen's Compensation Law. Actionable negligence by railroads and street railways is therefore treated in Carriers, if the duty was owing to a passenger or in respect to property carried, in Master and Servant if the duty was towards an employee, and in Railroads, Street Railways or Shipping, if the duty was towards any other persons or property.

[Note. In dividing this topic the plan has been to place in division I only such matter as applies generally to carriers without regard to the thing carried. Divisions II-V, respectively, include all matter relating to carriage of goods, live stock, passengers and baggage. It is nevertheless true that in cases of the carriage of passengers some of the precedents on carriage of goods will be pertinent, and some on carriage of passengers will be pertinent in other cases. A search of either division should also be supplemented by an examination of the cognate portions of the other divisions.]

Analysis.

I. General Law and Regulations.

§ 1. In general; who are common carriers.
§ 2. Public regulation in general.
§ 3. Franchise, rates and charges for service.
§ 4. ——Additions and extensions of lines of carrier.
§ 5. Posting and publication of rates and tariffs.
§ 6. Reception and interchange of cars and traffic.
§ 7. ——Private cars and car lines.
§ 8. ——Hack stands and taxicab stations.
§ 9. Foreign carriers and corporations.
§ 10. Control of buildings, grounds and tracks.
§ 11. Discrimination and rebates.

II. Carriage of Goods.

A. In General; Reception of Goods.

§ 12. Nature and responsibilities of the service.
§ 13. Duty to receive and carry.
§ 14. Delivery for carriage and inception of duty.
§ 15. Duty and liability of special carrier.

B. Contracts and Bills of Lading in General.

§ 16. In general; necessity and form of bills and receipts.
§ 17. Validity and effect of contracts and bills.
§ 18. Interpretation and explanation.
§ 19. Authority of consignor to assent.
§ 20. Authority of agents in making.
§ 21. Modification or avoidance of contract or conditions.

C. Title, Custody and Control of Goods.

§ 22. In general.
§ 23. Title and ownership.
§ 24. ——Notice or knowledge of carrier.
§ 25. Levy or seizure in transit.

D. Route, Transportation and Final Delivery.

§ 26. General duties as to route and transportation.
§ 27. Diversions and changes of destination.
§ 28. Delivery or notice of arrival.
§ 29. Person entitled to delivery; assignments and transfers.
§ 30. Presentation and surrender of bill or papers.
§ 31. ——Under "order" bills of lading.
§ 32. Place, manner and limits of delivery.
§ 33. ——Depositing in warehouse.
§ 34. Acceptance by consignee.
§ 35. Right to question delivery; assent and estoppel.
§ 36. Liability for misdelivery.
§ 37. ——C. O. D. shipments.
§ 38. Excuses for misdelivery or nondelivery.

E. Liability for Loss, Injury or Delay.

§ 39. General duty and liability.
§ 40. Act of God, and other extraordinary causes.
§ 41. Beginning and termination of liability.
§ 42. Directions or choice of shipper contributing to loss.
§ 43. Injury from or destruction by fire.

§ 44. Perishable goods.
§ 45. Injury from cold or heat or weather.
§ 46. Injury from delay, misrouting, etc.
§ 47. Reasonable time and delay.
§ 48. Extent of liability; undeclared value.

F. CARRIER AS WAREHOUSEMAN, AND LIABILITY AS SUCH.

§ 49. In general; when warehouseman character commences.
§ 50. After arrival and pending delivery or inspection.
§ 51. ——Pending delivery to connection.
§ 52. Duty and care required as warehouseman.
§ 53. Delay of consignee in removing goods.

G. CONNECTING CARRIERS AND FORWARDERS.

§ 54. In general; duty and relation to parties.
§ 55. Through contracts and shipments.
§ 56. Route and selection of connections.
§ 57. Degree and extent of liability.
§ 58. Termination and transfer of liability.
§ 59. Liability for injury after delivery to connection.
§ 60. ——Delivery to improper or forbidden connection.
§ 61. ——For misdelivery or nondelivery.
§ 62. Liability under Interstate Commerce Act.
§ 63. ——Excuses for loss or delay.
§ 64. Advances and reimbursement by connections.
§ 65. Forwarders, and duty and liability.

H. CONTRACT LIMITATIONS OF LIABILITY.

§ 66. In general; right to limit.
§ 67. Validity, construction and effect of limitations.
§ 68. ——As to acts or neglect of connecting lines.
§ 69. ——As to warehouseman's liability.
§ 70. ——As to valuation and damages recoverable.
§ 71. Assent to limitations.

I. FREIGHT AND CHARGES, AND LIENS.

§ 72. In general.
§ 73. Prepayment of charges.
§ 74. Demurrage.
§ 75. Liens.
§ 76. Penalties for overcharge.
§ 77. Right to recover overcharge or improper charge.

J. ACTIONS BY OR AGAINST CARRIERS.

§ 78. In general; remedies and form of action.
§ 79. Parties; right to sue.
§ 80. Defenses.
§ 81. Pleading; declaration.
§ 82. ——Assumption of duty and breach.
§ 83. ——In actions for recovery of overcharge or improper charge.
§ 84. ——In action for unlawful discrimination.
§ 85. Pleas; special defenses.
§ 86. Issues and variance.
§ 87. Burden of proof and presumptions.
§ 88. ——As to negligence.

§ 89. Admissibility of evidence.
§ 90. Sufficiency of evidence.
§ 91. Questions of law and fact.
§ 92. ——Delay and reasonableness of time.
§ 93. ——Place of injury; connecting lines.
§ 94. ——Contributory negligence.
§ 95. Instructions.

III. Carriage of Live Stock.
§ 96. In general.
§ 97. Duties and liabilities of carrier.
§ 98. Contracts and limitations on liability.
§ 99. Care, feeding and watering in transit.
§ 100. ——Duty assumed by shipper or caretaker.
§ 101. Liability for loss, injury or delay.
§ 102. ——Injury while unloaded incident to transportation.
§ 103. ——Excuses; act of God.
§ 104. Rights of action and person entitled to sue.
§ 105. Claim and presentation of same before suit.
§ 106. Actions and pleading.
§ 107. Burden of proof, presumptions and evidence.
§ 108. Questions for jury and instructions.

IV. Carriage of Passengers.
A. In General; Regulations; Duty to Public.
§ 109. In general; duty to receive and carry.
§ 110. Inception of the relation; who are passengers.
§ 111. ——Persons on improper trains.
§ 112. ——Workmen traveling free or on passes.
§ 113. ——Caretakers accompanying shipments.
§ 114. Continuance and termination of the relation.
§ 115. General duty to passengers.
§ 116. Carrier's regulations.

B. Contracts, Tickets and Fares; Limiting Liability.
§ 117. In general; contract for carriage.
§ 118. Special contracts.
§ 119. Nature, necessity and sufficiency of ticket.
§ 120. ——For travel on special rates.
§ 121. Opportunity and place to buy tickets.
§ 122. Through, local and zone rates and tickets.
§ 123. Fractional fares and distances.
§ 124. Coupon and return tickets.
§ 125. Stamping, dating, signing and identification.
§ 126. Extra charge for payment on train.
§ 127. Limitations of liability.

C. Transportation Facilities, Route and Stops.
§ 128. In general.
§ 129. Cars and accommodations.
§ 130. Travel on freight trains.
§ 131. Place to ride.
§ 132. Time tables and information.
§ 133. Stations and stops.

D. EJECTION OF PASSENGER AND BREACH OF CONTRACT.
§ 134. In general; grounds for ejection.
§ 135. ——Person on wrong train.
§ 136. ——Irregular or invalid ticket.
§ 137. Duty to show ticket or evidence of right.
§ 138. Duty to pay fare demanded.
§ 139. ——Demand for excessive fare.
§ 140. Statement or explanation by passenger.
§ 141. Mode, time and place of ejection.
§ 142. Actions for wrongful ejection; pleading.
§ 143. ——Burden of proof and evidence.
§ 144. ——Questions of law and fact, and instructions.
§ 145. Breach of contract; failure to carry as agreed.
§ 146. ——Actions, pleading and evidence.
§ 147. Penalties and actions for same.

E. PERSONAL INJURIES TO PASSENGERS.
1. *General Duty and Care; to Whom Owed.*
§ 148. In general; degree of care, and responsibility for agents.
§ 149. Concurrent negligence of carrier and others.
§ 150. Children and infirm or disabled passengers.
§ 151. Drunken passengers.
§ 152. Passengers riding free or not in ordinary way.
§ 153. Attendants and escorts of passengers.
2. *Stations and Platforms.*
§ 154. General duty and care required.
§ 155. Approaches to and exits from stations.
§ 156. Platforms and places to alight.
§ 157. ——Street railway stops.
3. *Tracks, Trains and Equipment.*
§ 158. Care, inspection and condition in general.
§ 159. Notice or knowledge of defects.
§ 160. Cars and equipment furnished by or bought from others.
§ 161. Tracks and roadbed and surroundings.
§ 162. Steps, platforms and cars.
§ 163. ——Accumulated snow or ice.
§ 164. Makeup of trains; mixed trains and freight trains.
4. *Operation and Management of Engines and Cars.*
§ 165. In general.
§ 166. Crew, attendants or watchmen.
§ 167. Jerks, jolts and uneven speed.
§ 168. Mixed trains and freight trains.
§ 169. Running over defective or dangerous places.
§ 170. Crossing other tracks or highways.
5. *Taking on and Discharging Passengers.*
§ 171. General duty and care.
§ 172. Warnings and assistance to passengers.
§ 173. ——Sleeping passengers.
§ 174. ——Infants, infirm and intoxicated passengers.
§ 175. Calling and announcing trains.
§ 176. Opportunity and time to board cars.
§ 177. Moving cars or trains during time for boarding.
§ 178. Starting and sudden movement before passengers are seated.
§ 179. Calling stations and stops.

§ 180. Misleading stops and starts.
§ 181. Carrying beyond station.
§ 182. Slowing down and suddenly starting or stopping.
§ 183. Premature or sudden start while alighting.
§ 184. Proper place or conditions for alighting.
§ 185. Moving trains or cars on adjoining tracks.

6. *Protection of Passengers from Other Persons.*
§ 186. In general; negligence of third persons.
§ 187. Protection from assault or attack.

7. *Contributory Negligence of Passenger.*
§ 188. In general; proximate cause.
§ 189. Age, infirmity or drunkenness as factor.
§ 190. Care required in riding on freight trains.
§ 191. Approaching and boarding trains.
§ 192. ——Cars in motion.
§ 193. Entering train too soon.
§ 194. Riding in wrong place.
§ 195. ——On platforms and running boards.
§ 196. ——By invitation or leave of trainmen.
§ 197. Walking in moving cars.
§ 198. Alighting from train or car.
§ 199. ——From moving train or car.
§ 200. ——After stop or slowdown.
§ 201. Alighting at wrong or unusual place.
§ 202. Crossing tracks on alighting.
§ 203. Leaving station by improper route.
§ 204. Acts done in face of danger.
§ 205. Supervening negligence; last clear chance.

8. *Actions for Injuries.*
§ 206. In general.
§ 207. Parties; joinder.
§ 208. Pleading; parties.
§ 209. Issues and variance.
§ 210. Burden of proof and presumptions.
§ 211. Admissibility of evidence.
§ 212. ——Conditions or acts at other times or places.
§ 213. ——Violation or disregard of law or ordinance.
§ 214. ——On contributory negligence or to rebut it.
§ 215. ——As to ownership, control or operation of road.
§ 216. Sufficiency and weight of evidence.
§ 217. ——As to character of plaintiff as passenger.
§ 218. ——As to control or operation by defendant.
§ 219. ——As to cause of injury.
§ 220. ——On contributory negligence.
§ 221. Questions for court and jury; directing verdict.
§ 222. ——Negligence respecting stations and platforms.
§ 223. ——Condition of trains, tracks and equipment.
§ 224. ——Management of cars and equipment.
§ 225. ——Collisions.
§ 226. ——Negligence in taking on or setting down passengers.
§ 227. ——Discharging passengers at wrong place.
§ 228. ——Failure to protect passengers.
§ 229. ——Liabilities of successive carriers.
§ 230. ——Contributory negligence.

§ 231. ——Getting on or off of moving trains.
§ 232. ——Gross negligence and last clear chance.
§ 233. Instructions and requests.
§ 234. ——Condition of tracks, trains and equipment.
§ 235. ——Taking on and discharging passengers.
§ 236. ——Assaults on passengers.
§ 237. ——Contributory negligence.
§ 238. Verdict, findings and judgment.

F. Connecting Carriers and Joint Facilities.
§ 239. In general; transfers and tickets.
§ 240. Ejection of passenger or breach of contract by second carrier.
§ 241. Joint stations and facilities.
§ 242. Joint and concurrent liability for injuries.

G. Sleeping, Dining and Parlor Cars.
§ 243. In general.

V. Carriage of Baggage and Passengers' Effects.
§ 244. In general; duty to receive and carry.
§ 245. What constitutes baggage.
§ 246. Delivery to carrier; checking.
§ 247. Contract for carriage and limitations of liability.
§ 248. Charges and rates.
§ 249. Nature and extent of liability.
§ 250. ——Hand baggage and articles in custody of passenger.
§ 251. ——Termination of liability as carrier.
§ 252. ——Contributory negligence of passenger.
§ 253. Storage and keeping while not in transit.
§ 254. Reclaiming and delivery back to passenger.
§ 255. Actions for injury or loss.
§ 256. ——Form of action and pleading.
§ 257. ——Burden of proof and evidence.
§ 258. ——Questions of law and fact.

[Note. Owing to the great multiplicity of statutes affecting common carriers and to the extensive changes brought about by the Interstate Commerce Acts, superseding in many particulars the state legislation, no attempt has been made to index the statutes exhaustively into this topic. Consult indexes to the published statutes. Particular reference to the Interstate Commerce Act and its amendments should be had whenever any interstate transportation is involved, and as to matters arising during the Federal administration of the railroads, the General Orders of the United States Railroad Administration should also be consulted.]

I. GENERAL LAW AND REGULATIONS.

§ 1. In general; who are common carriers.

When relation commences, see post §§ 14, 110.

When carrier becomes warehouseman, see post §§ 49, 50.

Carriage of live stock, nature of duty and service, see post III.

Express company as common carrier, see also post ¶ 33.

Nature of public service owed by telegraph or telephone companies and their lines, see Telegraphs and Telephones.

Statutory definition, see Comp. L. 1915, § 8111.

Telephone companies declared to be common carriers, see Comp. L. 1915, § 6689 et seq.

¶ 1. An undertaking to transport a circus train for a special rate in the cars of the proprietor, the carrier furnishing only the motive power and the trainmen, and expressly stating that the contract was not made as with a carrier, but with a "hirer" of machinery and motive power, right of way and men, does not create the relation of common

carrier.—Coup v. Wabash, St. L. & P. R. Co., 56 Mich. 111.

¶ 2. Telegraph companies, in the absence of any statutory provision, are not common carriers.—Western Union Tel. Co. v. Carew, 15 Mich. 525.

¶ 3. A log driving company is not liable as a common carrier for failure to deliver to destination logs received by it.—Mann v. White River Log & Booming Co., 46 Mich. 38.

¶ 4. An expressman habitually carrying baggage to and from trains, and agreeing to carry for hire a trunk from a train to the intended residence of a passenger getting off the train, is a common carrier.—Baker v. Maher, How. N. P. 89.

¶ 5. A public moving van company is a common carrier, and it carries on its business subject to the rules governing such carriers.—Lawson v. Judge of Recorder's Court of City of Detroit, 175 Mich. 375.

¶ 6. A mill owner, furnished with machinery by a manufacturer in another place, who under their agreement is to set up the machinery in the mill, "except that" such owner is to "do all the teaming" in his town in that connection, does not become a common carrier, and he is bound to exercise ordinary care only.—Allis v. Voigt, 90 Mich. 125.

§ 2. Public regulation in general.

In respect to particular matters, see also post §§ 3-11.
Duty to have tickets on sale and to provide opportunity to buy tickets before train time, see post § 121.
Regulative powers of the Railroad Commission, see Public Service.
Regulations of railroads and other transportation agencies in respects not connected with carriage, see Railroads; Street Railways.
Powers of municipalities, see Municipal Corporations, IX.
Railroad Commission Act, see Comp. L. 1915, chap. 155.
Subjection of express companies to Railroad Commission regulation, see Comp. L. 1915, § 8133 (f).

¶ 7. The contention that a railroad company operating in the city of Detroit was not incorporated for the purpose of intra-city transportation is untenable, as against the power of regulation of intra-city railroad traffic by the state, where the railroad was incorporated for the purpose of transportation, geographical limitations being immaterial under the circumstances.—Grand Trunk R. Co. of Canada v. Michigan Rail-Road Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152, affirming 198 Fed. 1009.

§ 3. Franchise, rates and charges for service.

Payment of charges and recovery of overcharges, see post II, I.
Taking new rates during injunction as overcharge, see post § 77.
Penalties for overcharge, see post § 76.
Certainty of rates established for "car loads," see post ¶ 187.
Right of passengers to pay established rates, see post §§ 121-126.
Rates for fractions of mile, see post § 123.
For baggage carriage, see post § 248.
Railroad and street railroad franchises, see Franchises; Railroads, I; Street Railways, I.
Relative powers of courts and legislature as to rates, see Constitutional Law, II.
Municipal power to regulate fares, see Municipal Corporations, IX.
Basis for determining reasonableness of rates, see Public Service.
Statutory rates, see Michigan Railroad Commission Act; Comp. L. 1915, chap. 155,
Long and short haul rates, see Pub. Acts 1915, No. 277.

¶ 8. Under the rule of Wellman v. Chicago & G. T. R. Co., 83 Mich. 592, and Smith v. Lake Shore & M. S. R. Co., 114 Mich. 460, the legislature has the power to fix rates to be charged by railroad companies, within certain limits.—Pingree v. Michigan Cent. R. Co., 118 Mich. 314.

¶ 9. Laws 1846, No. 42, § 15, makes it lawful for the Michigan Central Railroad to fix, regulate, and receive tolls, limited only by a reasonable amount as to passengers, viz., three cents per mile, and such power is not qualified by section 11, stating that the company may only charge sums lawfully established by the by-laws, or by section 30, stating that the by-laws passed by the board of directors shall not be contrary to law.—Pingree v. Michigan Cent. R. Co., 118 Mich. 314.

¶ 10. Railroad corporations organized under an existing law will not be heard to question the rates fixed by the law since they cannot avail themselves of the provisions which give them the right to do business and disregard provisions which are onerous.—Commissioner of Railroads v. Grand Rapids & I. R. Co., 130 Mich. 248. Affirmed in 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310.

¶ 11. Where a statute fixing maximum rates for the transportation of freight by railroads is included in the general railroad

law at the time of the incorporation of a railroad company, such company cannot question the reasonableness of the rates fixed by the statute.—Robinson v. Harmon, 157 Mich. 266.

¶ 12. Under Act No. 312, Pub. Acts 1907, giving the Michigan Railroad Commission power to establish maximum rates, the rates ordered by it continue in force until the railroads take the initiative and have them declared unreasonable, on evidence submitted by them to the courts.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 160 Mich. 355.

¶ 13. The language of an ordinance which provides that the rate of fare for one passenger on a street railroad shall not be more than 5 cents, does not give the city any right to reduce it below the rate of 5 cents, as established by the company.—City of Detroit v. Detroit Citizens' Street R. Co., 184 U. S. 368, 46 L. ed. 592, 22 Sup. Ct. Rep. 410.

§ 4. ——Additions and extensions of lines of carrier.

¶ 14. A franchise to a street railway company providing that the fare from any point in the township of Detroit "shall at no time exceed the rate then charged by the company from Pontiac to Detroit, and vice versa," refers not only to the company mentioned in the franchise but includes any line which that company or its assignee might at any time build or purchase.—Township of West Bloomfield v. Detroit United Ry., 146 Mich. 198.

¶ 15. A contract by ordinance relating to street railway fares is made in view of the power of the legislature of the state to increase or diminish the territory within the city, and neither the city nor the company contemplates that in case of an extension of the lines of the company within the city, either by purchase or acquisition from another company, an increased fare should be demanded.—People v. Detroit United Ry., 162 Mich. 460. Reversed in 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. Rep. 87.

¶ 16. In 1889 an ordinance was passed requiring the Detroit City Railway Company to sell workingmen's tickets eight for twenty-five cents during certain hours of the day, good over any of the company's lines in the city. Defendant became the assignee of said railway. It later purchased a street railway in territory adjoining the city. Subsequently the city annexed this territory. Held, the railway was liable for failure to sell said tickets, as provided in the ordinance of 1889, so as to entitle purchasers to use them over the purchased railway in the annexed territory.—People v. Detroit United Ry., 162 Mich. 460. Reversed in 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. Rep. 87.

¶ 17. Where a city ordinance provides that tickets shall be sold by a city railway at a named price, to be good over all parts of the city to which the railway may be extended, the term "extended" includes railway constructed and that acquired by purchase under Comp. L. 1897, § 6448.—People v. Detroit United Ry., 162 Mich. 460. Reversed in 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. Rep. 87.

¶ 18. A schedule of freight rates established by the Michigan Railroad Commission on a mileage basis applies to branch lines added by a carrier pending a contest of the reasonableness of such rates, as well as to trackage subsequently added.—Michigan Railroad Commission v. Detroit & Mackinac R. Co., 184 Mich. 242.

§ 5. Posting and publication of rates and tariffs.

Conclusiveness of established rates, see ante § 3.
Effect of publication of limited value rates to relieve carrier from higher value in case of loss, see post § 48.
Posted baggage limitation as affecting passenger, see post § 247.
Statutory provisions, see Comp. L. 1915, § 8118; and see also Interstate Commerce Act and Regulations.
Express rates, see Comp. L. 1915, § 8133 (a), (c).

¶ 19. Posting and filing with the Michigan Railroad Commission typewritten copies of a freight schedule established by a carrier under an order of such commission, is not in compliance with section 10a of Public Acts 1909, No. 300 (How. St., 2nd. Ed., § 6533), requiring printing in large type.—Michigan Railroad Commission v. Detroit & Mackinac R. Co., 184 Mich. 242.

§ 6. Reception and interchange of cars and traffic.

Statutory duty, see Comp. L. 1915, § 8112 (b).
Interchange of freight traffic, see Comp. L. 1915, § 8115.
See amendment as to interchange of traffic, Pub. Acts 1915, No. 278; Pub. Acts 1917, No. 387.
Private tracks and switches to industries, warehouses, and the like, see Comp. L. 1915, § 8114.
Changing side track and switching service, see Comp. L. 1915, § 8122.

¶ 20. The state of Michigan has power, through the Railroad Commission, to make a reasonable order requiring a carrier to

permit empty or loaded cars owned by it to be hauled from its line upon the connecting line for purposes of loading or delivery of intra-state freight, and to permit the cars of other carriers loaded with such freight consigned to points on the connecting line to be hauled from its line upon the connecting line for the purpose of delivery.—Michigan Central R. Co. v. Michigan Railroad Commission, 236 U. S. 615, 59 L. ed. 750, 35 Sup. Ct. Rep. 426; affirming 168 Mich. 230.

¶ 21. The provision of Pub. Acts 1911, No. 139, § 7, subd. "a," How. St., 2nd Ed., § 6530, providing that nothing in the act shall be construed "as requiring any railroad to give the use of its tracks or terminal facilities to another railroad, engaged in the like business," is not inconsistent with subdivision "d," requiring every common carrier to receive and transport at reasonable rates all car load traffic under the usual conditions locally consigned, between points in the same city or town, and receive and transport from any junction or transfer point or intersection with another railroad in such city or town all such carload freight destined to train tracks or other sidings on any line operated by the delivering carrier, and to deliver such cars upon such train tracks or sidings in the city or town where such cars are received from any such connecting line, when required so to do, so as to render the act void, and, subdiv. d, having been enacted at a later time, would, in any event, prevail.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 198 Fed. 1009; affirmed 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

§ 7. ——Private cars and car lines.

¶ 22. A common carrier's statutory duty to receive the cars of private owners does not oblige it to move them except in their own routine and in the ordinary course of business.—Coup v. Wabash, St. L. & P. R. Co., 56 Mich. 111.

§ 8. ——Hack stands and taxicab stations.

See also post § 10.

¶ 23. A railroad company cannot grant to one hack and omnibus company exclusive facilities for carrying passengers and freight to and from its station grounds, or even better facilities than it allows others in the same business; so held, not only in view of the provisions of How. St., § 3355, requiring all railroads to grant equal facilities for the transportation of passengers and freight to all persons, companies, or corporations, but independently.—Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194.

¶ 24. How. St., § 3355, requiring all railroad companies to grant equal facilities for the transportation of passengers and freight to all persons, companies and corporations, does not relate entirely to the mere carriage in the cars of the road, but includes the receiving of such passengers and freight at its depots, and by other "persons, companies and corporations" at the point upon the road where the carriage ends.—Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194.

¶ 25. A rule adopted by a railroad company reserving the right upon its own grounds to assign places to different hackmen, and excluding from those places others not assigned, is a reasonable rule which the company has a right to enforce.—Cole v. Rowen, 88 Mich. 219.

§ 9. Foreign carriers and corporations.

General law of foreign corporations, see Foreign Corporations.

¶ 26. A foreign express company permitted to do business in the state is subject to all the duties and obligations which the law imposes upon common carriers.—Attorney General ex rel. Moore v. American Exp. Co., 118 Mich. 682. Reversed in 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 695.

§ 10. Control of buildings, grounds and tracks.

See also ante § 8.

Right of station master to use force in enforcing regulations about hack stands, see Assault, ¶ 62.

¶ 27. A railroad company can make all needful reasonable rules and regulations concerning the use of its station and grounds, and can exclude all persons therefrom who have no business with the railroad or passengers going to and coming from its trains or stations, and it probably can prohibit all persons from soliciting business for themselves upon its premises; but it cannot, arbitrarily, admit one common carrier of passengers or freight to its stations or grounds, and exclude all others, for no other reason than that it is for its own profit or pleasure to do so.—Kalamazoo Hack & Bus Co. v. Sootsma, 84 Mich. 194.

¶ 28. A railroad company has a right to adopt and enforce reasonable regulations assigning places on its station grounds to omnibus and hack drivers while waiting for trains, and the station master is not guilty of assault and battery if, using no more force than is necessary, he ejects a refractory driver from another's place.—Cole v. Rowen, 88 Mich. 219.

§ 11. Discrimination and rebates.

Among hackmen and taxicabmen, see also ante § 8.
Right to freight, charges and liens, and recovery of overcharges, see post II, I.
As to cars for live stock, see post § 97.
Pleading discrimination, see post § 84.
Statutory prohibition, see Comp. L. 1915, §§ 8124-8126.

¶ 29. Under Comp. L. 1897, § 6235, which provides that railroads shall transport merchandise and persons "without partiality or favor," under a penalty of $100 for each violation "to be recovered by the party aggrieved," the penalty cannot be recovered by a connecting carrier to whom property may have been consigned for transportation to its destination, but only by the shipper, or his principal if he be an agent, he being the "party aggrieved."—Crosby v. Pere Marquette R. Co., 131 Mich. 288.

¶ 30. Under 24 U. S. Stat. 379, all discriminations made by railways are not unlawful, but only such as are unjust, undue, or unreasonable.—Dingman v. Duluth, S. S. & A. Ry. Co., 164 Mich. 328.

¶ 31. Relator, a shipper, had a dispute with defendant railway over the amount of certain freight bills. After that defendant refused to extend credit on shipments. Defendant was extending credit to other competitors of relator. Defendant testified that it had had a great deal of trouble with relator in settling charges. Held, mandamus would not lie to compel defendant to give credit to relator under Pub. Acts 1907, No. 312, § 17, which makes it unlawful for a carrier to give undue preference.—Brown & Brown Coal Co. v. Grand Trunk Ry. System, 159 Mich. 565.

II. CARRIAGE OF GOODS.

A. IN GENERAL; RECEPTION OF GOODS.

§ 12. Nature and responsibilities of the service.

General law and regulations applicable to all carriers, see ante I.
Carriage of live stock, see post III.
Carriage of baggage and passengers' effects, see post V.
Liability for loss, injury or delay in carriage, see post II, E.
Of connecting carriers, see post II, G.
Nature of the undertaking under limited liability contracts, see post § 67.
Burden of proof of shipper's liability for injury to car, see post ¶ 226.
Care required of gratuitous carrier, see also Bailments, ¶ 15.
General doctrine of responsibility of principal or master for acts of agent or servant, see Agency, II; Master and Servant, IV.
Notice to former agent or employee, see Agency, § 74, ¶ 448.
The duties of the carrier, and the corresponding negligence, in respect to the particular acts and things to be done in carrying the goods are specifically treated in the succeeding portions of division II.

§ 13. Duty to receive and carry.

Particular duties, see post II, D.
Free delivery and pickup limits, see post ¶ 86.
Reasonableness of delay in furnishing cars as jury question, see post § 92.
Right to prepayment of freight, see post § 73.
Statutory duty, see Comp. L. 1915, § 8112.
Duty to furnish cars, see Comp. L. 1915, § 8116.

¶ 32. A common carrier is bound to receive and carry goods only when offered for carriage by their owner or his authorized agent.—Fitch v. Newberry, 1 D. 1.

¶ 33. An express company is a common carrier, and as such it is its duty to receive for carriage and to carry the goods of any person tendered to it for transmission, provided that they are such that it holds itself out as willing to carry, and the party tendering them offers to pay its proper charges.—Attorney General ex rel. Moore v. American Exp. Co., 118 Mich. 682. Reversed in 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 695.

§ 14. Delivery for carriage and inception of duty.

Necessity for bill of lading, see post § 16.
Delivery to consignee or at end of transit, see post § 28 et seq.
Commencement and termination of liability, see also post § 41.
Inception of warehouseman's liability, see post § 49.
Pleading duty and relation of carrier, see post § 82.
Burden of proof against carrier, see post § 87.
Delivery and notification of carrier as question of fact, see post § 91.

¶ 34. A railroad company is not liable as common carrier for goods deposited in its warehouse to await orders from the owner for their transportation.—Michigan Southern & Northern I. R. Co. v. Shurtz, 7 Mich. 515.

¶ 35. If a common carrier agrees that property intended for transportation by him may be deposited at a particular place without express notice to him, such deposit alone is a sufficient delivery; and such an agreement may be shown by a constant practice and usage so to receive property without

special notice.—Pratt v. Grand Trunk R. Co. of Canada, 95 U. S. 43, 24 L. ed. 336.

¶ 36. A railroad company becomes immediately liable as a common carrier, where goods properly marked for shipment are placed inside its freight depot for immediate transportation, with the agreement by its agent that they will be shipped the following morning, although no shipping bill or written contract is given, and the carrier is liable for their destruction by fire while in its warehouse that day awaiting shipment. —Meloche v. Chicago, M. & St. P. R. Co., 116 Mich. 69.

¶ 37. Liability as a common carrier of goods is created where a consignee in placing goods on the station platform, has done all he intended to do to the goods before they are shipped, and has notified the agent that they were ready for immediate shipment and the agent agreed to forward them.—Stapleton v. Grand Trunk Ry. Co., 133 Mich. 187.

Duty of shipper to inform carrier of dangerous character of goods shipped, see note, 3 N. C. C. A. 248-266.

§ 15. Duty and liability of special carrier.

Special liability on contract to move circus train, see post § 98, ¶ 275.

¶ 38. A special carrier of goods is bound to use ordinary care only, and in case of breakage happening, by accident and not his negligence, in course of their being carried, is not liable.—Allis v. Voigt, 90 Mich. 125.

B. CONTRACTS AND BILLS OF LADING IN GENERAL.

§ 16. In general; necessity and form of bills and receipts.

Necessity of writing to limit liability, see post § 67.
Necessity of production in order to require diversion from route, see post ¶ 74.
Effect of limiting provisions in bill, assent of shipper, see post § 71.
Burden of proof as to contract when action sounds in tort, see post § 87.
For shipment of live stock, see post § 98.
Statutory requirements, see Comp. L. 1915, § 8148.
Under federal laws, see Interstate Commerce Act and amendments.
Bills of Lading Act of 1909, see Comp. L. 1915, chap. 156.
Uniform Bills of Lading Act, see Comp. L. 1915, chap. 156, § 8174 et seq.

¶ 39. The carrier's common law liability attaches where goods are accepted by it for transportation without the issuance of a shipping receipt or bill of lading.—Farnsworth v. National Exp. Co., 166 Mich. 676.

¶ 40. The War Revenue Act of June 13, 1898, requiring express companies to issue a bill of lading for shipments received for carriage, to which shall be attached a one cent stamp, imposes upon the carrier the obligation of issuing a receipt.—Attorney General ex rel. Moore v. American Exp. Co., 118 Mich. 682. Reversed in 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 695.

¶ 41. The War Revenue Act of June 13, 1898, requiring express companies to issue a bill of lading for shipments received for carriage, to which shall be attached a one cent stamp, imposes a duty which the carrier cannot evade by making new regulations and establishing new rates so as to throw the burden upon the shipper.—Attorney General ex rel. Moore v. American Exp. Co., 118 Mich. 682. Reversed in 177 U. S. 404, 44 L. ed. 823, 20 Sup. Ct. Rep. 695.

§ 17. Validity and effect of contracts and bills.

Authority to agree to contract, see post §§ 19, 20.
Right to delivery, assignee or transferree of bill, see post § 29.
Effect of shipping papers made out after delivery of goods, see also post ¶¶ 184, 185.
Of limitations of liability in bill or contract, see post §§ 67-70.
Bill of lading other than as contract for carriage, see Bills of Lading.

¶ 42. The law does not compel persons dealing with common carriers to rely and insist upon the liability which, in the absence of special contract, it imposes in their favor, but recognizes their competency to manage their own affairs, and to make such contracts with respect thereto as they may deem most conducive to their interests.—Michigan Cent. R. Co. v. Hale, 6 Mich. 243.

¶ 43. An agreement between a carrier and a shipper of goods made at the time of shipment whereby the carrier is to collect the freight from the consignee is valid.—King v. Van Slack, 193 Mich. 105.

¶ 44. The consignee of goods is bound by the contract made between the carrier and the consignor.—Frohlich v. Pennsylvania Co., 138 Mich. 116.

¶ 45. The fact that a shipper signed a bill of lading in haste, when it was presented to him at the last moment, does not prevent the enforcement of its provisions.—Hengstler v. Flint & P. M. R. Co., 125 Mich. 530.

¶ 46. The receipt or bill of lading issued by a common carrier (express company) to a consignor, and received by him without objection, and without any insistence upon the common law liability of the carrier, is a contract between the parties, and fixes their liabilities and rights.—Smith v. American Express Co., 108 Mich. 572.

Oral or written contract as controlling, where bill of lading not issued until after oral contract entered into, see note, 15 N. C. C. A. 928-976.

§ 18. Interpretation and explanation.

As to through shipment over successive lines, see post § 55.

Conclusiveness of bill of lading as evidence of receipt of goods, see also Bills of Lading, ¶ 1.

Inadmissibility of custom to change express contract, see Customs and Usages.

¶ 47. Each bill of lading is open to explanation, and the carrier may show that the actual amount of property which came into his hands was different from that stated in the bill.—Strong v. Grand Trunk R. Co., 15 Mich. 206.

¶ 48. Carriers seeking to modify their contracts by regulations and customs of their own must show that both parties acted in reference to them.—Moore v. Michigan Cent. R. Co., 3 Mich. 23.

¶ 49. A bill of lading conditioned to deliver goods "at Toledo for Detroit" is a contract to carry to Toledo and then forward to Detroit; and the carrier receiving the same at Toledo to carry to Detroit receives them under his common law liability and not under the conditions of the bill of lading, though he would be limited in his charges to the sum specified in the bill.—Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 50. The agent of the O. & P. R. R. Co., on receipt of goods to be forwarded, gave a dray ticket, signed by himself, in the following form: "Pittsburgh, Nov. 1, 1864. To O. & P. R. R. Rec'd of F. Bros., in good order [certain goods described], for M. I. M. & Co., Detroit. To Mansfield." A shipping bill was also given at the time, specifying Mansfield as the place for delivery of the goods. Held, that this dray ticket, standing by itself, was not evidence of an obligation on the part of the railroad company to convey the goods to Detroit, but, under the circumstances, evidenced only an obligation to keep the goods safely, and redeliver them or account for their value.—Fleming v. Mills, 5 Mich. 420.

§ 19. Authority of consignor to assent.

See also ante ¶ 44.

¶ 51. The carrier has the right to assume that the consignor is entitled to make contracts for carriage, and the consignee will be bound by such as he makes by the bill of lading.—McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

§ 20. Authority of agents in making.

Authority of forwarders, see post § 65.

¶ 52. The ticket or shipping agents of common carriers have authority to make all usual and ordinary contracts of carriage and shipment, and the public has a right to assume that they are authorized to do whatever they attempt to do.—Hayes v. Wabash R. Co., 163 Mich. 174.

¶ 53. A local agent of a railroad has authority to determine the form and contents of a bill of lading.—Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

¶ 54. The custom of issuing bills of lading, so that such a bill constitutes the contract between the parties, is not conclusive of the authority of a shipping agent, or of the reasonableness of a contract he assumes to make.—Rudell v. Ogdensburg Transit Co., 117 Mich. 568.

¶ 55. An agreement that a shipment shall arrive within usual time of transit at destination, is not so unusual or extraordinary as to be outside of the general authority of the carrier's shipping agent.—Rudell v. Ogdensburg Transit Co., 117 Mich. 568.

§ 21. Modification or avoidance of contract or conditions.

Modification of contracts in general, see Contracts, VIII.

¶ 56. Where a contract for shipment has already been made it cannot be changed by handing a receipt or bill of lading to the clerk of him for whom the goods are to be carried.—Rudell v. Ogdensburg Transit Co., 117 Mich. 568.

¶ 57. Assurances by an agent of an express company that the goods shipped will reach their destination at a given time are mere opinion and not evidence of fraud or deceit so as to avoid the ordinary printed conditions of the express receipt.—Sloman v. National Exp. Co., 134 Mich. 16.

¶ 58. The fact that the printed matter in an express receipt is partially covered by revenue stamps, does not indicate an erasure of any part of the terms.—Sloman v. National Exp. Co., 134 Mich. 16.

C. TITLE, CUSTODY AND CONTROL OF GOODS.

§ 22. In general.

Right of carrier to lien, see post § 75.

¶ 59. A common carrier who obtains possession of goods wrongfully, or without the owner's express or implied consent, and who on demand refuses to deliver them to him, is liable in trover for their value.—Fitch v. Newberry, 1 D. 1.

§ 23. Title and ownership.

Right of transferree to delivery at destination, see post § 29.

Who liable for freight, see post § 72.

The question of title in cases where shipment is being made pursuant to a contract of sale will depend on when the title passes by terms of the sale from one party to the other. This matter is treated in Sales, IV, which see.

¶ 60. Prima facie the consignee of goods is the owner thereof.—Turnbull v. Michigan Cent. R. Co., 183 Mich. 213.

¶ 61. Upon shipment of goods through a carrier to a third party and on delivery to the shipper of the bill of lading, the consignee is prima facie the owner of the property; but this presumption of ownership may be rebutted by proof of facts showing the actual intent of the shipper at the time the goods were delivered to the carrier for shipment.—Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

¶ 62. The consignee named in a bill of lading is presumptively the owner of the shipment and should be so treated by the carrier unless notified to the contrary, and this presumption will prevail as against any undisclosed intention of the consignor.—Nelson Grain Co. v. Ann Arbor R. Co., 174 Mich. 80.

¶ 63. Where goods are shipped through a carrier to a third party, on delivery to the shipper of a bill of lading, the consignee is prima facie the owner.—Ithaca Roller Mills v. Ann Arbor R. Co., 197 Mich. 440.

¶ 64. Upon shipment of goods through a carrier to a third party, and on delivery to the shipper of the bill of lading, the consignee is prima facie the owner of the property.—King v. Van Slack, 193 Mich. 105.

¶ 65. The presumption that the consignee is the owner of goods shipped through a carrier to a third person, on delivery to the shipper of a bill of lading, may be overcome by proof of facts showing the actual transaction and the intent of the parties.—Ithaca Roller Mills v. Ann Arbor R. Co., 197 Mich. 440.

¶ 66. Where a contract for the purchase of goods calls for the delivery of the goods at the purchaser's town and the carrier acknowledges receipt of the goods for transportation from the seller, the contract is with the seller and the seller is the owner of the goods until delivery to the consignee and consequently can maintain an action in his own name for negligent performance of the contract of carriage resulting in the damage to the goods.—Ithaca Roller Mills v. Ann Arbor R. Co., 197 Mich. 440.

§ 24. ——Notice or knowledge of carrier.

¶ 67. The knowledge of the arbitrary mark of a consignee of goods by railroad, possessed by a former officer or agent of the railroad company, is not the knowledge of the company so as to affect the company with notice of his ownership of goods thus marked in subsequent transactions. Nor would notice to an agent of the company on one or more occasions, that certain arbitrary marks indicated a certain ownership, affect the company with notice of such ownership in any subsequent transactions, unless the agent then actually remembered the previous notice, and had reason to believe the marks still indicated the same ownership.—Great Western Ry. Co. of Canada v. Wheeler, 20 Mich. 419.

§ 25. Levy or seizure in transit.

Liability of carrier for misdelivery to officer, see post § 38.

Levy as excusing connecting carrier under Interstate Commerce Act, see post § 68.

Burden of proof of lawfulness of levy as defense, see post § 87.

Duty to surrender to sheriff attached forest products in transit, see Attachment. § 59.

Place for levy of attachment on property in transit, see Attachment, § 50.

¶ 68. A railroad company which delivers a carload of shingles to the consignee after service of a writ of attachment thereon, not only loses its right to storage thereon until demand by the sheriff, but also makes itself liable for their conversion.—Lake v. Pere Marquette R. Co., 132 Mich. 190.

Liability of carrier for goods seized by public officer, see note, 6 N. C. C. A. 732-742.

D. ROUTE, TRANSPORTATION AND FINAL DELIVERY.

§ 26. General duties as to route and transportation.

Diversions and changes, see post § 27.

General duty and act of God as excuse for breach, see post II, E.

Directions or choice of car by shipper as excusing carrier from resultant loss or delay, see post § 42.
Liability for delay, misrouting, etc., see post § 46.
Reasonableness of time, see post § 47.
Authority of agent to make agreement for definite time of delivery, see ante ¶ 55; and see also Agency, ¶ 222.
Connecting carriers and forwarders, see post II, G.
Selection of connecting lines, see post, § 56.
Questions of pleading, evidence, jury questions, and instructions, see post II, J.
Suitable cars for live stock, see post § 97.
Statutory provisions as to routing, see Comp. L. 1915, § 8115.
Stoppages and breaking bulk or continuity of shipments, see Comp. L. 1915, § 8123.
For express shipments, see Comp. L. 1915, § 8133 (g).

¶ 69. It is the duty of a common carrier to safely transport goods, properly prepared for shipment and in good condition, intrusted to and accepted by it for that purpose, to their destination safely and with reasonable dispatch.—A. F. Young & Co. v. Grand Rapids & I. Ry. Co., 201 Mich. 39.

¶ 70. Where a contract for the transportation of goods gives the carrier an option between modes of transportation, the option must be exercised with a view to the interest of the opposite party; and it is a breach of the contract to exercise it to his disadvantage unless it is done in good faith and under circumstances which seem to require it.—Blitz v. Union Steamboat Co., 51 Mich. 558.

¶ 71. In an action for damages on a contract for the carriage of goods by steamer the usual course of business in such transportation must be considered in determining the propriety of shipping under sail on part of the route.—Blitz v. Union Steamboat Co., 51 Mich. 558.

¶ 72. A common carrier cannot refuse to carry such property as is generally carried, but it must have the right to carry it on trains made up by itself and running on its own time; it cannot be required to make up special trains on demand, or drive such trains made up entirely by other persons, or of their cars.—Coup v. Wabash, St. L. & P. R. Co., 56 Mich. 111.

¶ 73. A voluntary association raised $1,500 and put it in a bank to buy a monument, and the plaintiff contracted to furnish the monument, relying entirely on the $1,500 for payment, as the association had no other funds or financial responsibility. Against the protest of the plaintiff, the defendant railroad refused its regular service of shipment, and, at the instance of the association, provided special transportation, for the payment of which $700 was taken out of the $1,500 fund. Held, that in a suit for the $700, there was evidence from which the jury might infer liability upon the part of defendant, for interfering with plaintiff's contract rights.—Harrison Granite Co. v. Pennsylvania R. Co., 154 Mich. 48.

§ 27. Diversions and changes of destination.

¶ 74. A consignee has no right to change the destination of a shipment without producing the bill of lading.—Perkett v. Manistee & N. E. R. Co., 175 Mich. 253.

§ 28. Delivery or notice of arrival.

To connecting carrier, see post § 54 et seq.
Sufficiency of acceptance, see post § 34.
Excuses for nondelivery or misdelivery, see post § 38.
Delivery or notice as terminating liability as carrier, see post § 41.
Commencement of warehouseman's liability, see post § 49.
Performance of carriage as basis for lien, see post § 75.
Contributory negligence in ignoring misleading notice, see post ¶ 260.
Statutory provisions, see Comp. L. 1915, § 8346.

¶ 75. Common carriers by railroad and watercraft are excused from a personal delivery of goods carried by them; but, in lieu of delivery, are required to notify the consignee, and their liability as carriers continues until the consignee has had a reasonable time to remove the property.—Michigan Cent. R. Co. v. Ward, 2 Mich. 538.

§ 29. Person entitled to delivery; assignments and transfers.

Necessity of surrendering bill, see post §§ 30, 31.
Liability for misdelivery, see post §§ 36, 37.
Right of transferree to sue for injury to live stock, see post § 104.
Provisions of Uniform Bills of Lading Act, see Comp. L. 1915, § 8184 et seq.

¶ 76. Common carriers must recognize transfers of bills of lading and consignments of goods, and hence unless protected by proper vouchers cannot always assume to deal with consignments as actually and beneficially belonging to the consignee.—Walker v. Detroit, G. H. & M. R. Co., 49 Mich. 446.

§ 30. Presentation and surrender of bill or papers.

Necessity of producing bill to effect diversion, see ante ¶ 74.
Where bill is to the order of the shipper with directions to notify another on arrival, see post § 31.

Possession of papers as excuse for delivery to holder, see also post § 38.

¶ 77. Where a bill of lading provides that its proper indorsement and surrender shall be required before delivery, such provision is for the benefit of the carrier and will not subject the carrier to liability for failure to require its production, on making delivery to one to whom the consignor has ordered that it shall be delivered.—Nelson Grain Co. v. Ann Arbor R. Co., 174 Mich. 80. (Moore and Bird, JJ., dissenting.)

§ 31. ——Under "order" bills of lading.

C. O. D. shipments, see also post § 37.
Liability for act of connecting carrier under Interstate Commerce Act, see post § 62.
Sufficiency of evidence of wrongful delivery after assignment, see post § 90.

¶ 78. A carrier delivering goods without requiring the presentation of an outstanding order bill of lading with draft attached, does so at its peril.—Turnbull v. Michigan Cent. R. Co., 183 Mich. 213.

¶ 79. A provision of an order bill of lading with draft attached, requiring its surrender to the carrier before the delivery of a consignment, is for the mutual protection of both shipper and the carrier.—Turnbull v. Michigan Cent. R. Co., 183 Mich. 213.

¶ 80. A shipper placing goods in the hands of a carrier may rely on a condition of an order bill of lading with draft attached, requiring the surrender thereof to the carrier as a condition precedent to the delivery of the goods on arrival at destination.—Turnbull v. Michigan Cent. R. Co., 183 Mich. 213.

¶ 81. A consignor who does not give an order for the delivery of goods consigned to himself by a bill of lading with a draft attached, held not to have waived the presentation of the original bill of lading before delivery of the goods by the carrier at their destination.—Turnbull v. Michigan Cent. R. Co., 183 Mich. 213.

¶ 82. Where perishable property is shipped subject to inspection, under an order bill of lading with draft attached, a telegram from the consignor directing delivery to be made with the privilege of rejecting frozen goods at his expense, will not permit the carrier to make delivery without the surrender of the original bill of lading.—Berwick Store Co. v. Starks, 185 Mich. 473.

¶ 83. Where goods are consigned under an order bill of lading with draft attached subject to the order of one other than the consignor, the carrier is answerable to the latter for making delivery on the direction of such order consignee without requiring the presentation of such bill of lading.—Turnbull v. Michigan Cent. R. Co., 183 Mich. 213; Thomas v. Blair, 185 Mich. 422.

¶ 84. A carrier which delivers goods without the presentation of an outstanding order bill of lading with draft attached, is answerable to the consignor or a bona fide holder of the bill.—Turnbull v. Michigan Cent. R. Co., 183 Mich. 213.

¶ 85. Where goods are delivered to a carrier upon an order bill of lading signed by the consignee and by another person as shippers, and the goods are delivered upon a forged bill of lading signed by the consignee, without surrender of the outstanding order bill of lading, the carrier is liable to the other shipper, the real owner of goods.—Churchill v. Grand Trunk Western Ry. Co., 188 Mich. 376.

§ 32. Place, manner and limits of delivery.

Notice in lieu of personal delivery, see ante § 28.
Carload shipments to team tracks and particular sidings, see Comp. L. 1915, § 8115(d).
Statutory provisions as to receiving at station and notifying of arrival, see Comp. L. 1915, § 8346.

¶ 86. Where an express company, in apparent good faith, and with due regard to the public requirements, has assumed to fix limits in a city beyond which it will not call for or deliver packages, it is under no obligation, as to one having knowledge of the limits so fixed, to extend its service beyond them; and this is so, although such limits extend farther from its office in one direction than in another.—Bullard v. American Express Co., 107 Mich. 695.

¶ 87. An express company which undertakes to deliver by a certain time a package addressed to the Secretary United States Treas. Dept., Washington, D. C., and which within the specified time delivers it to the usual custodian of such department, is not liable for its failure to reach a certain bureau of the treasury to which the company has not assumed or agreed to deliver it.—Aldrich Car Seal Mfg. Co. v. American Express Co., 117 Mich. 32.

¶ 88. In an action against an express company for failure to deliver a basket of peaches, it appeared that it was left at the rear entrance of the house in which plaintiff had formerly lived. Plaintiff being out of the city, did not learn of the delivery until the fruit had become worthless. Held, that the carrier having failed to make proper de-

livery while there was still time, was liable for the damages.—Stowe v. United States Express Co., 179 Mich. 349.

¶ 89. Where a carrier's contract called for delivery at a specified dock in a certain port, conveyance to the port is not enough unless delivery be dispensed with or prevented by the owner.—Johnston v. Davis, 60 Mich. 56.

§ 33. ——Depositing in warehouse.

As misdelivery of C. O. D. shipment, see post ¶ 99.
Duty and liability as warehouseman, see post II, F.
Delay in removing as absolving from liability as warehouseman, see post § 53.
Right of lien for advances where warehouseman's custody is in violation of carrier's contract, see post ¶ 196.
Grain shipments, see Comp. L. 1915, § 8345.

¶ 90. Long acquiescence by consignees in the delivery of freight by a common carrier to an independent warehouseman from whom they receive it and by whom they are notified of its arrival and to whom they give receipts relieves the carrier from liability for safekeeping after delivery to a warehouseman.—Black v. Ashley, 80 Mich. 90.

§ 34. Acceptance by consignee.

Sufficiency of delivery, see ante §§ 28-33.
Duty to remove goods, termination of liability of carrier, see post § 41.
Neglect in accepting as jury question, see post § 94.

¶ 91. Plaintiff shipped a car of fruit over defendant railroad, the bill of lading being to plaintiff's order. Plaintiff's draft and order to deliver to the purchaser of the fruit were sent to a bank at the place of destination. The purchaser of the fruit upon its arrival broke open the seal of the car and inspected it, defendant having placed no lock on the car. The purchaser then refused to accept the draft or the fruit. Held, in a suit in assumpsit for failure to carry and deliver the car, that defendant was not liable for having made an unauthorized delivery of the fruit.—Yuille-Miller Co. v. Chicago, I. & L. Ry. Co., 164 Mich. 58.

¶ 92. A consignee of goods which are to be delivered at the consignee's town does not, by making an inspection of the goods in the railroad freighthouse in his town, accept them, and thereby make a good delivery of them.—Ithaca Roller Mills v. Ann Arbor R. Co., 197 Mich. 440.

¶ 93. There is a delivery of a car of potatoes where the consignee receives them under a joint account deal, whereby consignor and consignee are to divide the profits and loss, if any, takes possession of them upon their arrival in a damaged condition and transfers the unfrozen potatoes to a car ordered from the railroad company in order to put them in a salable condition.—Otto v. Manistee & N. E. R. Co., 196 Mich. 746.

§ 35. Right to question delivery; assent and estoppel.

¶ 94. The consignor of goods by rail cannot sue the carrier for them if the latter delivers them to the wrong person on written authority to do so from the consignee, even though the consignee states that he has no claim on the goods; a fortiori he cannot if he himself has assented to such delivery.—Dobbin v. Michigan Cent. R. Co., 56 Mich. 522.

¶ 95. Plaintiff shipped a carload of plums over defendant railway. The consignees wired and wrote plaintiff that the fruit was defective and they would not accept it unless plaintiff would allow a reduction of fifty dollars on the draft. Meanwhile plaintiff had wired defendant's agent asking him to notify the consignees and to wire the date of arrival and delivery. This telegram was not sent out in response to the telegram and letter of the consignees, but merely to serve as directions to defendant as to delivery. Defendant's agent wired that the car had arrived and had been delivered. It appeared that plaintiff did not rely on this telegram, and was suspicious as to the fact of delivery. He made no further inquiries of the bank holding the draft as to whether the consignees had made payment. The consignees rejected the plums. Plaintiff sued defendant railway for making an unauthorized delivery. Held, the defendant was not estopped by the telegram of its agent from denying that it made any delivery to the consignees.—Yuille-Miller Co. v. Chicago, I. & L. Ry. Co., 164 Mich. 58.

§ 36. Liability for misdelivery.

For improper surrender after levy, see ante § 25.
Delivery by connecting line without bill as required by contract, see post ¶ 148.
By connecting carrier under Interstate Commerce Act, see post § 62.

¶ 96. Delivery by a carrier of goods to a third party without the consent of the consignor or consignee is a conversion and renders the carrier liable in trover.—Gibbons v. Farwell, 63 Mich. 344.

¶ 97. A carrier is liable for damages for the misdelivery of goods reshipped to point of origin and there delivered to the former partner of the consignor, who had wrongfully obtained the shipping receipt, where it appears that the agent of the company who

made such delivery had no knowledge at the time of the delivery of the former partnership.—Adrian Knitting Co. v. Wabash Ry. Co., 145 Mich. 323.

¶ 98. Plaintiff shipped two carloads of beans to consignees, designated by a commission firm, the bills of lading being issued in the name of the latter as shippers. The commission firm sent forged bills of lading to consignees, to whom the cars were delivered. Plaintiff having failed to notify the carrier that it desired to retain title until the shipments were paid for, and the carrier having delivered the property on the order of the shippers and apparent owners, the carrier is not liable.—Nelson Grain Co. v. Ann Arbor R. Co., 174 Mich. 80. (Moore and Bird, JJ., dissenting.)

§ 37. ——C. O. D. shipments.

Freight shipments under order bills, see ante § 31.

Liability while holding for collection, see post ¶ 127.

Liability of forwarder of C. O. D. shipment, see post ¶ 155.

¶ 99. The instructions for carriage were that defendant should deliver certain goods to the express company, who in turn were to deliver them to one M. on the payment of a balance due upon them. The defendant delivered them to a warehouseman without instructions, and he delivered them to M. without payment. M. was insolvent. Held, that defendant was liable for the amount of such balance.—Hutchings v. Ladd, 16 Mich. 493.

Liability of express carrier for loss or damage due to negligence in handling C. O. D. shipment, see note, 12 N. C. C. A. 100-113.

§ 38. Excuses for misdelivery or nondelivery.

General liability for loss or injury, see post II, E.

¶ 100. If a carrier's servant delivers the goods to an officer whose writ gives him no legal right to take them the carrier is liable.—Gibbons v. Farwell, 63 Mich. 344.

¶ 101. Goods taken under a chattel mortgage were by the mortgagee delivered to a carrier for shipment, and were seized in transit by the sheriff on an attachment against the mortgagor. The carrier at once gave notice of the seizure. Held, that seizure on regular process exonerated the carrier for non-delivery at the place of consignment.—Pingree v. Detroit, L. & N. R. Co., 66 Mich. 143.

¶ 102. A custom of defendant carrier together with some other carriers of delivering goods to any person who might produce the shipping receipt, cannot avail to excuse a carrier from the burden which the law casts upon it, where on reshipment to point of origin it delivered the goods to one wrongfully in possession of the shipping receipt, it appearing that such custom was unknown to the consignor.—Adrian Knitting Co. v. Wabash Ry. Co., 145 Mich. 323.

E. LIABILITY FOR LOSS, INJURY OR DELAY.

§ 39. General duty and liability.

In carriage of live stock, see post III.

Duties as to route, transportation, time and delivery at destination, see ante II, D.

Loss by fire, cold, heat, or perishable nature of goods, see post §§ 43-45.

Liabilities of connecting and successive carriers, see post § 57 et seq.

General questions of procedure, including pleading, evidence, jury questions, and instructions, see post II, J.

Burden of proof as to negligence, see post § 87.

Burden of proof of shipper's liability for injury to cars, see post ¶ 226.

Liability of principal for acts of agents generally see Agency, II.

Liability for injury of person at freight house or tracks delivering or receiving goods, or there for other purpose incident to shipment, see Railroads, VIII, B.

¶ 103. Common carriers of freight are liable for any damage not caused by the act of God or of the public enemy.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 104. By a general doctrine of the common law, a common carrier is responsible on the implied contract for all loss of, or injury to, goods received for carriage, except in case of loss caused by the act of God or the public enemy or the fault of the owner.—Black v. Ashley, 80 Mich. 90.

¶ 105. It is the duty of an expressman, contracting for hire, to convey a trunk from a railway station to a private residence to watch over it, protect it, and carry it safely, and he is liable for the loss of the trunk due to its being stolen at a time when he has left his wagon in the street and is delivering a trunk at the residence of another person.—Baker v. Maher, How. N. P. 89.

Liability of carrier for injury to shipment while car on sidetrack en route, see note, 15 N. C. C. A. 745-763.

Liability of express carrier for loss or damage due to negligence in handling C. O. D. shipment, see note, 12 N. C. C. A. 100-113.

Application of the third section of the Harter Act (27 Stat. at Large 445), in actions against shipowners to recover for

livery while there was still time, was liable for the damages.—Stowe v. United States Express Co., 179 Mich. 349.

¶ 89. Where a carrier's contract called for delivery at a specified dock in a certain port, conveyance to the port is not enough unless delivery be dispensed with or prevented by the owner.—Johnston v. Davis, 60 Mich. 56.

§ 33. ——Depositing in warehouse.

As misdelivery of C. O. D. shipment, see post ¶ 99.
Duty and liability as warehouseman, see post II, F.
Delay in removing as absolving from liability as warehouseman, see post § 53.
Right of lien for advances where warehouseman's custody is in violation of carrier's contract, see post ¶ 196.
Grain shipments, see Comp. L. 1915, § 8345.

¶ 90. Long acquiescence by consignees in the delivery of freight by a common carrier to an independent warehouseman from whom they receive it and by whom they are notified of its arrival and to whom they give receipts relieves the carrier from liability for safekeeping after delivery to a warehouseman.—Black v. Ashley, 80 Mich. 90.

§ 34. Acceptance by consignee.

Sufficiency of delivery, see ante §§ 28-33.
Duty to remove goods, termination of liability of carrier, see post § 41.
Neglect in accepting as jury question, see post § 94.

¶ 91. Plaintiff shipped a car of fruit over defendant railroad, the bill of lading being to plaintiff's order. Plaintiff's draft and order to deliver to the purchaser of the fruit were sent to a bank at the place of destination. The purchaser of the fruit upon its arrival broke open the seal of the car and inspected it, defendant having placed no lock on the car. The purchaser then refused to accept the draft or the fruit. Held, in a suit in assumpsit for failure to carry and deliver the car, that defendant was not liable for having made an unauthorized delivery of the fruit.—Yuille-Miller Co. v. Chicago, I. & L. Ry. Co., 164 Mich. 58.

¶ 92. A consignee of goods which are to be delivered at the consignee's town does not, by making an inspection of the goods in the railroad freighthouse in his town, accept them, and thereby make a good delivery of them.—Ithaca Roller Mills v. Ann Arbor R. Co., 197 Mich. 440.

¶ 93. There is a delivery of a car of potatoes where the consignee receives them under a joint account deal, whereby consignor and consignee are to divide the profits and loss, if any, takes possession of them upon their arrival in a damaged condition and transfers the unfrozen potatoes to a car ordered from the railroad company in order to put them in a salable condition.—Otto v. Manistee & N. E. R. Co., 196 Mich. 746.

§ 35. Right to question delivery; assent and estoppel.

¶ 94. The consignor of goods by rail cannot sue the carrier for them if the latter delivers them to the wrong person on written authority to do so from the consignee, even though the consignee states that he has no claim on the goods; a fortiori he cannot if he himself has assented to such delivery.—Dobbin v. Michigan Cent. R. Co., 56 Mich. 522.

¶ 95. Plaintiff shipped a carload of plums over defendant railway. The consignees wired and wrote plaintiff that the fruit was defective and they would not accept it unless plaintiff would allow a reduction of fifty dollars on the draft. Meanwhile plaintiff had wired defendant's agent asking him to notify the consignees and to wire the date of arrival and delivery. This telegram was not sent out in response to the telegram and letter of the consignees, but merely to serve as directions to defendant as to delivery. Defendant's agent wired that the car had arrived and had been delivered. It appeared that plaintiff did not rely on this telegram, and was suspicious as to the fact of delivery. He made no further inquiries of the bank holding the draft as to whether the consignees had made payment. The consignees rejected the plums. Plaintiff sued defendant railway for making an unauthorized delivery. Held, the defendant was not estopped by the telegram of its agent from denying that it made any delivery to the consignees.—Yuille-Miller Co. v. Chicago, I. & L. Ry. Co., 164 Mich. 58.

§ 36. Liability for misdelivery.

For improper surrender after levy, see ante § 25.
Delivery by connecting line without bill as required by contract, see post ¶ 148.
By connecting carrier under Interstate Commerce Act, see post § 62.

¶ 96. Delivery by a carrier of goods to a third party without the consent of the consignor or consignee is a conversion and renders the carrier liable in trover.—Gibbons v. Farwell, 63 Mich. 344.

¶ 97. A carrier is liable for damages for the misdelivery of goods reshipped to point of origin and there delivered to the former partner of the consignor, who had wrongfully obtained the shipping receipt, where it appears that the agent of the company who

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E. LIABILITY FOR LOSS, INJURY OR DELAY.

§ 39. General duty and liability.

In carriage of live stock, see post III.

Duties as to route, transportation, time and delivery at destination, see ante II, D.

Loss by fire, cold, heat, or perishable nature of goods, see post §§ 43-45.

Liabilities of connecting and successive carriers, see post § 57 et seq.

General questions of procedure, including pleading, evidence, jury questions, and instructions, see post II, J.

Burden of proof as to negligence, see post § 87.

Burden of proof of shipper's liability for injury to cars, see post ¶ 226.

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¶ 104. By a general doctrine of the common law, a common carrier is responsible on the implied contract for all loss of, or injury to, goods received for carriage, except in case of loss caused by the act of God or the public enemy or the fault of the owner.—Black v. Ashley, 80 Mich. 90.

¶ 105. It is the duty of an expressman, contracting for hire, to convey a trunk from a railway station to a private residence to watch over it, protect it, and carry it safely, and he is liable for the loss of the trunk due to its being stolen at a time when he has left his wagon in the street and is delivering a trunk at the residence of another person.—Baker v. Maher, How. N. P. 89.

Liability of carrier for injury to shipment while car on sidetrack en route, see note, 15 N. C. C. A. 745-763.

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Application of the third section of the Harter Act (27 Stat. at Large 445), in actions against shipowners to recover for

loss or damage to cargo, see note, 14 N. C. C. A. 56-85.
Perils of the sea as a defense in actions to recover for loss of or damage to cargo, see note, 14 N. C. C. A. 152-156.
Liability of shipowner for loss or damage to cargo due to negligence in loading or unloading, see note, 14 N. C. C. A. 245-252.

§ 40. Act of God, and other extraordinary causes.

In live stock shipments, see post § 103.
Excuses for nondelivery or misdelivery, see also ante § 38.
Excuse for loss of baggage, see also post § 249.

¶ 106. While railroad companies must always be suitably prepared to receive and transport promptly and safely all freight that might reasonably be expected under ordinary circumstances, they are not bound to be prepared for such extraordinary contingencies as no ordinary prudence could foresee, and are not liable, as for unreasonable delay, for necessary delays in transportation arising therefrom.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

Liability of carrier for loss of goods by flood, see note, 11 N. C. C. A. 1-30.
Liability of carrier of goods touching carriage or delivery of accepted freights under conditions imposed by military law, see note, 14 N. C. C. A. 917-931.

§ 41. Beginning and termination of liability.

Among connecting carriers, see post § 58.
Pleading the duty, see post § 82.
Burden of proof and presumptions, see post § 87.

¶ 107. The liability of a common carrier of goods, as such, continues until the consignee has been notified of their arrival and has had a reasonable time in the common course of business, to take them away after such notification, and this rule applies though the consignee knew the probable date of shipment and the probable time of arrival.—Walters v. Detroit United Ry., 139 Mich. 303.

¶ 108. A carrier was not responsible for the destruction by fire of goods which a consignee had left on the carrier's premises for several days to suit his convenience as to their removal.—Stapleton v. Grand Trunk Ry. Co., 133 Mich. 187.

¶ 109. The liability of a carrier is discharged by a delivery of the goods. If he is an intermediate carrier, this duty is performed by a delivery to the succeeding carrier for further transportation, and an acceptance by him.—Pratt v. Grand Trunk R. Co. of Canada, 95 U. S. 43, 24 L. ed. 336.

Liability of carrier for injury to shipment while car on sidetrack at destination or shipping point, see note, 15 N. C. C. A. 816-840.

§ 42. Directions or choice of shipper contributing to loss.

Leaving goods in warehouse until frozen, see post ¶ 132.

¶ 110. A concert singer contracted with certain persons to give a concert at a certain point, and the latter expressly stipulated that she should furnish them the posters announcing it, not later than the 21st inst. The posters were printed in another town, and were delivered to the express company on the evening of the 20th to be forwarded. The person in charge of the express office was told that the forwarders wanted the package to go on "No. 5," in order to make connection, as "they" wanted the package and did not want it to be delayed. Nothing was said about its contents or purpose, or any necessity for its delivery next day, nor was any departure from the usual course of business asked for. The package was sent by train No. 5, but owing to the running arrangements it did not reach its destination until the evening of the 21st, and could not be delivered until the next day. The parties who had contracted for the concert accordingly canceled the arrangement, and the concert singer, claiming to be injured in consequence, sued the express company for negligence in not making seasonable carriage and delivery of the package. Held, that the action could not lie.—United States Express Co. v. Root, 47 Mich. 231.

¶ 111. The consignee of glass cannot hold the railroad company liable for damages on the theory that a defective car was furnished where there was an agreement between the railroad company and the consignor permitting the latter to select from among the cars delivered upon its siding such cars as it deemed fit and suitable for the purpose of shipping its glass and such selection had been made in this instance.—Frohlich v. Pennsylvania Co., 138 Mich. 116.

§ 43. Injury from or destruction by fire.

Liability during storage in warehouse, see post II, F.
Burning while awaiting shipment, see also ante ¶ 36.
Limitation against liability from fire, see post §§ 67-70.
Due to delay in removing goods, see also ante ¶ 108.
Burden of proof of negligence, see post § 88.
Questions for jury, see post §§ 91-94.

¶ 112. U. S. Rev. Stat., § 4282, exempting vessel-owners from liability for loss or damage to goods by fire, is limited in its application to fires happening on ship-board.—Black v. Ashley, 80 Mich. 90.

§ 44. Perishable goods.

See also post ¶¶ 115, 116, 118.
Surrender on order bill without presentment of bill, see ante § 31.
Sufficiency of evidence of care or neglect, see post § 90.
Right of carrier to sell, see Comp. L. 1915, § 8420.

¶ 113. Giving relief goods the preference in order of transportation at the time of such a public calamity as the Chicago fire of 1871 is not negligence towards perishable goods retarded in transit thereby, the necessity being paramount.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

¶ 114. Beans need not be shipped as perishable freight in order to permit a recovery for their deterioration in quality as the result of an unreasonable delay on the part of a carrier in making delivery at their destination.—Lyons v. Grand Trunk Ry. Co. of Canada, 185 Mich. 417.

Duty of carrier in transportation of live fish, see note, 2 N. C. C. A. 588.

§ 45. Injury from cold or heat or weather.

Delay in removing from warehouse as cause of freezing, see post ¶ 132.
Loss on connecting line, see post § 59.
Limitations against liability, see post § 67.
Burden of proving failure to ice car properly, see post § 88.
Sufficiency of evidence, see post § 90.
Place of failure to re-ice as jury question, see post § 93.

¶ 115. It is negligence for a carrier to receive in a refrigerator car perishable goods, which will suffer from a temperature of 8 degrees or less, on December 11th in Buffalo, N. Y., and on the next morning to remove them to a warehouse where they remained for some days exposed to lower temperatures, though it is the custom to unload shipments less than a car load and though they were sufficiently protected in the car.—Burroughs v. Grand Trunk R. Co., 67 Mich. 351, affirming lower court by equal division.

¶ 116. After a carrier was negligent at destination in taking perishable goods out of a protected car and placing them in an unprotected warehouse without notice to the consignee, the consignee's delay in calling for them or giving directions for their disposal did not avoid the carrier's liability.—Burroughs v. Grand Trunk R. Co., 67 Mich. 351, affirming lower court by equal division.

¶ 117. Under a bill of lading providing for the icing at G. of the cars containing the perishable fruit in question, and for re-icing as often as necessary to keep the car thoroughly iced, the carrier was not relieved from responsibility by the shipper's knowledge of insufficient icing of the cars before their departure, where they had no opportunity to relieve the situation, or honestly believed that the fruit would reach G. without injury.—Johnson v. Toledo, S. & M. Ry. Co., 133 Mich. 596.

¶ 118. An unreasonable delay in shipment of perishable produce is not the proximate cause of freezing of the produce thereafter.—Lardie v. Manistee & N. E. R. Co., 192 Mich. 77.

Liability of carrier for damages due to failure properly to ice car, see note, 6 N. C. C. A. 572-587.
Liability for damage to freight from failure to keep car properly heated, see note, 6 N. C. C. A. 873-878.
Liability of carrier for failure to supply refrigerator car, see note, 12 N. C. C. A. 1071-1082.

§ 46. Injury from delay, misrouting, etc.

Delay due to directions given by shipper, see also ante § 42.
Delay of perishable goods, see also ante § 44.
Delay as cause of freezing, see ante ¶ 118.
Delay causing loss on connecting line, see post § 59.
Reasonableness of time, see post § 47.
Variance as to point or manner of delivery from allegations, see post ¶ 215.
Burden of proving that delay did not cause loss, see post § 88.

¶ 119. A manufacturer under contract with a voluntary association for the manufacture and delivery by a certain date at a certain place of a monument, is entitled to a verdict for damages, where, in an action against a carrier for intermeddling with such contract, it appears that such carrier, with full knowledge of all the facts, after gaining possession of such monument by plaintiff's consignment of it to itself at the point of destination, refused its regular service to plaintiff, thus preventing plaintiff from performing its contract, but that such defendant, by agreement with such association, rendered special service, which was unnecessary, carrying such monument to its destination, over the protest of plaintiff, for which defendant received from such association, which was financially irresponsible, in payment a large part of a fund raised for the purchase of such monument, thereby divert-

ing to the defendant money, which otherwise would have been paid to plaintiff, and which was, in consequence, wholly lost to plaintiff, regardless of the fact that such carrier delivered such monument in good condition at its destination by the date agreed upon.—Harrison Granite Co. v. Pennsylvania R. Co., 145 Mich. 712.

§ 47. Reasonable time and delay.

In carriage of live stock, see post III.
Duty to carry in reasonable time, see ante § 26.
Burden of proof of negligent delay, see post § 88.
Admissibility of evidence as to usual time required, see post § 89.
Sufficiency of evidence, see post § 90.
As question of fact, see post § 92.

¶ 120. The question of unreasonable delay in railroad transportation is determined by ascertaining the average running time under the circumstances existing at the time of the delay.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

48. Extent of liability; undeclared value.

Limitations of liability to declared value, see post § 70.

¶ 121. Where the carrier makes no inquiry and no artifice is used to mislead him as to the value of goods, he is responsible for loss, however great the value may be.—Farnsworth v. National Exp. Co., 166 Mich. 676.

¶ 122. Pub. Acts 1909, No. 300, providing for the filing of schedules with the railroad commission and in the various offices of the carrier and forbidding the carrier to depart therefrom in making its charges, does not prevent the carrier from being liable for the full value of a lost package where no inquiry was made as to its value, notwithstanding, had the value been disclosed, it would have been required to carry at a greater charge.—Farnsworth v. National Exp. Co., 166 Mich. 676.

¶ 123. Where the shipper obtains a lower rate in consideration that the value of the property be limited he is estopped to recover more than the agreed valuation.—Harrison Granite Co. v. Grand Trunk Ry. Co., 175 Mich. 144.

F. CARRIER AS WAREHOUSEMAN, AND LIABILITY AS SUCH.

§ 49. In general; when warehouseman character commences.

See also post § 50.
As to baggage, see post § 251.
Delivery at warehouse as commencement of carrier's relation, see ante § 14.
Delivery at warehouse as delivery of the goods, see ante § 33.
Rights and liabilities of warehousemen in general, including independent warehousemen receiving goods from carriers, see Warehousing.

¶ 124. While the same party may be both carrier and warehouseman at the same time, the two functions cannot be so mingled as to attach to the same property at the same time.—Buckley v. Great Western R. Co., 18 Mich. 121.

Liability of carrier as insurer or warehouseman where goods are damaged or destroyed while in vehicle of transportation before or after transit, see note, 4 N. C. C. A. 277-291.

§ 50. After arrival and pending delivery or inspection.

¶ 125. A railroad company's liability for goods in warehouse awaiting delivery to the consignee is as common carrier, not as warehouseman, unless there is usage or agreement to the contrary.—Buckley v. Great Western Ry. Co., 18 Mich. 121; Feige v. Michigan Cent. R. Co., 62 Mich. 1; McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79 (equally divided court).

¶ 126. The Michigan Central Railroad Company is liable under its charter as warehouseman, and not as common carrier, for goods transported by it and deposited in its warehouse awaiting delivery to the final consignee.—Michigan Cent. R. Co. v. Hale, 6 Mich. 243, overruling Michigan Cent. R. Co. v. Ward, 2 Mich. 538.

¶ 127. The liability of an express company holding at their point of destination goods sent C. O. D. in order to give the consignees an opportunity to pay for and take such goods, or until the consignees who have been notified appear, is that of a warehouseman and not of a common carrier, and there can be no recovery against it for loss by fire without its fault.—Hasse v. American Express Co., 94 Mich. 133.

Liability of carrier for injury to shipment while car on sidetrack at shipping point or destination, see note, 15 N. C. C. A. 816-840.

§ 51. ——Pending delivery to connection.

See also post ¶ 142.

¶ 128. A railroad company which has entered into a contract to deliver flour on shipboard continues liable as common carrier until this delivery is made; and if the flour is destroyed in its warehouse, it cannot claim

that its liability, while the flour was there, was that of warehouseman merely.—Moore v. Michigan Cent. R. Co., 3 Mich. 23.

¶ 129. The Michigan Central Railroad is, under its charter, liable as warehouseman for goods transported by it and deposited in its warehouse awaiting delivery to an intermediate carrier for further transportation. —Michigan Cent. R. Co. v. Lantz, 32 Mich 502; Contra, Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (83 U. S.) 318, 21 L. ed. 297.

¶ 130. The provision of a railroad charter that the company shall be responsible for goods on deposit in any of their depots awaiting delivery as warehousemen and not as common carriers refers to property that has reached its final destination and is there awaiting delivery to its owner.—Michigan Cent. R. Co. v. Mineral Springs Mfg. Co., 16 Wall. (83 U. S.) 318, 21 L. ed. 297.

§ 52. Duty and care required as warehouseman.

See also generally, Warehousing.
Limitations of liability as warehouseman, see post § 69.

¶ 131. Where the company is prohibited by its charter from charging as warehouseman for storage, it is liable for property so deposited as gratuitous bailee only.—Michigan Southern & Northern I. R. Co. v. Shurtz, 7 Mich. 515.

§ 53. Delay of consignee in removing goods.

¶ 132. A delay of 6 days and 12 days respectively in removing shipments of potatoes from the warehouse at point of destination in the winter time, after notice to consignees, relieves a carrier from liability for damage by freezing.—Barber v. Detroit, G. H. & M. Ry. Co., 197 Mich. 643.

G. CONNECTING CARRIERS AND FORWARDERS.

§ 54. In general; duty and relation to parties.

Of passengers, see post IV, F.
Duty as to receiving and interchanging traffic, see ante § 6.
Implication as to through shipment or billing, see post § 55.
Warehouseman's liability pending delivery to connection, see ante § 51.
Intrastate shipments, see Comp. L. 1915, § 8115(e).

¶ 133. In the absence of any special agreement or contract as to trains going over connecting lines, it is the duty of the carrier to carry safely to the end of its line, and there deliver to the next carrier in the route beyond, and by so doing the carrier is discharged.—Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co., 67 Mich. 110.

¶ 134. A carrier of goods must receive and forward articles on the usual terms and deliver them in the condition in which he received them; he has ordinarily no means of opening packages and examining their contents, and has nothing to do with previous dealings with the property by independent carriers.—Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 51.

¶ 135. A carrier of goods acts as agent of the consignee in transferring them to another carrier, and not as the latter's agent.—Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 51.

§ 55. Through contracts and shipments.

See also ante ¶ 136.
As assuming liability for succeeding carrier, see post §§ 59, 62.
Sufficiency of evidence of contract, see post § 90.
Evidence as to joint liability as baggage carriers, see post § 257.
Statutory regulations as to through billing and rates, see generally Comp. L. 1915, chap. 155.

¶ 136. Where a carrier receives goods marked for a particular destination beyond his line, and does not expressly undertake to deliver them at the point designated, the implied contract is only to transport them over his own line and forward from its terminus. —McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 137. A railroad company receiving and receipting goods for transportation to a point beyond the terminus of its road is not to be understood as undertaking to carry the goods beyond such terminus, unless there is an express promise to that effect.—Detroit & B. C. R. Co. v. McKenzie, 43 Mich. 609.

¶ 138. By a contract for the shipment of goods to a point known to the shipper to be off the line of the defendant carrier, the latter agreed to deliver the goods in good order "at —— station," and further "to forward the property to the place of destination as per margin, but are not to be held liable on account thereof after the same shall be delivered as above." The station on defendant's line where transfer occurred was not filled in. Held, that the contract was not one for through carriage.—Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co., 67 Mich. 110.

¶ 139. A shipper delivered two car loads of lumber to a railroad company, consigned

to a point beyond its road, and received a bill of lading, in which it was stated that the lumber was received "for transportation by [defendant] to its destination, if upon the railroad company's line of road—otherwise, to the place where said property is to be received by the connecting carrier—upon the terms and conditions on the back" of the bill of lading. Among the conditions was one providing that the railroad company, "in forwarding the lumber from the point where it leaves its road, is to be held as a forwarder only." Held, that the mere fact that the railroad company gave the shipper a through rate for freight would not, in view of the terms expressed in the bill of lading, and upon which it received the lumber, make the railroad company liable as a carrier beyond its own line.—McEacheran v. Michigan Cent. R. Co., 101 Mich. 264.

§ 56. Route and selection of connections.

See also ante ¶ 70.

¶ 140. The initial carrier may deliver freight to a connecting carrier of its own choice in the absence of directions from the shipper and of contract routing.—Goehrend v. Pere Marquette R. Co., 146 Mich. 497.

§ 57. Degree and extent of liability.

Termination of original and commencement of connecting liability, see post § 58.
Initial carrier's liability under Interstate Commerce Act, see post §§ 62, 63.
Limitations on liability to own line, see post § 68.
Place of injury as jury question, see post § 93.
Liability of initial carrier, and right of action over against connecting carriers, see Pub. Acts 1917, No. 387, amending Comp. L. 1915, § 8115.

¶ 141. Where loss is occasioned by the successive delays of different common carriers, one of them cannot properly be held liable for the whole injury.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

§ 58. Termination and transfer of liability.

See also ante ¶ 109.
Injury occurring after turning over to succeeding line, see post § 59.
Burden of proof on terminal carrier as to condition when received, see post § 87.

¶ 142. A common carrier's liability for freight that is to be transferred to another carrier continues until it is so transferred, or at least until such notification has been given to the other carrier as amounts to a tender of delivery. And if the first carrier merely stores the freight in a warehouse of its own, where the other is in the habit of taking it at its convenience, and the freight while so stored is destroyed, the first carrier is answerable for its value.—Condon v. Marquette, H. & O. R. Co., 55 Mich. 218.

§ 59. Liability for injury after delivery to connection.

Under limiting provisions in bill or contract, see post § 68.
Burden of proof that liability was incurred on other line, see post § 87.
Jury questions, see post § 93.

¶ 143. If a carrier agrees to carry to a certain point chattels which are destined to a more distant market, and by his delay causes damage to the shipper for the non-arrival of the chattels in a reasonable time at their ultimate destination, he is responsible for such damages as much as if it had occurred upon his own line.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 144. Proof of negligent delay by a subsequent carrier, and that without it the injury would have been avoided, is a complete answer to an action seeking to hold the first carrier responsible by reason of its delay for the injury to fruit by freezing while in custody of the subsequent one.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

¶ 145. The freezing of apples while being transported by a subsequent carrier is not so direct a result of unreasonable delay by the first carrier as to make such first carrier liable therefor by reason of such delay.—Michigan Cent. R. Co. v. Burrows, 33 Mich. 6.

¶ 146. Under a bill of lading issued for a car of perishable fruit consigned to a locality in another state, and providing that the property was received "subject to carriers' liability under the common law and statutes" in force in the various states through which the goods might pass, and providing for reicing as often as necessary to keep the car thoroughly iced, the carrier was liable to the shipper for any part of the loss due to the negligence of connecting roads.—Johnson v. Toledo, S. & M. Ry. Co., 133 Mich. 596.

§ 60. ——Delivery to improper or forbidden connection.

¶ 147. Where a transportation company undertook to forward goods from New York to Detroit, "by sail on the lake," all dangers of the lake, etc., to be at the risk of the owner, it was held that the contract was restrictive as to the mode of transportation; and the company having departed from it, by shipping the goods by steam instead of by sail, and the goods having been lost on the lake, the company was liable to the owners for their value.—Merrick v. Webster, 3 Mich. 268.

§ 61. ——For misdelivery or nondelivery.

¶ 148. Where a contract for the shipment of goods by a carrier to a point beyond the line of its road specifies that the property shall not be delivered except upon a bill of lading, the delivery of the goods by such carrier to one of its connecting lines, to be forwarded, accompanied by the necessary information concerning the delivery, relieves such carrier from liability for a delivery without the presentation of the bill of lading.—Rickerson Roller Mill Co. v. Grand Rapids & I. R. Co., 67 Mich. 110.

§ 62. Liability under Interstate Commerce Act.

Excuses of initial carrier, see post § 63.
Pleading the bill, see post § 81.

¶ 149. Under Act of Congress of June 29, 1906, c. 3591, § 7, 34 Stat. L. 595, an initial carrier is liable for the loss, damage or injury caused to property by the connecting carrier.—Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

¶ 150. An initial carrier is, under 34 U. S. St. 594, Fed. St. Ann. Supp. 1909, pp. 273, 274, answerable to a shipper for the value of a consignment wrongfully delivered by the final carrier pursuant to directions of the person subject to whose order the shipment was made, without first requiring the presentation of an outstanding order bill of lading with draft attached.—Thomas v. Blair, 185 Mich. 422.

¶ 151. Plaintiffs took from defendant railroad a "straight" bill of lading, made out to the order of the consignee and indorsed on same the words: "B. L. attached to draft." Plaintiffs informed defendant, the initial carrier, that they wished to send the goods in such a manner that the consignee could not obtain the same without payment therefor, and were informed by defendant's agent that the bill of lading as made out would accomplish said purpose. The goods themselves were addressed to the consignor, with the direction to notify the consignee. Held, defendant was liable for the act of the connecting carrier in delivering the goods to the consignee without payment of the draft. —Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

§ 63. ——Excuses for loss or delay.

¶ 152. Where a shipper sues the initial carrier for damages from diversion of a shipment to his own order, it is no defense that the goods were seized under attachment where the evidence shows that the connecting carrier at the instance of the purchaser, who was the person to be notified, stopped the car 60 miles from its destination and left it standing on the sidetrack, at which place during the delay he caused the attachment.—Perkett v. Manistee & N. E. R. Co., 175 Mich. 253.

§ 64. Advances and reimbursement by connections.

Right to lien for advances as dependent on rightfulness of possession under contract of carriage, see post ¶ 196.

¶ 153. A connecting carrier to whom property has been delivered by the initial carrier subject to charges, and who makes a deduction from the freight earned, under an illegal custom is liable to an action therefor by the initial carrier if the deduction was made under protest and the action is brought before he has accounted with the owner.—Strong v. Grand Trunk R. Co., 15 Mich. 206.

§ 65. Forwarders, and duty and liability.

Contract to ship and forward, see also ante ¶ 49.
Connecting carrier as agent to turn over to successor, see ante ¶ 135.
Authority of forwarder's clerk to make contracts, see also Agency, ¶ 159.

¶ 154. It is within the scope of a forwarder's business to send forward with property instructions qualifying or imposing restrictions upon its delivery, and his clerk must therefore be presumed to have authority to make a contract to do so.—Hutchings v. Ladd, 16 Mich. 493.

¶ 155. Forwarding instructions for the delivery C. O. D. to the express company along with the goods, in a sealed envelope, was not a compliance with the contract to forward and deliver according to instructions.—Hutchings v. Ladd, 16 Mich. 493.

H. CONTRACT LIMITATIONS OF LIABILITY.

In shipments of live stock, see post § 98.

§ 66. In general; right to limit.

See also ante ¶ 42.
Necessity and sufficiency of written contract or bill of lading, see ante §§ 16, 17.
Right to take heavier charges for larger liability, see post ¶ 186.
Pleading limitations, necessity of special pleas, see post § 85.
Sufficiency of evidence of contract, see post § 90.

¶ 156. A common carrier has no power to restrict, in any way, his common-law liability, but is bound to transport the property intrusted to him under this liability, if it be not waived or changed by contract. But he may make any contract with an individual relative to the transportation of his

property which the latter may deem conducive to his interest and enter into upon a consideration satisfactory to himself, though a diminution of the carrier's common-law liability results therefrom.—Michigan Cent. R. Co. v. Hale, 6 Mich. 243; McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 157. A corporation which is made a common carrier by its charter, and required to "transport merchandise and property without showing partiality or favor," has the same power to contract for a limitation of liability as any other carrier, and no consideration of public policy is contravened by the exercise of such power.—Michigan Cent. R. Co. v. Hale, 6 Mich. 243; overruling Michigan Cent. R. Co. v. Ward, 2 Mich. 538.

¶ 158. Though the general railroad law of 1855 prohibits the companies formed under it from limiting their common-law liability as carriers, it does not preclude persons for whom goods are carried from releasing such companies from any part of that liability.—McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 159. The provisions of the act of 1867, Sess. L. 1867, p. 165 (see How. St., § 3418), which forbid railroad companies to change or limit their common-law liability as common carriers, apply only to those kinds of property which the company was, by its charter, bound to carry in that capacity, and such other kinds as they should assume thus to carry.—Michigan Southern & Northern I. R. Co. v. McDonough, 21 Mich. 165.

¶ 160. A common carrier of goods may by contract limit or extend his common-law liability.—Black v. Ashley, 80 Mich. 90.

¶ 161. A common carrier may limit its strict common-law liability, by express agreement, in such manner as the law can recognize as reasonable, and not inconsistent with sound public policy.—Smith v. American Express Co., 108 Mich. 572.

§ 67. Validity, construction and effect of limitations.

Form and effect of bills of lading, see ante II, B.
Live stock contracts, see post § 98.
Right to limit liability, see also ante § 66.
Waiver of condition for presentation of claim, see post ¶ 206.

¶ 162. When a limited liability is legally contracted for, the bailee is not a common carrier in the full common-law sense, but a private carrier, or a bailee of another class, or a common carrier sub modo only.—Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329.

¶ 163. The act of 1867 (How. St., § 3418), in requiring all contracts limiting a carrier's liability to be wholly in writing, is in conflict with the act of 1873 (How. St., § 3328), in so far as the latter simply requires them to be signed in writing; and to the extent of this variation the latter act repeals the former.—Feige v. Michigan Cent. R. Co., 62 Mich. 1.

¶ 164. As a general rule a carrier may not exempt itself wholly from liability for its negligence, but can limit its liability only by stipulations, which are in themselves just and reasonable.—Lardie v. Manistee & N. E. R. Co., 192 Mich. 77.

¶ 165. A carrier may by contract exempt itself from liability from loss by fire not caused by its own negligence.—Smith v. American Express Co., 108 Mich. 572.

¶ 166. Where shipper and carrier enter into an agreement whereby the shipping rate is reduced in consideration that the liability for damages resulting from negligence be limited such an arrangement is held good except in the event of gross negligence of the carrier.—Harrison Granite Co. v. Grand Trunk Ry. Co., 175 Mich. 144.

¶ 167. A carrier may limit its liability for damages due to freezing of perishable produce in a bill of lading by the insertion of a clause in the bill of lading to the effect that shipment is made in a box car at shipper's request and at shipper's risk of freezing, where the carrier informs the shipper that it is unable to furnish a refrigerator car and is informed that a box car will be all right, as such provision does not attempt to relieve the carrier from its own negligence but from a loss contemplated by the parties to the contract.—Lardie v. Manistee & N. E. R. Co., 192 Mich. 77.

¶ 168. A sufficient consideration for restrictive provisions contained in a bill of lading will be presumed.—McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 169. General words of exemption, when employed after a designation of specific exemptions from the liability of a carrier, will be presumed to include only those of a similar character, unless a different intention is manifest in the contract.—Hawkins v. Great Western R. Co., 17 Mich. 57.

¶ 170. A carrier's limited liability contract is not to be construed as in any way limiting the carrier's liability for loss or

damage due to the neglect or default of its employees.—Smith v. American Express Co., 108 Mich. 572.

¶ 171. A bill of lading for matches exempting the carrier from loss or damage by fire relieves the defendant from liability as insurer for damage to such goods while in transit, but it does not relieve defendant from liability for its negligent conduct.—Modern Match Co. v. Baltimore & O. R. Co., 140 Mich. 570.

§ 68. ——As to acts or neglect of connecting lines.

In live stock shipments, see post § 98.

¶ 172. A carrier is not liable for loss of a parcel burned in an express car after delivery to a succeeding carrier, where the contract expressly limits its liability to its own line.—Smith v. American Express Co., 108 Mich. 572.

¶ 173. A carrier may stipulate for immunity from responsibility for damages resulting upon connecting roads after his discharge of his full duty of delivering the goods to another road.—Kibby v. Michigan Cent. R. Co., 142 Mich. 313.

¶ 174. Where a carrier contracts to furnish a suitable car to transport potatoes for the entire trip and deliver the car and cargo to a connecting line in good condition, it is responsible for its breach of contract where the potatoes were ruined by rain coming through a leaky roof, despite a stipulation that it should not be liable for damages not occurring on its own road.—Kibby v. Michigan Cent. R. Co., 142 Mich. 313.

¶ 175. Defendant, the initial carrier, received goods for shipment under a contract providing that it should not be liable for loss or injury, or for delay in delivery, by any other carrier after the delivery of the goods to it by the defendant. The goods were properly delivered to a connecting carrier. A new waybill was made out by the connecting carrier from which were omitted the words "notify H. & Co.," at the place of destination, which had appeared upon the bill of lading. The consignee, by reason of the error, was not located, and the goods were placed in storage, from which the consignee, after locating the goods, refused to remove them unless the storage charges were paid. Months later the goods were sold for such charges. Held, that defendant was not liable beyond possibly the first delay.—Hope v. Delaware & H. Canal Co., 111 Mich. 209.

¶ 176. Whether a waybill, providing that perishable goods shipped in a designated car to a foreign station, should be at the owner's risk from frost with a limitation of liability to the initial carrier's own line applied beyond the line of the carrier which gave it and bound the connecting carrier, quære; the court being equally divided.—Burroughs v. Grand Trunk R. Co., 67 Mich. 351.

§ 69. ——As to warehouseman's liability.

¶ 177. It is competent for a carrier to limit or modify, by contract, its common-law liability with respect to the character in which it holds goods in its warehouse awaiting delivery.—Buckley v. Great Western Ry. Co., 18 Mich. 121; Feige v. Michigan Cent. R. Co., 62 Mich. 1.

§ 70. ——As to valuation and damages recoverable.

Reduced rate limitations, see ante § 67.
Instructions as to effect of release clause on bill, see post § 95.

¶ 178. A provision in a bill of lading limiting the carrier's liability to an agreed value, made to adjust the rate is not forbidden by the Carmack Amendment.—Harrison Granite Co. v. Grand Trunk Ry. Co., 175 Mich. 144.

¶ 179. The receipt given by an express company for a package delivered to it for transportation provided that the company should not, in any event, be held liable beyond the sum of $50, unless the just and true value of the property was stated in the receipt. This was not done, nor was the value disclosed by the consignor to the company. Held, that the limitation was reasonable, and, in case of loss, fixed the limit of recovery by the consignor.—Smith v. American Express Co., 108 Mich. 572.

¶ 180. Where a shipper takes a receipt from an express company which states that the value of the package shall not be deemed to exceed fifty dollars unless the shipper declares a different value, and the shipper merely marks the package as containing opals and the receipt states it to contain the same, the shipper can recover for loss of the package only up to fifty dollars.—D'Arcy v. Adams Exp. Co., 162 Mich. 363.

¶ 181. Where plaintiff enters into a contract with defendant to ship certain material described in the shipping receipt as "building granite" which in fact is polished granite, and there is a provision limiting the liability in consideration of the lower shipping rate, the contract is valid and plaintiff is bound by the limitation in an action to recover damages to the shipment.—Harrison Granite Co. v. Grand Trunk Ry. Co., 175 Mich. 144.

Freight rates charged by carrier as limiting liability for goods lost or damaged, see note, 8 N. C. C. A. 53-66.

Liability of express company for goods lost or damaged as limited by rates charged for transportation, see note, 8 N. C. C. A. 120-132.

§ 71. Assent to limitations.

Authority of forwarders to make, see ante § 65.

Consignee as bound by consignor's agreement, see ante § 44.

¶ 182. A common carrier cannot limit his common-law liability by a mere notice indorsed upon the receipt given the consignor, or published or posted, or otherwise brought to the consignor's notice. The assent of the latter to the limitation is necessary, and must be proved by evidence aliunde; it cannot be presumed from the terms of the receipt alone, or be implied from the posting of notices or the delivery thereof to the consignor.—Michigan Cent. R. Co. v. Hale, 6 Mich. 243; McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 183. The sending of goods under a restrictive contract in any number of instances does not bind the party sending them to a similar contract in the future without his agreement to that effect; nor is it evidence that a like contract existed in the case of goods subsequently sent.—McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

¶ 184. After property had been delivered to a railroad company for carriage the owner signed a request for its shipment, which was presented to him by the company, and upon which was a notice to limit the company's liability in case of loss. A part of the property was never forwarded, but was lost from the company's warehouse. Held, that having received the property for transportation before the notice was given, the company's obligation to send forward the same was not restricted thereby, and the owner had a right to understand the notice as referring only to the liability of the company in respect to its carriage.—Detroit & M. R. Co. v. Adams, 15 Mich. 458.

¶ 185. Where no receipt is given at the time of shipment, the carrier cannot in the absence of statutory regulation, limit its liability by afterwards delivering to the shipper a receipt containing a limited liability clause, if the evidence shows that the shipper had no knowledge that the carrier claimed any such limitations at the time of shipment.—Farnsworth v. National Exp. Co., 106 Mich. 676.

¶ 185a. A bill of lading conditioned to deliver goods "at Toledo for Detroit" is a contract to carry to Toledo and then forward to Detroit; and the carrier receiving the same at Toledo to carry to Detroit receives them under his common-law liability and not under the conditions of the bill of lading, though he would be limited in his charges to the sum specified in the bill.—McMillan v. Michigan Southern & N. I. R. Co., 16 Mich. 79.

I. FREIGHT AND CHARGES, AND LIENS.

§ 72. In general.

Discriminations, see ante § 11.

Agreement to collect from consignee, see also ante ¶ 43.

Right to storage on attachment of goods, see also ante ¶ 68.

Public regulation of rates and charges, see ante §§ 2, 3.

Conclusiveness of established rates, see ante § 3; and see Public Service.

Establishment of rates by Railroad Commission, and review of its decisions and rates, see Public Service.

Provisions as to free service, see Comp. L. 1915, § 8113(b).

Short and long haul charges, see Comp. L. 1915, § 8117, and Pub. Acts 1915, No. 277.

Classifications and commodity rates, see Comp. L. 1915, §§ 8119-8121.

Statutory maximum rates, see Comp. L. 1915, § 8133(d).

Drayage charges, see Comp. L. 1915, § 8347.

¶ 186. It seems that railroad companies can adjust their charges for carrying freight in view of the risks which they assume or the law imposes; they may therefore properly exact heavier charges if held to a carrier's responsibility than if liable only as warehousemen.—Feige v. Michigan Cent. R. Co., 62 Mich. 1.

¶ 187. The proviso to Comp. L. 1897, § 6234, limiting the rate for transporting freight by the car, is not ambiguous or uncertain, but it refers to transportation of freight by the carload, regardless of the size of the car or the weight of freight contained therein.—Robinson v. Harmon, 157 Mich. 266.

¶ 188. A consignee who actually receives goods upon which extra freight charges have not been paid, as the result of underbilling, is solely liable for the payment thereof where the carrier and shipper enter into an agreement that the consignee shall alone be liable for freight on the goods, and the consignee accepts the goods, especially where no demand is made on the consignees for the extra freight, and it is not claimed that the shipper is guilty of bad faith in underbilling the goods.—King v. Van Slack, 193 Mich. 105.

§ 73. Prepayment of charges.

Extending credit to some and not others as discrimination, see ante ¶ 31.

Advances to initial and other carriers, see ante § 64.

¶ 189. A common carrier is not bound to receive and carry goods unless freight is paid in advance if required.—Fitch v. Newberry, 1 D. 1.

¶ 190. A railroad employee does not waive the right of the company to a prepayment of charges before delivery of the cars, and to car rental for delay of the consignee, by responding "all right" to a statement by the consignee that he will give a disposal order for the cars, and will send the amount of the freight whenever he gets the expense notices and knows the amount.—McEachran v. Grand Trunk R. Co., 115 Mich. 318.

¶ 191. Where the Michigan Railroad Commission establishes a schedule of freight rates on lumber intended for manufacture and reshipment over the lines of a common carrier, with an additional rate of 50 cents per thousand feet on lumber not intended for reshipment, subject to such rebate however in the event of reshipment, the carrier cannot in the first instance impose such additional charge on all shipments.—Michigan Railroad Commission v. Detroit & Mackinac R. Co., 184 Mich. 242.

§ 74. Demurrage.

Burden of proof of waiver of demurrage, see post § 87, ¶ 220.

¶ 192. A demurrage charge is a terminal charge within the meaning of the Act of Congress of June 29, 1906.—Michigan Cent R. Co. v. Michigan Railroad Commission, 183 Mich. 6.

¶ 193. A railroad forming part of the so-called "Grand Trunk Railway System" cannot recover demurrage charges due to other railroads, although such railroads also form part of such "system," in the absence of pleading and proof that plaintiff paid demurrage charges for the other railroads in the usual course of business, or had become liable to pay such charges, and in such case plaintiff's recovery will be limited to charges accruing to its own line.—Detroit, G. H. & M. Ry. Co. v. Owosso Sugar Co., 192 Mich. 533.

§ 75. Liens.

Sale of unclaimed freight, see Comp. L. 1915, § 8247.

¶ 194. A carrier has a lien on the cargo for the freight earned.—Strong v. Grand Trunk R. Co., 15 Mich. 206.

¶ 195. A carrier cannot claim a lien for freight unless the contract of carriage is fully performed.—Johnston v. Davis, 60 Mich. 56.

¶ 196. To justify a lien upon goods for their freight, the relation of debtor and creditor must exist between their owner and the carrier, so that an action at law might be maintained for the payment of the debt for which the lien is claimed; and where plaintiff had shipped goods by carriers under a special contract, and during their transit they came into possession of other carriers without his assent, and were delivered to the defendants, who were warehousemen, and who advanced charges thereon in ignorance of the manner in which the last-mentioned carriers had come to possession, it was held that the defendants had no lien on the goods for their advances and charges, and plaintiff was entitled to the possession of the goods without payment thereof.—Fitch v. Newberry, 1 D. 1.

¶ 197. Where one replevied his goods from a carrier who claimed the right to retain them until the freight was paid, it was competent for plaintiff to prove damages to them in their transit, and thus reduce the amount of freight actually due, or show nothing due.—Bancroft v. Peters, 4 Mich. 619.

¶ 198. Where a purchase is induced by fraud and the title passed the seller on rescinding cannot recover the goods free from a lien acquired by a railroad company for subsequent transfer charges incurred by the purchaser.—Hoffman v. Lake Shore & M. S. R. Co., 125 Mich. 201.

§ 76. Penalties for overcharge.

¶ 199. Since the penalty for overcharge imposed by Comp. L. 1897, § 6235, is laid on "every such corporation" operating as a common carrier, it will not be extended to a receiver appointed by the federal court to operate the railroad.—Robinson v. Harmon, 157 Mich. 272, on rehearing reversing original opinion.

§ 77. Right to recover overcharge or improper charge.

See also ante ¶ 29.

Right to recover for special service improperly given and charged for, see also ante ¶ 73.

Right to recover charges on underbilled goods, see ante ¶ 188.

Penalties, see ante § 76.

Proper form of action for recovery, see post § 78.

Pleading, see post § 83.

Reasonableness of established rates as matter beyond issues, see post ¶ 214.

Complaint to Railroad Commission, see Comp. L. 1915, § 8118(g).

Under Interstate Commerce Act, see that act and the regulations of the Interstate Commerce Commission.

¶ 200. Where rates charged by a shipper are condemned by the Railroad Commission as unreasonable, and new ones approved as reasonable, the mere fact that a temporary injunction against putting the new rates into effect permits the carrier, notwithstanding the orders of the commission, to continue to take what its published tariffs called for, does not legalize the exaction nor prevent recovery of the excess charge by the shipper, upon the representations upon which the injunction was based later being held to be unfounded. —Fletcher Paper Co. v. Detroit & M. Ry. Co., 198 Mich. 409.

¶ 201. A railroad company that receipts goods to be transported to a point beyond its line for a definite sum named, and charges the consignor a larger sum therefor, is responsible to the consignor for the excess.—Detroit & B. C. R. Co. v. McKenzie, 43 Mich. 609.

J. ACTIONS BY OR AGAINST CARRIERS.

§ 78. In general; remedies and form of action.

Trial practice generally, see specific topics like Trial; Verdicts; Judgments; Argument of Counsel; Continuances; Discontinuance, Dismissal and Nonsuit; etc.

Improper argument in actions for loss of goods, see Argument of Counsel.

When the action sounds in contract, the rules of procedure will be the same in many respects as contracts in general, and accordingly see Contracts, X.

Action for taking goods without assent of owner, see ante ¶ 50.

Primary jurisdiction of Railroad Commission or of Interstate Commerce Commission in respect of rates and claims for overcharge, see Courts, V.

Mandamus to compel performance of duty, see Mandamus, IV.

Measure and elements of damages, see Damages.

Setoff of injury or loss against freight charges, title of defendant as requisite, see Set-off.

Claim for damages and investigation by Railroad Commission, see Comp. L. 1915, § 8150.

¶ 202. If a common carrier obtains possession of goods wrongfully, or without the consent of the owner, express or implied, and, on demand, refuses to deliver them to the owner, such owner may bring replevin for the goods or trover for their value.—Fitch v. Newberry, 1 D. 1.

¶ 203. Where the Railroad Commission has decided that a certain rate charged a shipper is unreasonable, and that another is reasonable, a shipper may recover, in an action of assumpsit, the money illegally exacted through the charging of a higher than the fixed rate, and it is immaterial whether it declare upon Pub. Acts 1909, No. 300, § 10, subd. g., How. 2d Ed., § 6533, and the action of the commission or on the common counts. —Fletcher Paper Co. v. Detroit & M. Ry. Co., 198 Mich. 409.

§ 79. Parties; right to sue.

See also ante ¶ 66.

Right of consignor to recover overcharge, see also ante § 77.

Bona fide transferree of order bill suing for misdelivery, see also ante ¶ 84.

Right of railway "system" to recover charges accruing to distinct lines comprised in it, see also ante ¶ 193.

Right of one road in "system" to recover charges due to others, see also post ¶ 237.

In case of live stock shipments, see post § 104.

Rights of action not released by Railroad Commission Act, see Comp. L. 1915, § 8154.

¶ 204. A written contract for the transportation of goods entered into by the real owner of the property in the name of those from whom he purchased, they having been the original shippers by another line, from which defendants received them, and required by defendants to be thus made in the name of such original shippers, may be sued upon by said real owner of the property in their names.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 205. In an action against a railroad company for failure to furnish cars for the movement of a peach crop, the contract for furnishing refrigerator cars being between defendant and plaintiff, a third party jointly interested with plaintiff in the crop is not a necessary party plaintiff.—Fremont Canning Co. v. Pere Marquette R. Co., 180 Mich. 283.

§ 80. Defenses.

Pleading defenses, necessity of special plea, see post § 85.

Burden of proof of levy as defense, see post § 87.

¶ 206. Where a carrier places its refusal to pay to the consignor of goods a claim for damages on distinct and definite grounds, it waives its right to insist, after the consignor has incurred the expense of litigation, on other defenses known to it, including the defense that a claim for loss in writing was not made within four months after the loss.—Ithaca Roller Mills v. Ann Arbor R. Co., 197 Mich. 440.

§ 81. Pleading; declaration.

In action on live stock carriage, see post § 106.
Issues and variance, see post § 86.
General law of pleading, see Pleading.
Pleading damages, see Damages, X.

¶ 207. In an action under the Interstate Commerce Act where the shipper sues the initial carrier for damages from a diversion of the shipment, held, the bill of lading was sufficiently described in the declaration to be admissible in evidence.—Perkett v. Manistee & N. E. R. Co., 175 Mich. 253.

§ 82. ——Assumption of duty and breach.

¶ 208. Admitting it to be one of the duties of a common carrier to transport without unreasonable delay, the neglect of that duty could not be a ground of recovery against him without an averment in the declaration charging the duty and averring a breach of it.—Buckley v. Great Western R. Co., 18 Mich. 121.

§ 83. ——In actions for recovery of overcharge or improper charge.

Matter within issues, see post ¶ 214.

¶ 209. In an action by a consignor against a carrier of goods to recover a freight charge, as for transportation beyond its line, in excess of that arranged for on receipting the goods, a variance in describing the defendant's undertaking as one for the carriage of the goods for the whole distance is immaterial.—Detroit & B. C. R. Co. v. McKenzie, 43 Mich. 609.

§ 84. ——In action for unlawful discrimination.

¶ 210. Plaintiff sued defendant railway for unjust discrimination against his business under Comp. L. 1897, § 6266. The declaration alleged that defendant gave a rival bus company the exclusive privilege of going upon its trains to solicit business, and gave a free pass for such purpose. It did not allege that said rival paid anything for the privilege. Held, that the demurrer to the declaration should be sustained.—Dingman v. Duluth, S. S. & A. Ry. Co., 164 Mich. 328.

§ 85. Pleas; special defenses.

¶ 211. Failure by a carrier to plead the so-called "5 day" provision for filing claim for damages is a waiver of that defense.—Tobin v. Lake Shore & M. S. Ry. Co., 192 Mich. 549.

¶ 212. In order to enable a carrier to prove a special contract changing or modifying its common-law liability, such contract must be pleaded.—Tobin v. Lake Shore & M. S. Ry. Co., 192 Mich. 549.

§ 86. Issues and variance.

Evidence that plaintiff road is part of "system" with which defendant dealt, see also post ¶ 237.

¶ 213. Where two railroad companies are sued on a joint contract for transportation, evidence as to which was in default is immaterial.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 214. In an action of assumpsit in the circuit court by a shipper against a carrier to recover the difference between the amount paid under a tariff published by defendant and that designated by the Railroad Commission held that the question of the reasonableness of the exactions could not be considered.—Fletcher Paper Co. v. Detroit & M. Ry. Co., 198 Mich. 469.

¶ 215. A declaration in an action by a shipper against a common carrier of goods for injuries to goods while in transit, is sufficient to support a recovery where it alleges the delivery of goods to defendant, a common carrier, for shipment, the acceptance of the goods by defendant, the breach of duty to deliver the goods safely at destination, that through defendant's negligence they were wholly lost, damaged, and destroyed, and not delivered to a connecting carrier, or to plaintiff at destination "or elsewhere," and where the proof shows that after a long wait for the goods at destination, plaintiff directed them to be returned to the original shipping point, where they were offered to him in a damaged condition.—Reason v. Detroit, G. H. & M. Ry. Co., 150 Mich. 50.

§ 87. Burden of proof and presumptions.

See also post ¶ 233.
As to ownership of goods, see also ante § 23.
To show assent to contract, see also ante ¶ 48.
Of negligence, see post § 88.
As to injury to live stock carried over several lines, see post § 107.
Instructtions on burden and shifting, see post § 95.
Instruction on presumptive continuance in good order, see post § 95.
General law of presumptions and burden, see Evidence, II.

¶ 216. If plaintiff in assumpsit counts upon the common-law liability of common carriers to carry safely, he must prove all the circumstances necessary to create the liability; and if he fail to show that the property was delivered to, and accepted by, the company under circumstances which made it their duty to assume the care and custody of the property in its reception, transportation and delivery, he fails to prove the contract alleged.—Michigan Southern & Northern I. R. Co. v. McDonough, 21 Mich. 165.

¶ 217. In an action in tort to recover for the negligence of a carrier in transporting goods, the plaintiff is not required to prove a contract. The burden of proof is on the defendant to show any provision of the contract which excuses liability.—Bonfiglio v. Lake Shore & M. S. R. Co., 125 Mich. 476.

¶ 218. One who sues a common carrier for injury to goods must show affirmatively that defendant received them in good order.—Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 51.

¶ 219. A carrier's obligation to carry safely what he received safely is independent of the question of negligence; but in the absence of proof that goods were delivered to him or delivered safely, any presumption that he received them goes behind his duty and enters into the origin of the contract for carriage, since there is nothing for the contract to act on until the goods come into his charge, and until that is proved the contract is not.—Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 51.

¶ 220. One who relies upon the authority of an employee of a common carrier to waive the right to prepayment of demurrage charges before delivery of the cars has the burden of showing authority.—McEachran v. Grand Trunk R. Co., 115 Mich. 318.

¶ 221. A carrier sued in trover for the value of goods which it has allowed an officer to take from its possession cannot show such taking as a defense unless it shows also that the officer had a legal right to take them by virtue of his writ.—Gibbons v. Farwell, 63 Mich. 344.

¶ 222. In an action against a terminal carrier for damages to goods shipped it cannot be assumed that the damage was done while in the hands of the defendant rather than while in the hands of the initial carrier.—Rolfe v. Lake Shore & M. S. R. Co., 144 Mich. 169.

¶ 223. Where goods are transported by successive carriers and an action is brought against the terminal carrier for damages to the goods, it is not enough to show that the goods were delivered to the initial carrier in good condition, but it is incumbent upon the plaintiff to show that they were in good order when received by the defendant.—Rolfe v. Lake Shore & M. S. R. Co., 144 Mich. 169.

¶ 224. Where goods are received by a carrier for shipment to a point beyond its own line, and after their arrival at their destination the shipper directs that they shall be returned, and upon their return they are received by him in a damaged condition, the burden of proof is upon him to show that they were received by the initial carrier from the connecting carriers, upon the return trip, in good condition, where the initial carrier has shown delivery by it to a connecting carrier, in good condition, upon the outgoing trip.—Reason v. Detroit, G. H. & M. Ry. Co., 150 Mich. 50.

¶ 225. Where a carrier receives goods for transportation by itself and connecting carriers to a point beyond its termination, the burden of proof is upon it to show that it has delivered the goods to the succeeding carrier uninjured.—Reason v. Detroit, G. H. & M. Ry. Co., 150 Mich. 50.

§ 88. ——As to negligence.

¶ 226. In a suit by a railroad to recover of a shipper for the burning of a car assigned to defendant, the burden of proof of negligence primarily rests with plaintiff.—Grand Rapids & I. Ry. Co. v. L. Starks Co., 172 Mich. 270.

¶ 227. Where an action against a carrier is based upon the destruction by fire, through the carrier's negligence, of a package delivered to it for transportation, such negligence must be proved; mere proof of an accident does not establish negligence.—Smith v. American Express Co., 108 Mich. 572.

¶ 228. In a suit by a railroad to recover of a shipper for the burning of a car assigned to defendant, negligence cannot be presumed but must be proved, and the mere fact of the accident is not sufficient to impose liability.—Grand Rapids & I. Ry. Co. v. L. Starks Co., 172 Mich. 270.

¶ 229. If unusual conditions cause unavoidable delay in the transportation of goods properly prepared for shipment and in good condition, preventing performance of the duty of the carrier to transport safely and with reasonable dispatch, the burden of proof is upon the carrier to show that its negligence did not cause or contribute to the loss or injury to the goods.—A. F. Young & Co. v. Grand Rapids & I. Ry. Co., 201 Mich. 39.

¶ 230. In an action by a shipper against the initial carrier for damages for negligence of a connecting carrier in delaying shipment and failing to properly ice the fruit, the burden of proof is upon the plaintiff to show that the fruit was not iced as provided by the contract.—Perkett v. Manistee & N. E. R. Co., 191 Mich. 106.

Application of doctrine of res ipsa loquitur in actions against carrier, see note, 5 N. C. C. A. 35.

§ 89. Admissibility of evidence.

General law of evidence, see Evidence.
Admissibility of similar unrelated cases or facts, see Evidence, III.
Admissibility of custom to show understanding of contract, see Customs and Usages.
Proof of genuineness of bills of lading as foundation for admission of them, see Evidence, VIII, A.
Evidence on damages, see Damages, XI.

¶ 231. Where two railroad companies are sued on a joint contract for transportation, it is immaterial which one was in default, and evidence on that subject is irrelevant and immaterial.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 232. Where eggs transported in a refrigerator car, which they partially filled, were placed by the carrier in its warehouse at the point of destination, and, remaining uncalled for for several days, were frozen, it was not proper for the carrier to show that its warehouse was like others in not protecting such property from freezing.—Burroughs v. Grand Trunk R. Co., 67 Mich. 351, affirming lower court by equal division.

¶ 233. Hay was shipped from Sheboygan to Escanaba, and there taken by a railroad company, which carried it to Marquette, where it was found to be wet and injured. The company was sued for damages. Held, that the burden of proof was upon the plaintiffs and that proof of its condition at the port of previous shipment was not to be resorted to unless more direct evidence was lacking. But if admitted, it was held proper cross-examination to inquire into the mode of its transshipment, the condition of its storage, the weather, and the condition in which it reached the place where the company received it.—Marquette, H. & O. R. Co. v. Langton, 32 Mich. 251.

¶ 234. Evidence tending to show that goods were in good condition when loaded on the car, and that the car was in good condition when receipted for by defendant's road, in an action against such carrier for damages to such goods while in transit, would also tend to show that the goods when such car was received by defendant were in the same condition as when shipped.—Modern Match Co. v. Baltimore & O. R. Co., 140 Mich. 570.

¶ 235. In an action by a shipper against a carrier for injury by freezing to an interstate shipment of potatoes because of delay in transportation, it is competent to show, as bearing upon the question of unreasonable delay in transit, not only the actual time consumed in the particular case, but the distance and usual time required and taken for such transportation.—A. F. Young & Co. v. Grand Rapids & I. Ry. Co., 201 Mich. 39.

¶ 236. In an action by a shipper against the initial carrier for damages for delay in shipment and improper icing of fruit due to the negligence of a connecting carrier, the certificates of the Commissioner of Health at the point of destination showing the condemnation of fruit, some shipped by other persons than the plaintiff, but also inferentially the fruit which he shipped, and all of the fruit being included in the same shipment, is admissible.—Perkett v. Manistee & N. H. R. Co., 191 Mich. 106.

¶ 237. In an action by a railroad company to recover for demurrage charges, where it is sought to recover such charges due to other companies, parol evidence that plaintiff and such other railroads are parts of what is called the "Grand Trunk Railway System" is incompetent unless it shows what will amount to an assignment of the charges to plaintiff, since the so-called "system," even if incorporated and capable of suing and being sued, could not, simply by reason of such fact, recover such charges due to the various railroads composing it.—Detroit, G. H. & M. Ry. Co. v. Owosso Sugar Co., 192 Mich. 533.

§ 90. Sufficiency of evidence.

See also ante ¶ 73.
Bare proof of accident or loss, see ante § 88.
Of liability for improper charges incurred, see also ante ¶ 119.

¶ 238. Although it devolves upon a common carrier to show affirmatively the terms of any contract which lessens his common-law liability, yet the fact is to be proved, like any other, by any pertinent evidence. If in writing, the writing must be shown; but if by parole, there is no rule which requires any different proof from that which would establish any other contract. The jury must be satisfied from the evidence that a certain contract exists; and, if satisfied, that is sufficient.—American Transp. Co. v. Moore, 5 Mich. 368. Affirmed in 24 How. 1, 16 L. ed. 674.

¶ 239. The agent of the O. railroad on receipt of goods to be forwarded gave a dray ticket, signed by himself, reading: "Pittsburgh, Nov. 1, 1864. To O. & P. R. R. Rec'd of F. Bros., in good order [description of goods] for M. I. M. & Co., Detroit. To Mansfield." A shipping bill was also given to the same time, specifying Mansfield as destination. Held that the dray ticket, standing by itself, was not evidence of an obligation of the carrier to transport the goods to Detroit, but only showed a duty to keep the goods safely and to redeliver them or account for their value.—Fleming v. Mills, 5 Mich. 420.

¶ 240. In an action by a bank as an assignee of a bill of lading for a car of produce against a railroad company to recover damages for negligence in shipment and in delivering the car to a third person without requiring the delivery of the original bill of lading properly indorsed, where it appeared that the defendant was informed by an agent of the consignor before delivery of the produce that the bill of lading with the draft attached had been indorsed to the plaintiff and was in a bank of the city to which the produce was shipped for collection, and that such agent had no authority or control over them, evidence held sufficient to sustain a finding that there was a wrongful delivery of the produce.—First Nat. Bank of Allegan v. Grand Rapids & I. Ry. Co., 195 Mich. 1.

¶ 241. The nonexistence of ice in the bunkers of a fruit refrigerator car may not be established by evidence that there could not have been any ice in the car, and that if there was ice in the car, cold air would strike the limbs of a person upon entering the car, where the bunkers could easily be examined.—Perkett v. Manistee & N. E. R. Co., 191 Mich. 106.

¶ 242. In an action by a shipper against the initial carrier for damages for delay in shipment and improper icing of fruit alleged to be due to the negligence of a connecting carrier, evidence held insufficient to establish improper icing.—Perkett v. Manistee & N. E. R. Co., 191 Mich. 106.

¶ 243. In an action by a shipper against a carrier for damages for the freezing of produce alleged to be caused after an unreasonable delay, evidence held insufficient to establish that the produce was not frozen before the delay had become unreasonable.—Lardie v. Manistee & N. E. R. Co., 192 Mich. 77.

¶ 244. In an action for damages for freezing of produce alleged to be due to delay in shipment, held that any finding that if the produce had reached its destination within the time required it would not have been frozen would be mere conjecture.—Barber v. Detroit, G. H. & M. Ry. Co., 197 Mich. 643.

¶ 245. Where an interstate shipment of potatoes in refrigerator cars is shown to have been delivered to the carrier at the point of shipment in good condition and properly loaded for transportation in the winter time, and it arrived at its destination in bad condition, with some of the potatoes frozen, some wet, and some rotten, if unreasonable delay in dispatching the shipment is shown, the condition of the goods at their destination might fairly raise the question, in absence of any proof by the carrier, whether the latter fulfilled the duty imposed upon it by Comp. Laws 1915, § 8176, to exercise that degree of care in the transportation and safe-keeping of goods intrusted to it which a reasonably careful man would exercise in regard to similar goods of his own.—A. F. Young & Co. v. Grand Rapids & I. Ry. Co., 201 Mich. 39.

¶ 246. In an action by a railroad company to recover for demurrage charges, where plaintiff sought to recover for such charges accruing to other railroads, which, like itself, formed part of the so-called "Grand Trunk Railway System," it is not error to refuse to direct a verdict for plaintiff, although there is in evidence a letter from defendant to such "system" informing it that defendant is withholding payment of its charges against defendant pending settlement of a claim for delay in transporting beets, such letter being at most a promise to pay what defendant owed to such "system" on condition of the settlement of its claim, and being addressed to the "system," and not to plaintiff, was not an admission that it owed plaintiff anything.—Detroit, G. H. & M. Ry. Co. v. Owosso Sugar Co., 192 Mich. 533.

§ 91. Questions of law and fact.

In general, see Trial, VI.
As to damages, see Damages, XII.

¶ 247. Where a shipper had adopted the habit of leaving his goods on the station platform until they were ready for shipment and then notifying the agent of their being so ready, the question whether in the case in question the agent had been so notified and whether the goods were in the possession of the defendant as a common carrier, was for the jury.—Stapleton v. Grand Trunk Ry. Co., 133 Mich. 187.

¶ 248. The question of a carrier's negligence in handling a car in which matches were loaded, was for the jury, in an action against such carrier for damages to such goods while in transit, where the evidence tended to show that the matches were packed in air-tight cartons, that such cartons were packed in pine boxes securely nailed, and that the matches could not have ignited unless these boxes were broken open, and the matches scattered, that the car containing the matches was in good condition when receipted for by defendant road, but that after coming into defendant's possession, and prior to reaching its destination, the two couplers at either end of such car were cracked so that they had to be replaced.—Modern Match Co. v. Baltimore & O. R. Co., 140 Mich. 570.

¶ 249. In an action against a railroad company by the assignee of a claim of the consignee of a shipment of goods for dam-

ages for negligent performance of the contract of carriage resulting in a shortage of goods received by plaintiff's assignor, where it appeared that the freight bill, with an admission thereon of shortage signed by an agent of the carrier, was introduced in evidence, but that the seal of the car was intact when the car was delivered to the consignee; that all of the goods were not removed during the day and there was no evidence that the car was sealed during the night following the first day, and the shortage was not discovered until the goods reached the warehouse of plaintiff's assignor, held that it was a question for the jury whether there was a shortage which was due to the negligent performance of defendant's contract.—Oceana Canning Co. v. King, 195 Mich. 628.

§ 92. ——Delay and reasonableness of time.

¶ 250. The alleged negligence of a carrier in failing to make prompt delivery of a box, held, under the evidence, to be a question for the jury.—A. E. Wood & Co. v. Michigan Cent. R. Co., 184 Mich. 672.

¶ 251. In an action for damages caused by delay in transportation of a shipment of potatoes against the receivers of a railroad, the question as to whether delivery was made in a reasonable time held for the jury.—Loveland & Hinyan Co. v. Waters, 192 Mich. 680.

¶ 252. In an action for damages for delaying cars loaded with peach baskets required by plaintiff in its business, evidence held to present a question of fact as to whether the cars were moved with reasonable dispatch, which question was properly submitted to the jury.—Fremont Canning Co. v. Pere Marquette R. Co., 180 Mich. 283.

¶ 253. In an action for damages for delay in delivering a car loaded with cans required by plaintiff which was engaged in the peach canning business, it was shown that the car was placed on a siding at a distant point inaccessible to plaintiff and was not moved to plaintiff's siding until two days later, and that by reason of the delay food intended to be placed in the cans was greatly depreciated in value, held that the question of defendant's negligence was for the jury.—Fremont Canning Co. v. Pere Marquette R. Co., 180 Mich. 283.

¶ 254. In an action against a railroad company for failure to furnish refrigerator cars as provided by contract between plaintiff and defendant, evidence held to present a question of fact as to whether such cars were furnished within a reasonable time as required by Public Acts 1909, No. 300, § 8, How. Ann. St., 2nd Ed., § 6531.—Fremont Canning Co. v. Pere Marquette R. Co., 180 Mich. 283.

§ 93. ——Place of injury; connecting lines.

In live stock shipments, see post § 108.

¶ 255. The question of whether goods had been delivered to a connecting carrier is one for the jury, upon conflicting evidence.—Reason v. Detroit, G. H. & M. Ry. Co., 150 Mich. 50.

¶ 256. In an action against a carrier for injury to perishable fruit by insufficient icing, where the bill of lading provided for re-icing as often as necessary to keep the car thoroughly iced, the question as to whether any injury occurred while the cars were upon defendant's road was for the jury, where there was some testimony tending to show that the cars were insufficiently iced when furnished, of which fact plaintiff had no knowledge until too late to remedy the difficulty, and where there was also evidence of delay.—Johnson v. Toledo, S. & M. Ry. Co., 133 Mich. 596.

¶ 257. Defendant carrier received a car of potatoes from plaintiff, with instructions to notify the consignee of their arrival. In making the transfer to the connecting carrier, defendant failed to include such instructions to notify in the waybill. After many delays, unexplained by the evidence, on the route of the connecting carrier, the goods arrived at the place of consignment and remained upon the track four days before the consignee was notified. There was evidence of damage from decay, but there was no evidence what part of said damage was incurred while the potatoes were en route by the connecting carrier and what part was incurred in the period between the time of their arrival and the time the consignee was notified. Held, the court properly directed that plaintiff could recover only nominal damages.—L. Starks Co. v. Manistee & N. E. R. Co., 165 Mich. 518.

¶ 258. Plaintiff shipped goods by freight from St. Louis to Flint, Mich. By mistake of defendant railroad the car was taken to Utah. Before it reached Flint, plaintiff left and made his home in Detroit. He asked defendant's agent in Detroit to have the goods sent to Detroit when they reached Flint, or to intercept them and have them sent directly to Detroit. This the agent agreed to do. The agent did not intercept them. Upon their arrival at Flint plaintiff was notified and ordered them carried by another railroad to Detroit, where they arrived in damaged condition. Plaintiff offered no evidence to show whether the damage occurred before the arrival at Flint or on the way between Flint and Detroit. Held, there was no contract with defendant for transportation from Flint to Detroit, and a verdict should have been directed for it.—Sheehy v. Wabash R. Co., 169 Mich. 604.

§ 94. ——Contributory negligence.

¶ 259. Whether a person engaged in the millinery business was negligent in failing to accept from a carrier a box labeled "shoes," which did not have any mark indicating the consignor, held properly submitted to the jury in an action against the carrier for loss occasioned by the delayed delivery of a box of velvets, where the plaintiff claimed that the box first tendered was not the one subsequently delivered.—A. E. Wood & Co. v. Michigan Cent. R. Co., 184 Mich. 672.

¶ 260. Whether a milliner was negligent in ignoring notices from a carrier of the receipt of a box marked "shoes" which did not bear the name of the consignor, held properly submitted to the jury in an action against the carrier for loss occasioned by a delayed delivery of a box of velvets, where the plaintiff claimed that the box referred to in such notices was not the one subsequently delivered.—A. E. Wood & Co. v. Michigan Cent. R. Co., 184 Mich. 672.

§ 95. Instructions.

General law of instructions, see Instructions. Instructions on damages, see Damages, XII.

¶ 261. Where an action for an injury to goods transported by successive carriers is brought against one of them, it is error to charge that if the goods were delivered in good order to the first carrier it is inferable, in the absence of evidence, that they continued so until received by the defendant.—Marquette, H. & O. R. Co. v. Kirkwood, 45 Mich. 51.

¶ 262. In a suit by a railroad against a shipper for negligently causing a car assigned to it to be destroyed by fire, the court charged that after plaintiff had made a prima facie case of negligence the burden was on defendant to show that it used reasonable care in setting up and firing a stove therein to keep potatoes from freezing. Defendant introduced evidence to the effect that it was necessary and customary to maintain fires in stoves in such cases; that this was known and permitted by plaintiff; that the stove used was the usual one, was sound and was carefully set up; and that due care was used in firing and caring for same. Held, the instruction was sufficiently favorable to plaintiff to prevent a reversal of a verdict and judgment in defendant's favor.—Grand Rapids & I. Ry. Co. v. L. Starks Co., 172 Mich. 270.

¶ 263. In an action for damages for failure to furnish refrigerator cars as provided by contract between plaintiff and defendant railway company, instructions held fairly to submit the case to the jury.—Fremont Canning Co. v. Pere Marquette R. Co., 180 Mich. 283.

¶ 264. A request to charge the jury that by contract of carriage the liability of defendant was limited to five dollars for each hundredweight carried, was properly refused where the only evidence of such limitation of liability was the unexplained clause in the bill of lading, "O. R. Rel. $5 per cwt. Henry Reason, Shipper, per M. Jacobs," and where it appeared that Jacobs did not in fact sign, and the authority of Jacobs to sign was denied.—Reason v. Detroit, G. H. & M. Ry. Co., 150 Mich. 50.

III. CARRIAGE OF LIVE STOCK.

§ 96. In general.

General law and regulations of all carriers, see ante I.

Burden of proving character of carrier, see post § 107.

¶ 265. Railroad companies are not, by the common law, common carriers of live stock, and can only make themselves such by assuming to convey it as common carriers.—Michigan Southern & N. I. R. Co. v. McDonough, 21 Mich. 165; Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329.

¶ 266. One who has never assumed or offered to carry chattels of a certain class—e. g., live stock—except upon special terms exempting him from all the important duties and liabilities of a common carrier, cannot be classed among common carriers of property of that kind, or be made amenable in the character of a common carrier as to such property.—Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329.

¶ 267. A charter passed in 1846, binding a railroad company to take upon itself the business of a common carrier, did not impose the duty of carrying cattle and live stock; and the company could not, therefore, be held liable as common carrier for the transportation of such property, except by special contract to that effect, or by professing or holding itself out to the public or to plaintiff as doing that kind of business in the character and with the risks of common carriers. The burden of proof of such contract or of such holding out would be upon the plaintiff; and the mere fact that defendants were in the habit of transporting this kind of property does not, of itself, raise any presumption that they had assumed the common law duties and responsibilities of common carriers of such property.—Michigan Southern & Northern I. R. Co. v. McDonough, 21 Mich. 165.

¶ 268. That a company has the character of common carrier of live stock is not shown by evidence that it has carried and still offers to carry live stock for hire for all who desire, on terms as to duties, liabilities and relations not recognized by the law of common carriers, but in some respects variant from, and in others repugnant to it.—Lake

Shore & M. S. R. Co. v. Perkins, 25 Mich. 329.

¶ 269. Whether live pigeons would, at common law, be freight for an express company acting as common carrier, quaere.—American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515.

§ 97. Duties and liabilities of carrier.

Feeding and watering and caring for animals, see post § 99.
Particular liabilities, see also post §§ 101-103.
Preference in right to cars and movement, see Comp. L. 1915, § 8116.

¶ 270. The obligation to furnish suitable cars fit for the carriage of horses is absolute without reference to the fitness or fidelity of agents or officers, subordinate or otherwise, or the silence of the special contract for carriage, unless the party with notice of the defect assented to their use.—Great Western R. Co. v. Hawkins, 18 Mich. 427.

¶ 271. The fact that railroad companies hold themselves out to the public as carrying live stock for all alike, on the same special terms as to care and risks (different from those of common carriers), would not make them common carriers as to such care and risks, though, in other respects, their liability should be the same as in the case of other property generally; and their obligation to furnish proper cars, and properly to make up and run their trains, would be the same, and the provisions of their charter against partiality would apply.—Michigan Southern & Northern I. R. Co. v. McDonough, 21 Mich. 165.

¶ 272. A railroad company, in carrying live stock, is not chargeable with the common-law liability of a common carrier, but is only bound to transport with ordinary prudence, skill and care, and with reasonable dispatch —Heller v. Chicago & G. T. R. Co., 109 Mich. 53.

¶ 273. A railroad company transporting live stock is not chargeable with the common-law liability of a common carrier, and is bound only to transport the stock with reasonable dispatch.—McKenzie v. Michigan Cent. R. Co., 137 Mich. 112.

Liability of carrier for injury to live stock from defective or unsuitable cars or loading facilities, see note, 6 N. C. C. A. 349-355.
Liability of carrier for loss of or injury to live stock as result of delay in transportation or in furnishing cars, see note, 6 N. C. C. A. 521-539.

Right of carrier to delay shipment of live stock after accepting same because of doubt as to sufficiency of certificate of health, see note, 16 N. C. C. A. 1008-1009.

§ 98. Contracts and limitations on liability.

Necessity of stop to allow watering assumed by shipper, see post § 100.
Provision for claim before suit as part of contract, see post § 104.
Contract obnoxious to federal statute relating to watering and care in transit, see post ¶ 291.
Burden of proof of limitations, see post § 107.
Statutory right to limit, see Comp. L. 1915, §§ 8248, 8334.

¶ 274. Provision in a bill of lading, that a shipper of a carload of cattle is at his own sole risk and expense, to load, care for, and feed and water the stock, and limiting the liability to negligence by the contracting carrier on its own road, is not contrary to public policy.—Hengstler v. Flint & P. M. R. Co., 125 Mich. 530.

¶ 275. A common carrier's liability does not attach to a railway company that has contracted to move a menagerie in the latter's own cars, controlled by its own agents, and, though operated by railway employees, run upon a time schedule to suit the menagerie. And a stipulation that the railway company shall not be liable for injuries to the menagerie caused by want of care in thus moving it may be upheld.—Coup v. Wabash, St. L. & P. R. Co., 56 Mich. 111.

¶ 276. Cattle were delivered to a railroad company for immediate shipment. Two days afterwards the company delivered a contract for carriage with restrictive clauses. In an action for damages caused by unreasonable delay, held, that the contract would be the measure of the obligation of the company from the time it was given, but would not merge any liability the company might have incurred by unreasonable delay previously,—there being nothing in the terms indicating such an intent.—Cleveland & T. R. Co. v. Perkins, 17 Mich. 296.

¶ 277. A contract for the carriage of live stock which exempts the railroad company from responsibility for losses and damages "in loading, unloading, conveyance and otherwise," whether arising from negligence, misconduct or otherwise, does not exempt the company from the necessity of furnishing suitable cars; and a loss in consequence of defective cars the company is liable for.—Hawkins v. Great Western R. Co., 17 Mich. 57; Great Western Ry. Co. v. Hawkins, 18 Mich. 427.

¶ 278. A contract of a railroad to carry a carload of cattle does not impose upon the

company the duty to feed and water them when its express provisions put that duty on the shipper.—Hengstler v. Flint & P. M. R. Co., 125 Mich. 530.

¶ 279. The words "or from causes beyond their control" in a contract for the shipment of live stock providing that the carrier should not be liable for the injury to live stock from "any or either of the following causes to wit: overloading, crowding upon one another, kicking or goring, suffocating, fright, burning of hay or straw or other material used for feeding or bedding, or by fire from any cause whatever, or by heat, cold or by changes in weather, or for delay caused by stress of weather, by obstruction of track, by riots, strikes or stoppage of labor, or from causes beyond their control" should be construed as referring to the word "delay."—Slider v. Pere Marquette R. Co., 194 Mich. 581. (Ostrander, J., dissenting.)

¶ 280. In an agreement with a carrier for the transportation of cattle the owner agreed to take and assume "all and every risk of injuries which the animals or either of them may receive in consequence of any of them being wild, unruly, vicious, weak, escaping, maiming or killing themselves or each other, or from delays," etc., and "risk of any loss or damage which may be sustained by reason of any delay, or from any other cause or thing in, or incident to, or from or in the loading or unloading of the stock." Such agreement held to refer to injuries to the animals caused by delay, etc., and to loss or damage by reason of delay in loading and unloading, and to have no reference to other losses which the delay of the carrier might cause.—Sisson v. Cleveland & T. R. Co., 14 Mich. 489.

¶ 281. The mere statement of an agent that a carload of cattle could be shipped through to the destination is not an agreement to be liable for the neglect of a connecting carrier.—Hengstler v. Flint & P. M. R. Co., 125 Mich. 530.

Limitation of liability of carrier as applied to shipment of live stock, see note, 6 N. C. C. A. 718-731.

§ 99. Care, feeding and watering in transit.

Contract provisions as to watering, etc., see ante § 98.
Assumption of duty by shipper, see post § 100.
Liability for injury while unloaded, see post § 102.
Pleading negligence, see post § 106.
Question for the jury, see post § 108.
Person riding on pass to care for stock, as passenger, see post § 113.

¶ 282. It may be said that the duty of drenching or showering stock which is being transported by a common carrier, is part of the actual duty of transportation.—Wallace v. Lake Shore & M. S. Ry. Co., 133 Mich. 633.

¶ 283. Whether an express company transporting live birds, either as a common carrier or as an ordinary carrier for hire, would not, in the absence of express agreement to do so, be impliedly bound to supply them with food and water, so far, at least, as was necessary for their preservation, quaere. A refusal to charge, in a suit to recover its freight charges, that the company was not required to feed and water the birds in the absence of the agreement to do so, and the submission to the jury of the fact of not feeding and watering to be considered as going to show actual neglect, held not error.—American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515.

¶ 284. In an action by a shipper to recover from an express company the value of a bull calf that broke from its crate and escaped, the crate having no defect other than it was a little too large, the failure of the company to tie the bull to the crate when it was noticed that it was restless and excited and, practically at the same time, broke away, is not an act of negligence and the verdict should be directed for the defendant.—Deake v. United States Exp. Co., 172 Mich. 451.

Liability of carrier for injury to or death of live stock due to heat, see note, 1 N. C. C. A. 581-587.
Negligence of carrier incidental to the dipping of live stock in accordance with quarantine laws, see note, 14 N. C. C. A. 281-288.

§ 100. ——Duty assumed by shipper or caretaker.

Evidence to show that caretaker was passenger, see post § 217.
Sufficiency of evidence of denial of opportunity, see post § 107.

¶ 285. It is the custom of shippers of live stock to send a caretaker with the stock, and, in the absence of an agreement on the part of the carrier to perform the duties of a caretaker, a shipper assumes all risks arising from his failure to comply with such custom.—Heller v. Chicago & G. T. R. Co., 109 Mich. 53.

¶ 286. The provision that "the stock is to be loaded, unloaded, fed, watered and otherwise cared for, while in the cars, by the shipper or owner," does not mean that the duty is to be performed by the shipper while the train is in motion, and without being afforded an opportunity by the company to perform it, but, if said provision should be given any force, it creates a fair inference that the

company will afford the shipper the opportunity to perform the duty which it has seen fit to impose upon him.—Smith v. Michigan Cent. R. Co., 100 Mich. 148.

¶ 287. Where a railroad company accepts horses for shipment over its road under a contract which provides that they are to be "loaded, unloaded, fed, watered and otherwise cared for, while in the cars, by the shipper or owner, and at his expense and risk," the company, as a bailee for hire, having control of the cars in which the horses are placed, is bound at least to furnish the shipper an opportunity to give the animals the care which they may require.—Smith v. Michigan Cent. R. Co., 100 Mich. 148.

¶ 288. Where the shipper of live stock sends a caretaker with the stock, the railroad is not chargeable with neglect to afford an opportunity to feed and water the stock, where no request for such opportunity is made by the caretaker.—McKenzie v. Michigan Cent. R. Co., 137 Mich. 112.

§ 101. Liability for loss, injury or delay.

Of general freight carriers, see ante II, E. Measure of damages, see Damages.

¶ 289. A statute requiring a railroad company to carry freight from its depots and way stations in the order in which it is received, when desired by the owner, is not violated by delaying the transportation of stock awaiting shipment at a way station and ready when the train passed, but which was not ready when the train was made up, and which could not be taken without the employment of an extra engine sent on at night for that purpose. The company are bound only to provide means to meet the ordinary exigencies of the business of their road, and are not obliged, owing to a sudden and unavoidable exigency arising from accident, to put another train upon the route.—Michigan Southern & Northern I. R. Co. v. McDonough, 21 Mich. 165.

Statutory provisions and general rules pertaining to liability of carriers of live stock, see note, 6 N. C. C. A. 43-58.

Liability of carrier of live stock for injuries due to negligence in transit, see note, 6 N. C. C. A. 147-166.

Liability of railroad company as carrier for injuries caused by animals shipped or kept on premises, see note, 8 N. C. C. A. 454-459.

Liability of carrier for damages to live stock due to defective or inadequate car accepted from connecting carrier, see note, 11 N. C. C. A. 483-492.

Liability of carrier of live stock for loss or damage, due to insecure yards, see note, 11 N. C. C. A. 763-778.

Liability of carrier for loss or depreciation in value of live stock awaiting shipment, in transit, or awaiting delivery after transportation, because of confinement in crowded, unsheltered, or otherwise insanitary yards, see note, 11 N. C. C. A. 826-846.

§ 102. ——Injury while unloaded incident to transportation.

¶ 290. A duty rests upon the carrier to prevent the escape of animals unloaded for some reason incident to the transportation.—Snyder v. King, 199 Mich. 345.

¶ 291. Where an interstate shipment of horses is unloaded at an intermediate point for the purpose of being watered and fed as required by the federal statute, 34 Stat. L. 608, such unloading is incident to the transportation, and, notwithstanding a prejudicial provision in the uniform live stock contract under which the horses are shipped, recovery of damages for injuries sustained by the horses after being unloaded at such intermediate point cannot be defeated on the ground that they were suffered when the horses were not being actually transported, a contract not being capable of overriding a federal statute.—Snyder v. King, 199 Mich. 345.

¶ 292. In an action aaginst a carrier for damages for injuries to an interstate shipment of horses resulting from their escape from the stock pen, at an intermediate point, into which they were unloaded for the purpose of being watered and fed as required by the federal statute, held that it was not error to deny defendant's motion for a directed verdict, sought on the grounds that there was no negligence in handling the horses at the intermediate point and that plaintiff's loss resulted from the nature of the animals themselves.—Snyder v. King, 199 Mich. 345.

§ 103. ——Excuses; act of God.

In general shipments, see ante § 40.

¶ 293. Shippers of live stock assume the risk of unavoidable accidents and delays.—McKenzie v. Michigan Cent. R. Co., 137 Mich. 112.

¶ 294. A carrier is not liable for injuries to stock in transit where the injury is due to an act of God and not to the negligence of the carrier.—Tobin v. Lake Shore & M. S. Ry. Co., 192 Mich. 549.

¶ 295. A railroad company is not liable for delay in the transportation of a car of live stock due to a washout caused by heavy rains where it acted promptly in repairing the track.—McKenzie v. Michigan Cent. R. Co., 137 Mich. 112.

¶ 296. Before a carrier can be absolved from liability for damage to stock in transit as the result of an act of God, it must appear that the circumstance relied on as an act of God was the sole, proximate cause of the damage.—Tobin v. Lake Shore & M. S. Ry. Co., 192 Mich. 549.

¶ 297. In an action to recover for damage to stock while in transit, where the defense is that the damage was due to a severe storm, which was an act of God, it cannot be said to appear that the storm was the sole proximate cause of the damage sought to be recovered for, where it appears that there were delays in transportation which were not accounted for.—Tobin v. Lake Shore & M. S. Ry. Co., 192 Mich. 549.

§ 104. Rights of action and person entitled to sue.

¶ 298. Live stock was transferred to the plaintiff while in possession of a railroad company for transportation. In an action against the company for unreasonable delay it was claimed by defendants that they were liable only in respect of such delay as had occurred after the transfer was made on their books. Held, that they were liable from the time when they had actual notice of the transfer. —Cleveland & T. R. Co. v. Perkins, 17 Mich. 296.

§ 105. Claim and presentation of same before suit.

¶ 299. The so-called "5 day" provision for filing a claim for damages under a contract for the transportation of stock, is part of a special contract limiting the carrier's common-law liability.—Tobin v. Lake Shore & M. S. Ry. Co., 192 Mich. 549.

¶ 300. There was a substantial compliance with a contract of carriage requiring a verified claim for damages for injury to a shipment of stock to be made within a specified time after unloading to the tariff manager of the carrier in a certain city before a claim would be paid or an action could be brought, except as to the verification, where, upon delivery of a shipment of horses to a shipper at the point of destination which was other than the city where the tariff manager was located, and upon tender of a receipt to the shipper for signature, he, before signing it, amended it by inserting over the words "in apparently good order," the words "stock damaged as per statement attached," and in such attached statement the horses were numbered and a detailed report of the injury to each one set forth.—Slider v. Pere Marquette R. Co., 194 Mich. 581. (Ostrander, J., dissenting.)

¶ 301. In an action against a carrier for damages for injuries to an interstate shipment of horses held that the report of plaintiff's claim made by defendant's agent at the point of destination was, under the circumstances, a substantial compliance with the requirement of the uniform live stock contract under which the horses were shipped that in the event of the accrual of damages a verified claim therefor be made in writing within five days from the time the stock is removed from the car.—Snyder v. King, 199 Mich. 345.

¶ 302. Evidence that a carrier received an unverified claim for damages from a shipper of stock, with a promise to give the matter prompt attention as soon as certain discrepancies were explained, and without any other objection than that the amount claimed was unreasonable, justifies the finding of a waiver of the requirement of its bill of lading that, in order to maintain a claim for damages to stock, a verified statement thereof must be served within five days after the removal of the stock from the cars.—Soper v. Pontiac, O. & N. R. Co., 113 Mich. 443.

¶ 303. The provision of a bill of lading that no claim for damages to the stock in question should be made unless filed within five days, was waived where, although the claim was filed one day late, it was returned to the shipper's agent to have the freight bill attached, which, having been done, the claim was placed with the carrier's agents, who after examination and further correspondence, declined to make payment, but not upon the ground of the claim having been filed too late.—Wallace v. Lake Shore & M. S. Ry. Co., 133 Mich. 633.

Notice to carrier of claim for damages for loss or injury to live stock in transit. see note, 6 N. C. C. A. 631-640.

Duty to give notice of injury to live stock by carrier notwithstanding unreasonableness of stipulated period. See note, 11 N. C. C. A. 541-546.

§ 106. Actions and pleading.

Pleading in actions on general carriage, see ante §§ 81-85.
Making claim before suit, see ante § 105.
Pleading, evidence, instructions, and jury questions on damages, see Damages.

¶ 304. Whether plaintiff in an action for negligent carriage of live stock can recover for a specific negligent act, known to him at the time of bringing suit, without alleging the same in his declaration quære.—Heller v. Chicago & G. T. R. Co., 109 Mich. 53.

¶ 305. The fact that the declaration in a suit by a shipper of horses to recover the value of one of the horses, which he claims died by reason of want of care, feeding, and

watering, charges both delay in transporting the horses, and failure to furnish the shipper an opportunity for feeding and watering them, will not warrant the contention that, as neither of said causes would alone have occasioned the death of the horse, it is necessary for plaintiff, not only to prove both, but to show that defendant omitted to perform its duty to plaintiff in both particulars, and therefore, if there is no liability on its part for delay of trains, that one of the essential elements of the proximate cause of the death of the horse cannot be charged against defendant, and the case must fail.—Smith v. Michigan Cent. R. Co., 100 Mich. 148.

§ 107. Burden of proof, presumptions and evidence.

In actions on general carriage, see ante §§ 87-90.
Presumption, see also post ¶ 317.
Evidence of character of carrier, see also ante ¶ 268.
Evidence of waiver of claim for damages, see also ante ¶ 302.
General law of evidence, see Evidence.

¶ 306. Under a declaration in case against a company for violating the duties of a common carrier in its transportation of live stock, and charging the company as a common carrier only, proof is essential that the company has the character of a common carrier of such stock.—Lake Shore & M. S. R. Co. v. Perkins, 25 Mich. 329.

¶ 307. It is incumbent upon the plaintiff in an action for injuries to live stock during shipment to show what injury, if any, resulted after the act of negligence by the company upon which the claim for recovery is based, where it appears that most, if not all, of the injury was done before such act.—Heller v. Chicago & G. T. R. Co., 109 Mich. 53.

¶ 308. Where, in an action of tort to recover for negligent damage to stock in transportation, based on the common-law liability of the carrier, the plaintiff makes out a prima facie case, it is incumbent on defendant to show a special contract changing or modifying the common-law liability.—Tobin v. Lake Shore & M. S. Ry. Co., 192 Mich. 549.

¶ 309. In an action by a shipper to recover from an express company the value of a bull calf that broke from its crate and escaped, the conduct of the bull at the time it escaped being material, evidence is admissible by the plaintiff as to the disposition of the bull while on his farm.—Deake v. United States Exp. Co., 172 Mich. 451.

¶ 310. In an action in tort to recover for negligent damage to stock in transportation, based on the common-law duty of the carrier, plaintiff makes out a prima facie case when he shows a delivery in good order to the carrier, its subsequent delivery in bad order by the carrier, together with delay in transportation and failure to feed.—Tobin v. Lake Shore & M. S. Ry. Co., 192 Mich. 549.

¶ 311. In an action by a shipper against a carrier for the death of hogs through delay and failure to water externally, where the defendant claimed that it did not appear whether the damage occurred while the car was being transported by the defendant or later while in charge of another road, the jury might have drawn the inference that defendant was responsible for the injury from the fact that the delay of the defendant was during the most trying time of the day.—Wallace v. Lake Shore & M. S. Ry. Co., 133 Mich. 633.

¶ 312. In an action for damages for delay in transportation of live stock against a carrier, statements by defendant's station agent that defendant had acquired control of a connecting line whereon the delay was caused, do not prove that the said connecting line was not a carrier responsible alone for the acts of its servants, and for the service it gave freight shippers.—Goehrend v. Pere Marquette R. Co., 146 Mich. 497.

¶ 313. Testimony of a shipper of a carload of cattle that he spoke to the conductor and brakeman about feeding and watering whenever he had the chance, and that he told them the cattle would need water and feed, and they told him they could not give it to him, is not sufficient to fasten liability on the initial or connecting carrier where the bill of lading puts the burden of caring for the stock on the shipper and the evidence shows an 8 hour lay-over in one town, where it might have been done.—Hengstler v. Flint & P. M. R. Co., 125 Mich. 530.

§ 108. Questions for jury and instructions.

Instructions as to duty to feed and water, see also ante ¶ 283.
Directing verdict on negligence, see also ante ¶¶ 284, 292.

¶ 314. The question of the negligence of a carrier to drench or shower certain hogs which were being carried, was for the jury, although the bill of lading provided that the shipper was to load, take care of, feed and water the stock during transportation, and that neither the carrier nor a connecting carrier was to be under liability or duty with reference thereto except in the actual transportation; and although the shipper did not

accompany the stock, although given transportation for the purpose; it appearing that the conductor knew that the shipper was not on the train, and that such shipper could have done nothing in the way of drenching or showering the hogs had he been present.—Wallace v. Lake Shore & M. S. Ry. Co., 133 Mich. 633.

¶ 315. In an action by a shipper against a carrier for the death of hogs through delay in delivery at the stock yards and failure to shower the hogs while in transit, where the testimony as to the negligence of the defendant was conflicting, and there was room to infer both delay and failure to properly shower, the question was one for the jury.—Wallace v. Lake Shore & M. S. Ry. Co., 133 Mich. 633.

¶ 316. The case should go to the jury where a carrier was sued for delay in transporting animals and failure to feed and water them or provide means for so doing, also for breach of the statutory duty (Comp. L. 1897, § 11742) not to carry them continuously for more than 28 hours without unloading, rest, food and water, and where there was evidence that the delay and damage occurred after delivery to the L. E. railroad at a junction point, but there was evidence that the L. E. railroad was controlled by and a part of defendant's line, and there having been no routing or any connecting line named in the contract which simply undertook to transport from place of origin named "to destination if on the carrier's line of railroad, otherwise to the place" of connection; since it could not be said as matter of law that the injury did not occur on defendant's line under such proof.—Goehrend v. Pere Marquette R. Co., 146 Mich. 497.

¶ 317. Where freight charges for carrying live pigeons were sued for, and neither pleadings nor evidence indicated in what character the plaintiff carried them, it was held no error to refuse charges based on the assumption that common carriers are not liable for injury to live animals in the course of transportation; also, that the plaintiff could not complain of being held to the liability, at least, of ordinary bailees for hire.—American Merchants' Union Exp. Co. v. Phillips, 29 Mich. 515.

IV. CARRIAGE OF PASSENGERS.

A. IN GENERAL; REGULATIONS; DUTY TO PUBLIC.

§ 109. In general; duty to receive and carry.

General law and regulations of carriers, see ante I.

Carriage of baggage, see post V.

¶ 318. Any one, no matter what his character is or has been, presenting himself for transportation to a common carrier, is, upon paying his fare, entitled to be transported, provided there is nothing in his condition or conduct when he presents himself, to justify his exclusion.—Meisner v. Detroit, B. I. & W. Ferry Co., 154 Mich. 545.

¶ 319. It is not proper to exclude a blind person simply on account of his blindness, if he is competent to care for himself.—Wilson v. Detroit United Ry., 167 Mich. 107.

§ 110. Inception of the relation; who are passengers.

To whom duty of care to prevent personal injuries is owing, see post IV, E, 1.

Termination of relation, see post § 114.

Contract for carriage, see post § 117.

Signalling at flag station, see also post ¶ 414.

Evidence as to character, see post § 217.

Delivery to attach liability for baggage, see post § 246.

Person buying ticket solely to have baggage carried, see also post ¶ 826.

¶ 320. The acceptance of a passenger by a carrier need not be direct nor express to create the relation of carrier and passenger, but it must be something from which it can fairly be implied.—Ramonas v. Grand Rapids Ry. Co., 194 Mich. 69.

¶ 321. One who runs and boards a moving interurban car need not introduce himself or be introduced to the carrier's agent, or be recognized by the carrier's agent before he becomes a passenger.—McKenzie v. Detroit, J. & C. Ry. Co., 195 Mich. 218.

¶ 322. Plaintiff engaged in an altercation in the public street with a police officer while on his way to defendant's depot for the purpose of taking a train. He then picked up his grips and went to the door of the depot, handed defendant's baggage master fifty cents, and without entering turned back and continued the altercation with said policeman, who after calling the depot watchman to his assistance arrested plaintiff. Plaintiff's apparent purpose in handing the fifty cents to said baggageman was to apply same on the purchase of a ticket, but no ticket was in fact sold to him. Held, he was not a passenger of defendant so as to render defendant liable for its watchman's part in arresting him.—Ruman v. Michigan Cent. R. Co., 168 Mich. 651.

Existence of relation of passenger and carrier as dependent upon prepayment of fare, see note, 8 N. C. C. A. 288-298.

Liability for injuries to intending passengers, see note, 4 N. C. C. A. 432-450.

Liability of carrier for injury to prospective passenger while attempting to board moving street car, see note, 16 N. C. C. A. 1-57.

Status of persons procuring passage on railroad trains by fraudulent means, see note, 7 N. C. C. A. 262-270.

Liability of railroad company to prospective passenger struck by train or car, see note, 16 N. C. C. A. 758-789.

Liability of street railway company to prospective passenger struck by car, see note, 16 N. C. C. A. 817-827.

§ 111. ——Persons on improper trains.

¶ 323. Since railroad companies may prohibit the carriage of passengers upon their freight trains, or prescribe the conditions upon which they may ride thereon, a lumber scaler could not become a passenger on a log train by making an arrangement with the conductor to permit him to ride, contrary to a rule of the company known to both.—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557.

¶ 324. The existence of the relationship of passenger and carrier cannot be implied where a person, not familiar with the English language, but possessing the ordinary powers of observation, who has been to an amusement park where a miniature railway is operated carrying passengers and has seen the amusement concessions operated, goes to such park at a time when such railway is not being operated, sees men congregated about the railway, some of whom are eating dinner, and knows that they are employees, and that the ticket office is closed, that no tickets are being offered for sale, and no efforts being made to collect fare, and, who, instead of consulting the engineer about the price of admission or fare, or asking him when he would be ready to take on passengers for the day's business, simply asks him about making up steam, and is not invited to board the train by anybody, but is told by the engineer that when he was ready to take on passengers he would let him know, and who boards such train with employees who are on their way to work on another part of the railway, and is injured.—Ramonas v. Grand Rapids Ry. Co., 194 Mich. 69.

§ 112. ——Workmen traveling free or on passes.

Nonliability to person unlawfully traveling free on logging train, see post ¶ 431.

¶ 325. Where plaintiff, who was employed by defendant in a town where he resided, was ordered to work at the same wages at a town some distance away, being given a passbook which enabled him to ride upon defendant's railway between his home and his place of work, which book was used by him for that purpose, the inference is that the book was a part of the consideration for plaintiff's services, and therefore it was not furnished gratuitously, and plaintiff was not being carried gratuitously on it, and an agreement on the back exempting defendant from liability, is not binding.—Eberts v. Detroit, Mt. C. & M. C. Ry., 151 Mich, 280.

¶ 326. Ignorance of the fact that he was being wrongfully carried without payment of fare on a railroad train, will not relieve a person from the effect of a violation of Public Acts 1909, No. 300 (How. St., 2nd Ed., §§ 3360-3365), prohibiting the furnishing of free transportation to passengers.—Van Auken v. Michigan Cent. R. Co., 182 Mich. 331.

¶ 327. The conductor of a logging train cannot bind his employer by inviting a person to ride thereon in contravention of the published schedule of fares, and of Public Acts 1909, No. 300 (How. St., 2nd Ed., §§ 3360-3365), prohibiting the furnishing of free transportation.—Van Auken v. Michigan Cent. R. Co., 182 Mich. 331.

Employee of street railway company as passenger while being carried to or from work, see note, 2 N. C. C. A. 165-174.

Liability of carrier for injuries to government postal employees, see note, 14 N. C. C. A. 197-222.

§ 113. ——Caretakers accompanying shipments.

¶ 328. A person accompanying stock on a drover's pass, is a passenger for hire, and he is not bound by a stipulation releasing the carrier from liability for negligence.—Weaver v. Ann Arbor R. Co., 139 Mich. 590.

¶ 329. Under a contract giving a shipper the right to have an employee accompany a shipment of stock, a person actually put in charge of, and accompanying the stock is an "employee" though he has not previously been employed by the shipper and receives no compensation other than the free transportation.—Weaver v. Ann Arbor R. Co., 139 Mich. 590.

¶ 330. "Bona fide employees" of a shipper of stock as used in instructions to the agents of the carrier will be construed as meaning "Parties actually in charge of and accompanying within named stock," where the latter expression is used in the contract of carriage.—Weaver v. Ann Arbor R. Co., 139 Mich. 590.

¶ 331. Where a contract by a shipper for the shipment of stock contained the expression "Parties actually in charge of and accompanying within named stock," and instructions to the carrier's agents on the back of

the contract specified "bona fide employees" of the shipper, "bona fide employees" will be held to mean the same as the expression used in the contract.—Weaver v. Ann Arbor R. Co., 139 Mich. 590.

Liability of carrier for injury to shipper accompanying shipment, see note, 6 N. C. C. A. 649-674.

§ 114. Continuance and termination of the relation.

Continuance of relation until time to alight and be clear of cars, see also post § 183.
Continuance of relation until passenger has passed clear of unsafe place at point of alighting, see post § 184.
Effect of tardiness in leaving train due to sleeping, see also post ¶ 483.
Termination of initial carrier's relation when change is made to connection, see post ¶¶ 814, 815.
Ejectment or order to leave train as making one trespasser, see post ¶ 381.

¶ 332. The relation of common carrier and passenger continues to exist while the latter is alighting from the train.—Serviss v. Ann Arbor R. Co., 169 Mich. 564.

¶ 333. In the case of a street railway, ordinarily, the relation of carrier and passenger terminates as soon as the passenger alights and the railway no longer owes him the duties of care of a carrier to a passenger.—Spangler v. Saginaw Valley Traction Co., 152 Mich. 405.

¶ 334. The relation of passenger and carrier continues while the passenger is transferring from one car to another, he having been furnished a ticket enabling him to do so, when a transfer from one street car to another is part of a continuous trip.—Wilson v. Detroit United Ry., 167 Mich. 107.

¶ 335. Passengers who have alighted in safety from motor cars running on railroad tracks at a country crossing and at a point in the public highway from which they can depart where and as they please, thereafter cease to be passengers, and become merely travelers upon the highway.—Switzer v. Ann Arbor R. Co., 190 Mich. 35, 16 N. C. C. A. 198.

¶ 336. A passenger who has just landed from a steamboat is not so identified with the steamboat company as to make the company solely liable for an injury suffered by the passenger from another quarter immediately afterwards.—Malmsten v. Marquette, H. & O. R. Co., 49 Mich. 94.

Status of passenger leaving train for refreshments, see note, 14 N. C. C. A. 716-723.

§ 115. General duty to passengers.

To prevent personal injuries, see post IV, E.
Towards children and infirm or disabled persons, see also post § 150.
Duty towards free passengers, see post § 152.
In regard to cars, facilities and stops, see post IV, C, IV, E.
In regard to carrying passenger and ejection, see post IV, D.
In regard to tickets and fares, see post IV, B.
In taking on or setting down passengers, see post IV. E, 5.
Protection from other passengers or carrier's servants, see post § 187.
Right of passengers to be in stations and cars, see post IV, C, D.
Duty of passengers to know ordinary incidents of travel, see post § 188.
Pleading, evidence, questions of fact, and instructions in passenger's actions for injuries, see post IV, E, 8.
Instructions as to care required, see post §§ 233-237.

¶ 337. In determining the duties of conductors, and the rights of passengers, the methods generally adopted by common carriers to carry on business successfully must be regarded.—Frederick v. Marquette, H. & O. R. Co., 37 Mich. 342.

¶ 338. Railway passenger carriers fulfil their duty if they furnish and conduct their road in the manner generally found and believed to be safe by prudent railway companies.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

Liability for injury to dead body, see note, 6 N. C. C. A. 1002-1009.
Duty of carrier towards dead body of passenger dying at sea, see note, 16 N. C. C. A. 89-98.
Liability of carrier growing out of transportation of dead bodies, see note, 16 N. C. C. A. 235-256.

§ 116. Carrier's regulations.

Of hackmen at stations, see ante § 8.
Against travel on freight trains, see post § 130.
Duty to prevent riding in unsafe place, see post § 131.
Ejection for breach of regulations, see post IV, D.
Pleading regulations, see post § 208.
Rules and waiver of them as jury question, see post § 221 et seq.
Power of carrier to regulate, see Comp. L. 1915, § 8243, "Ninth" par.

¶ 339. Passengers on railroad cars are not interested in the internal affairs of the company, nor are they required to know the rules or regulations made by the directors of the company for the control of the actions of its agents and management of its affairs.—Hufford v. Grand Rapids & I. R. Co., 64 Mich. 631.

¶ 340. The right to be carried by a common carrier of passengers is a right superior to the rules and regulations of the conveyance, and it cannot be affected by them; but the accommodation of passengers, while being transported, is subject to such rules and regulations as the carrier may think proper to make, provided they be reasonable.—Day v. Owen, 5 Mich. 520.

¶ 341. Rules and regulations must have for their object the accommodation of passengers generally; and they must be of a permanent nature, and not made for a particular occasion or emergency.—Day v. Owen, 5 Mich. 520.

Right of carrier to make reasonable rules and regulations in the transportation of its passengers, see note, 4 N. C. C. A. 982-996.

Rule of carrier requiring passengers to exhibit tickets before entering trains, see note, 7 N. C. C. A. 1099-1104.

B. CONTRACTS, TICKETS AND FARES; LIMITING LIABILITY.

§ 117. In general; contract for carriage.

Acceptance of passenger by carrier, see ante § 110.

Stamping, dating and signing, see post § 125.

Coupon ticket as separate contracts with right to stop over en route, see post § 124.

Transfers and tickets for connecting lines, see post § 239.

What facilities and trains must be furnished under the contract, see post IV, C.

Acquiescence in riding on trains not within contract, see post § 364.

Regulation and reasonableness of rates, see ante § 3; and see Public Service; Railroads, I; Street Railroads, I.

Right to eject for want of proper ticket, see post IV, D.

Pleading payment or tender of fare, see post §§ 142, 146, 147.

Evidence as to honoring of ticket issued by predecessor, see post ¶ 403.

Prohibition of free passes, see Comp. L. 1915, § 8113 (a).

¶ 342. A contract to carry a child as a passenger is established where a father asked for tickets for his child to a village at which there was no station and, pursuant to custom, was given a ticket by the agent to a station of a similar name two miles distant, and such ticket was accepted by the conductor.—Moss v. Detroit & Mackinaw Ry. Co., 188 Mich. 1.

Duty of carrier to change money presented in payment of fare, see note, 9 N. C. C. A. 877-889.

§ 118. Special contracts.

Commutation tickets, dating and signing, see post § 124.

Contract for particular stop, see post §§ 132, 133.

Breach of contract, see post § 145.

Right of action for breach of contract, see post § 145.

Statutory sanction for reduced and special rates, see Comp. L. 1915, § 8350.

¶ 343. The passenger and ticket agent of defendant railway made a contract to carry plaintiff and his party promptly from Detroit to Washington, upon the regular train, to arrive there at the time required, guaranteeing the connection at Buffalo. Held, the contract was within the scope of the agent's authority.—Hayes v. Wabash R. Co., 163 Mich. 174.

Liability of carrier for failure to furnish special train or other exclusive accommodation, see note, 8 N. C. C. A. 777-779.

§ 119. Nature, necessity and sufficiency of tickets.

For through or local travel, see post § 122.

Extra fare for payment on train, see post § 126.

Duty to show ticket or evidence thereof, see post § 137.

Duty to pay fare to prevent ejection, see post § 138.

Burden of proof and evidence in action for ejection, see post § 143.

Necessity to check baggage, see post § 246.

Parol evidence to prove terms of contract, see Evidence, V, A.

¶ 344. As between conductor and passenger the latter's ticket is conclusive evidence of the extent of his right to travel, and he must produce it when called on, as the evidence of his right to the seat he claims.—Frederick v. Marquette, H. & O. R. Co., 37 Mich. 342; Hufford v. Grand Rapids & I. R. Co., 53 Mich. 118.

¶ 345. A passenger ticket "good on any train" does not give the right of riding on a through freight train without a permit, where the company's rule forbids; and the conductor may eject a person who attempts to ride.—Thomas v. Chicago & G. T. R. Co., 72 Mich. 355.

¶ 346. In order to show that a contract of carriage evidenced by a mileage book issued by another company has been assumed by a defendant carrier, evidence that it had been honored for several months, is admissible.—Johnson v. Michigan United Rys. Co., 153 Mich. 65.

§ 120. ——For travel on special rates.

¶ 347. Conceding the right to so contract, a contract entered into between a village and an interurban railway company, whereby the passenger rates anywhere on the line are fixed at 1½ cents per mile is enforceable and any person may claim the benefit without being required to purchase a ticket.—Coy v. Detroit, Y. & A. A. Ry., 125 Mich. 616.

§121. Opportunity and place to buy tickets.

Statutory provisions, see Comp. L. 1915, § 8246.

¶ 348. Under a street railway franchise providing for the sale of tickets on the cars good either way between points in a village to a certain city, in strips of five at a reduced rate, and providing that tickets be kept upon each car, the company is required to have such tickets for sale on its cars at points other than within the territorial limits of such village.—Rice v. Detroit, Y. & A. A. Ry. Co., 122 Mich. 677.

¶ 349. Under a provision in a franchise that family tickets "entitling the purchaser or any member of his immediate family to ten rides from any point in said township to and from the city of Pontiac and vice versa," shall be sold, the meaning is that every one has a right to purchase a family ticket at the place where he has a right to board the cars for passage, and it is not a compliance therewith to sell tickets only at one terminal.—Township of West Bloomfield v. Detroit United Ry., 146 Mich. 198.

§ 122. Through, local and zone rates and tickets.

Power of Michigan Central railroad, see ante § 3.

Coupon tickets and right to stop over, see post § 124.

Franchise rates for street railways, see also Street Railways, I.

Statutory rates, see Comp. L. 1915, § 8243, "Ninth" par.

¶ 350. A passenger on an interurban car is entitled to ride from one town to another for the aggregate of the fares for the different townships, fixed by contracts between the railway company and the various townships and cities through which he rides, regardless of the general mileage charge sought to be imposed by the company, and regardless of rates of fare fixed for villages inside the said townships, and subject to township regulations because inside.—Coy v. Detroit, Y. & A. A. Ry., 125 Mich. 616.

¶ 351. A street railway company being obligated by a village franchise to accept a certain fare per mile along its road to or from such village, was bound to accept such fare from passengers to or from such village, although the franchises of other villages through which such passenger passed, provided for a different rate.—Vining v. Detroit, Y., A. A. & J. Ry., 133 Mich. 539.

¶ 352. A ticket issued by a street railway company for passage from a village to another city, is a contract binding upon the street railway company, and being unrestricted and unlimited, additional fare cannot be exacted from the passenger because of the fact that he is a through passenger and did not get on the car at the village referred to, but at a point further away.—Kissane v. Detroit, Y. & A. A. Ry., 121 Mich. 175.

¶ 353. A street railway company, organized under Pub. Acts 1893, No. 12, which provides for maintenance of a road upon conditions agreed upon by the company, and townships through which the road passes (§ 13), which company is also granted a franchise from a village situated wholly within a township, granting to the company the right to charge one and one-half cents per mile for carriage of passengers, provided that no passenger shall be carried for less than five cents for any distance, is not authorized to charge an extra fare for riding through the village where the franchise granted by the township stipulates the amount to be charged for passage through the township.—Kissane v. Detroit, Y. & A. A. Ry., 121 Mich. 175.

¶ 354. A street railway company, organized under Pub. Acts 1893, No. 12, which provides for maintenance of a road upon conditions agreed upon by the company, and townships through which the road passes (§ 13), is bound by such agreements, and where such company operates under franchises from several townships, permitting transportation for a certain sum for passage through each township, it cannot exact an additional fare for passage through a village situated wholly within one of such townships, even though the franchise granted by such village stipulates that no person shall be carried any distance for less than the additional sum sought to be collected.—Kissane v. Detroit, Y. & A. A. Ry., 121 Mich. 175.

Right of passenger to make journey by stages for purpose of taking advantage of local fares less than through fare, see note, 13 N. C. C. A. 967-968.

§ 123. Fractional fares and distances.

¶ 355. How. St., § 3323, subd. 9, which authorizes railroad companies to regulate the time and manner in which passengers and property shall be transported, and the tolls and compensation to be paid therefor, but provides that such compensation for transporting any passenger and his or her ordinary baggage, not exceeding a given weight, shall not exceed two, two and one-half or three cents per mile, according to the gross earnings per mile of each road, will not permit a charge for a fraction of a mile, unless it is so large a fraction as to make the charge of one cent or more not in excess of the rate per mile fixed by the statute.—Zagelmeyer v. Cincinnati, S. & M. R. Co., 102 Mich. 214.

¶ 356. Under How. St., § 3323, subd. 9, fixing railroad passenger rates at three cents per mile, the utmost which could be charged for a distance of 6.48 miles was 19 cents, the fraction over being less than one-half of 1 cent.—Chamberlain v. Lake Shore & M. S. R. Co., 122 Mich. 477.

¶ 357. A street railway company which placed its own construction upon the provisions of its franchise requiring it to sell a strip of five tickets for fifty cents for the fare between a village and a city, by dividing each ticket into halves for use at intermediate points, had no right to demand more than 5 cents for the remainder of the trip from a passenger who had used a half ticket at such intermediate point and had demanded a strip of 5, which the conductor did not have on hand.—Rice v. Detroit, Y. & A. A. R. Co., 122 Mich. 677.

§ 124. Coupon and return tickets.

Stamping, dating and identification, see post § 125.

¶ 358. A person bought tickets at a railroad agency in Buffalo, one from Buffalo to Stratford in Canada, and the other from Stratford to Detroit over another road. The two tickets were printed on one paper. He used the first; stopped over at Stratford for two months, and then continued his journey to Detroit. On offering the second ticket for his passage it was refused because of the delay. Held, that the tickets were distinct contracts for separate journeys, and, as they contained no restrictions, the validity of the second was not affected by the delay.—Brooke v. Grand Trunk R. Co., 15 Mich. 332.

¶ 359. A return coupon is not evidence to conductor of the holder's right to finish out the remainder of the going portion of the trip, where the first conductor mistakenly took up all the going coupons, leaving the passenger without any token of his right to ride from a change station to destination.—Van Dusan v. Grand Trunk R. Co., 97 Mich. 439.

§ 125. Stamping, dating, signing and identification.

Ejection for failure to have ticket stamped and dated and signed, see post § 136.

¶ 360. Where the right to a return passage upon an excursion ticket was conditioned upon presentation of the ticket to defendant's agent at Chicago, its dating and stamping by him, and the affixing of plaintiff's signature to a printed statement on the back of the ticket, as evidence that he was the original purchaser, held, that the condition was reasonable, and that it was a condition precedent to plaintiff's right to such return passage, and that the conductor to whom the ticket was presented was not called upon to investigate as to plaintiff's identity.—Edwards v. Lake Shore & M. S. R. Co., 81 Mich. 364.

¶ 361. A commutation book bore date of issue June 8, 1909, the date of expiration was properly punched July 9, 1909, but was improperly written and printed on the back as of June 9, 1909; held that it should have been received when presented for passage on June 28, 1909.—Humphrey v. Michigan United Rys. Co., 166 Mich. 645.

§ 126. Extra charge for payment on train.

See also ante ¶¶ 347, 357.

Extra charge for through travel, see also ante ¶ 352.

¶ 362. A railroad company cannot impose, as a penalty for not purchasing a ticket before entering its car, so large a sum that the total fare collected on the train exceeds the maximum rate allowed by statute.—Zagelmeyer v. Cincinnati, S. & M. R. Co., 102 Mich. 214.

§ 127. Limitations of liability.

Effect of failure to read time limit on transfer slip, see post § 239.

Notice of limitation to own lines, see post § 240.

¶ 363. A carrier may impose such restrictions touching its liability while carrying passengers on a logging train, as it may see fit.—Van Auken v. Michigan Cent. R. Co., 182 Mich. 331.

Effect of limitation of railroad tickets to particular trains, see note, 8 N. C. C. A. 416-424.

Effect of clause in free pass purporting to relieve carrier from liability for personal injuries, see note, 14 N. C. C. A. 549-565.

C. TRANSPORTATION FACILITIES, ROUTE AND STOPS.

§ 128. In general.

Liability for personal injuries to passengers, and duty and negligence causing such injuries, see post IV, E.
Duty to have crew or attendants, see post §§ 166, 172-174.
Operating at uneven speed or with jolts and jerks, see post § 167.
Duty to afford accommodations, see Comp. L. 1915, § 8244.

¶ 364. Where a conductor permits a passenger to ride upon an expired ticket, or upon tickets good only upon certain trains, common carriers are not estopped by these acts, though often repeated, to thereafter deny the passenger's right of transportation, contrary to the terms of his contract.—Johnson v. Michigan United Rys. Co., 153 Mich. 65.

§ 129. Cars and accommodations.

Right to eject for riding on wrong train, see post § 135.
Condition for safety of passengers, see post §§ 162-164.
Liability for failure of connecting line to furnish agreed accommodations, see post § 240.

¶ 365. Where the franchise given by a township to a street railway corporation contained a provision that the passenger cars should be "supplied with suitable appliances for a suburban railway, insuring the comfort, convenience and safety of its passengers" in an action to compel the corporation to comply with the provisions of the franchise, a finding by the jury that there were no toilet rooms or water tanks sustains the contention that the cars were not supplied with suitable appliances for a suburban railway to insure the comfort and convenience of passengers.—Township of West Bloomfield v. Detroit United Ry., 146 Mich. 198.

Liability of carrier for injury to or death of passenger due to failure to heat car or waiting room, see note, 1 N. C. C. A. 393-397.

§ 130. Travel on freight trains.

Person holding ticket "good on any train," see also ante ¶ 345.
Limiting liability, see ante § 127.
Care required of passengers, see post § 190.
Variance in action for ejectment, see post ¶ 396.
Permission to ride as jury question, see post § 221.

¶ 366. A rule prohibiting conductors of freight trains from allowing persons to travel as passengers thereon without permits is reasonable and valid.—Thomas v. Chicago & G. T. R. Co., 72 Mich. 355.

¶ 367. Railroad companies may prohibit the carriage of passengers upon their freight trains, or prescribe the conditions upon which they may ride thereon.—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557.

¶ 368. Railroad companies may, through a long continued, open and notorious disregard of their rules by their employes, waive the enforcement of rules regarding riding on freight trains.—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557.

§ 131. Place to ride.

Negligence in operating cars with reference to passengers not seated or riding out of ordinary manner, see post IV, E, 4.
Care required in operating cars with passengers on running board, see post § 165.
Duty to prevent child from riding in wrong place, see also post ¶ 426.
Contributory negligence in choosing wrong place, see post §§ 194-196.
Placing invalid on cot in baggage car, see post ¶ 561.

¶ 369. Street railway companies must use safe vehicles, and must not permit persons to ride in unsafe places on their cars.—East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503.

¶ 370. A street railway company may prohibit passengers from riding upon the platform, or give notice that those who ride there must do so at their own risk, and until they adopt some such regulation and notify the public, they are liable for injuries resulting from their own negligent acts to patrons exercising reasonable care riding upon the platform.—Upham v. Detroit City R. Co., 85 Mich. 12.

¶ 371. Where the interior of a street car is crowded it is necessarily contemplated that passengers thereafter received shall ride upon the platform.—Larskowski v. Detroit United Ry., 193 Mich. 408.

¶ 372. A corporation which operates a logging railroad only as incident to its business and authorizes the conductors of its trains to receive passengers and furnishes them with tickets to be given upon payment of fare, which has no passenger cars, no train schedule, and does not solicit passenger traffic, and whose instructions are that persons carried must ride in the caboose and not elsewhere, owes no duty to any person to provide for his safety when riding anywhere other than in the caboose, and is not liable for an injury to a person sustained while riding on

a flat car, although the conductor had instructed him to ride there, the conductor being expressly prohibited from allowing passengers to ride there, and his orders to the person injured not being within the scope of his agency.—Boisen v. Cobbs & Mitchell, 147 Mich. 429.

§ 132. Time tables and information.

Penalty for misinformation, see post § 147.
Penalty for failure to carry as held out, see post § 147.
Notice of change to avoid penalty, see also post § 147.
Calling trains and calling stations and stops on trains, see post §§ 175, 179.
Reliance by public on working time table, see also post ¶ 420.
Admissibility of time tables in action for breach, see post ¶ 413.

¶ 373. Railway passengers have a right to rely, until differently informed, on the information received by them from ticket agents in answer to their inquiries as to the stoppages of trains. But they must not disregard reasonable means of information.—Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277.

¶ 374. Passengers about to embark upon a boat and with little time to spare are justified in assuming, if they do so in good faith, that they may safely follow the directions of the officers of the boat in getting on, unless there is very obvious danger in doing so. And if it takes an expert to define the duty of the officers, the presumption in the passenger's favor is all the stronger.—Clinton v. Root, 58 Mich. 182.

¶ 375. Railroad companies may change their time tables, and take off and put on trains, and all that is required under Comp. L. 1897, § 6235, which provides a penalty for failure to transport according to contract without legal or just excuse, is that reasonable notice be given of such changes.—Van Camp v. Michigan Cent. R. Co., 137 Mich. 467.

§ 133. Stations and stops.

Right to rely on information as to stops, see ante § 132.
Penalty for failing to stop at station, see post § 147.

¶ 376. Railway passengers are entitled to remain in the waiting-room at a station as long as they have occasion to do so, and commit no offense against the good order of the place and reasonable regulations made to govern it; they are not bound to leave it on being ordered out by the keeper for any such indecorum as spitting on the floor, and the refusal to go on being ordered will not excuse the commission of an assault and battery upon them to compel them to.—People v. McKay, 46 Mich. 439.

¶ 377. A railway company has power, subject to liability for damages for any breach of contract involved, to determine for itself what trains shall stop at particular places.—Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277.

¶ 378. A railway conductor cannot be required by a passenger to deviate from his regular stops on the latter's statement of an alleged agreement with the company conflicting therewith.—Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277.

¶ 379. That a regular train has already taken on more passengers than it can properly accommodate, and that others are waiting at a regular station to board the train, rendering it, in the conductor's judgment, unsafe to stop, does not constitute a "legal or just excuse" for a failure to discharge a passenger having a ticket for such station, within How. St., § 3324, providing that a railroad company, in case of its failure, without a legal or just excuse, to deliver a passenger at his destination, shall be liable to a penalty of $100.—Hoyt v. Cleveland, C., C. & St. L. R. Co., 112 Mich. 638.

D. EJECTION OF PASSENGER AND BREACH OF CONTRACT.

§ 134. In general; grounds for ejection.

On connecting line, see post § 240.
Duty to hear passenger's explanation, see post § 140.
Personal injuries to passenger, see post IV, E.
Statutory grounds, see Comp. L. 1915, §§ 8297, 8298.

¶ 380. A conductor has a right to eject a passenger who fails to produce a ticket which is apparently good upon its face or to pay cash fare.—Brown v. Rapid Ry. Co., 134 Mich. 591.

Ejection of passenger for disorderly conduct, see note, 4 N. C. C. A. 1025-1028.
Right of carrier to eject passenger for refusal to pay child's fare, see note, 6 N. C. C. A. 1060-1064.

§ 135. ——Person on wrong train.

See also ante ¶ 345.

¶ 381. One entering a train which frequently stopped at the desired destination, although not scheduled to stop there, cannot be considered a trespasser until the conductor has notified him that the train would

not stop there and that he must detrain at another station or go to the next station beyond.—Baldwin v. Grand Trunk R. Co., 128 Mich. 417.

§ 136. ——Irregular or invalid ticket.

Ticket required for riding through special fare zone, see also ante § 122.

Duty to hear passenger's explanation, see post § 140.

Invalidity of transfer kept too long, see post § 239.

Questions for jury, see post § 144.

¶ 382. The conductor of a railroad train was not called upon to investigate as to a traveler's identity, and the company was not liable in tort for his ejectment from the cars, where such traveler presented to the conductor for the return passage an excursion ticket, which contained a provision agreed to in writing by the purchaser that it was conditioned upon presentation of such ticket to defendant's agent in Chicago, its dating and stamping by him, and the affixing of purchaser's signature on the back, where such condition had not been fulfilled and such traveler refused to pay his fare.—Edwards v. Lake Shore & M. S. R. Co., 81 Mich. 364.

§ 137. Duty to show ticket or evidence of right.

See also ante ¶¶ 344, 359.

¶ 383. A railway passenger who, having in his possession evidence of the fact that he has once paid his fare (e. g., a mileage book from which the proper mileage has been regularly detached), wilfully neglects to produce the same upon his fare being again demanded by the conductor in apparent good faith, cannot recover for his ejection from the train in consequence of his refusal to comply with such demand.—White v. Grand Rapids & I. R. Co., 107 Mich. 681.

¶ 384. Where a passenger receives a check from the conductor on the surrender of his ticket, and goes into another car, and upon his fare being demanded, fails to produce the check, claiming that none was given him, and, on his refusal to return to the other car for identification, is ejected from the train, he cannot recover damages of the railroad company for such ejection.—Lucas v. Michigan Cent. R. Co., 98 Mich. 1.

§ 138. Duty to pay fare demanded.

Effect of demand for too much fare, see post § 139.

¶ 385. Although if the railroad ticket is apparently good the passenger has a right to rely on it and refuse to leave the train, if the conductor requires him to do so as an alternative to paying his fare, the safer way is to pay the fare and afterwards hold the company responsible for the refunding of the money so paid and for compensation for any trouble he may be put to in getting it.—Hufford v. Grand Rapids & I. Ry. Co., 53 Mich. 118.

¶ 386. Whatever a railway passenger's remedy against the company for damages arising from its refusal or failure to take him to his destination as agreed through its ticket agent, he has no right, without paying additional fare, to stay on the train after he is notified by the conductor that it will not stop there, and the additional exaction will be an element of the damages to which he may be entitled.—Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277.

¶ 387. The rule requiring the passenger to pay a second time, if he has the money, in compliance with his duty to minimize defendant's loss, should not be extended so as to compel him, if he has not the money, to go among his friends or acquaintances upon the train and endeavor to borrow it at the risk of refusal and humiliation.—Light v. Detroit & M. Ry. Co., 165 Mich. 433 (Hooker, J., dissenting.)

¶ 388. Where a passenger in a street car which stops before arriving at his destination is told by the conductor to get off and take the next car and does so, but presents to the conductor of the second car no evidence except his own statement of his right to ride in that car without payment, and is therefore ejected, he cannot recover damages for an unlawful ejectment; it was his duty to pay his fare and seek redress for violation of contract to convey him to the end of the line.—Mahoney v. Detroit Street R. Co., 93 Mich. 612.

§ 139. ——Demand for excessive fare.

¶ 389. One who tenders the legal fare to the conductor of a passenger train, and is ejected because of his refusal to pay the customary fare, which is in excess of the amount legally demandable, may recover the actual damages sustained by reason of his ejection, although he had knowledge of the custom of the company, and had frequently paid the higher rate of fare. He is not relegated to his remedy of paying the fare demanded and then suing to recover the excess.—Chamberlain v. Lake Shore & M. S. R. Co., 110 Mich. 614.

¶ 390. A railway passenger who either produces a ticket which, as between the conductor and himself, entitles him to passage, or stands ready to pay the fare legally demandable, can recover substantial damages

for being evicted from the car on his refusal to pay an unauthorized demand.—Zagelmeyer v. Cincinnati, S. & M. R. Co., 102 Mich. 214.

§ 140. Statement or explanation by passenger.

As to agreement to stop at certain place, see ante ¶ 378.

¶ 391. Where a passenger has bought from an authorized agent of the company a ticket covering the distance between two points, and tells the conductor that he has paid his fare to the agent who gave him the ticket presented and told him it was good, it is the conductor's duty to accept the statement of the passenger until he finds out it is not true, no matter what the ticket contained in words and figures or other marks.—Hufford v. Grand Rapids & I. R. Co., 64 Mich. 631.

¶ 392. A passenger resisting ejection cannot compel a railroad conductor to accept without question, and without opportunity to investigate, his oral statement that he has paid his fare.—Mahoney v. Detroit St. R. Co., 93 Mich. 612.

¶ 393. In transferring from one street car to another, it is the duty of passengers to secure evidence of payment of fares, and a conductor is under no legal obligation to accept their statements that they have paid such fares.—People v. Detroit United Ry., 154 Mich. 514.

¶ 394. Defendant's conductor after collecting plaintiff's cash fare, threw the receipt therefor on the floor. Later he attempted to collect the fare again and upon plaintiff's refusal to pay twice ejected him from the car without giving plaintiff a chance to explain. The conductor had a duplicate receipt in his pocket which would have thrown light on the fact of payment by plaintiff if the conductor had stopped to examine same. Held, defendant was liable in a suit for damages.—Burnham v. Detroit, G. H. & M. Ry. Co., 168 Mich. 55.

§ 141. Mode, time and place of ejection.

Liability for injury to drunken men put off of train and wandering back into danger, see also post ¶ 485.

¶ 395. A carrier of passengers is not required by the common law to put out a trespasser at one place rather than at another; and while the law will not permit a person to be wantonly exposed to peril, there is no rule which requires any consideration to be shown for the mere convenience of a wrong-doer.—Great Western Ry. Co. of Canada v. Miller, 19 Mich. 305.

¶ 396. The conductor of a train represents the company in its management, his position being similar to that of the master of a ship; and in the expulsion of a passenger from the train he will be regarded as acting in the line of his employment. But for any aggravations that may arise out of his wantonness and malice the responsibility of the company is not the same as his.—Great Western Ry. Co. of Canada v. Miller, 19 Mich. 305.

Duty and liability of carriers in regard to ejection of passengers from cars, see note, 4 N. C. C. A. 998-1034.

§ 142. Actions for wrongful ejection; pleading.

Liability for personal injuries to passenger, see post IV, E.

Right to sue on breach of contract, see also post ¶ 410.

Actions for breach of contract, see post § 146.

Penal actions, see post § 147.

Evidence and questions of fact, see post §§ 143, 144.

Damages and the measure thereof, and pleading, evidence and instructions on damages, see Damages.

¶ 397. Whether an action for breach of contract might not lie for ejecting a passenger who had paid for a ticket to a certain point, but had been given one to a shorter distance, quaere. But it must not be based on the conductor's refusal to respect a correct ticket, if he really respects the ticket presented for the distance it covers.—Frederick v. Marquette, H. & O. R. Co., 37 Mich. 342.

¶ 398. Where a declaration in an action against a railroad company for ejection from a train charges that plaintiff, lawfully riding as a passenger, was wrongfully put off by the conductor, and where the evidence shows that plaintiff, through the station agent's fault, was riding on the freight train without a proper permit, the variance is fatal.—Thomas v. Chicago & G. T. R. Co., 72 Mich. 355.

§ 143. ——Burden of proof and evidence.

¶ 399. One who alleges that he was unlawfully ejected by a carrier, after presenting a mileage book for the payment of his fare, is bound to show that he had a valid mileage ticket, good for transportation according to its terms, over defendant's road.—Johnson v. Michigan United R. Co., 153 Mich. 65.

¶ 400. In an action by a passenger for ejection on refusing to pay an excessive fare, where the exact distance was in dispute, the files and records in a prior suit between the same parties in which the distance was admitted, were properly admitted as they went to show that an excessive fare

was being demanded after defendant knew by the ruling in that case what the limit was it could charge between the points in question.—Chamberlain v. Lake Shore & M. S. R. Co., 122 Mich. 477.

¶ 401. Plaintiff was one of a party of ball players for whom tickets were bought by their manager. Plaintiff's home was one station beyond that of the other players and he was put off by the conductor when attempting to ride beyond the stopping place of the other players. In response to a telegram from plaintiff the defendant's agent where the tickets were bought telegraphed plaintiff that one of the tickets sold was to plaintiff's station. At the trial defendants practically admitted that such ticket was sold. Held, it was not prejudicial error to admit the ticket in evidence at plaintiff's instance.—Light v. Detroit & M. Ry. Co., 165 Mich. 483.

¶ 402. The right of a passenger who was ejected from a street railway car after having presented a ticket which on its face entitled her to ride on the defendant's car, could not be defeated by testimony that the defendant, by advertisement, had sought to limit the time for the use of the ticket, where plaintiff had no knowledge of either the advertisement or the limitation.—Carney v. Detroit & M. Ry. Co., 133 Mich. 659.

¶ 403. Where a carrier refused to honor a mileage ticket, and ejected a passenger, evidence that the passenger had previously traveled over defendant's road frequently, and that the validity of his ticket had not been questioned, is sufficient to sustain a verdict, on the theory that the contract evidenced by the mileage ticket, which was not on its face issued by defendant, had been assumed by defendant.—Johnson v. Michigan United Rys. Co., 153 Mich. 65.

§ 144. ——Questions of law and fact, and instructions.

¶ 404. In an action against a street-railway company for personal injuries sustained by reason of defendant's conductor forcibly ejecting plaintiff from the car, where the ticket presented by plaintiff to the conductor could not be used after a certain hour, and the testimony is in sharp conflict as to whether plaintiff presented his ticket before or after such hour, the case was properly submitted to the jury.—Scheer v. Detroit United Ry., 155 Mich. 561.

¶ 405. Plaintiff claimed that he was unlawfully ejected from railroad train by conductor while in possession of ticket entitling him to passage, which ticket, owing to his having fallen asleep, he did not have an opportunity to present, although, upon his regaining consciousness while being taken out of the car, he told the conductor he had a ticket. The questions involved held to have been properly submitted in the charge to the jury.—Ferguson v. Michigan Cent. R. Co., 98 Mich. 533.

¶ 406. Where, in an action for unlawful ejection from defendant's train there was no evidence that the conductor gave orders to eject plaintiff, it was error to instruct the jury that if it should find that the conductor, or any other employee of defendant, acting under the conductor's orders, ejected plaintiff, or compelled him to alight, from the cars while they were in motion, as he testified, and if he was thereby injured, defendant was liable.—Brassel v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 5.

¶ 407. A declaration for wrongful ejectment from one of defendant's trains averred that the conductor and a brakeman forcibly ejected plaintiff from and off the moving cars, throwing him with violence from the platform of the cars to the ground, and plaintiff testified that he was pushed or shoved off while the train was in motion. The jury was instructed that unless it should find that plaintiff was shoved or pushed, or in some way forcibly ejected, from the train while it was in motion, as alleged in the declaration and claimed in plaintiff's testimony, he could not recover. Held, that the jury should not have been left, as they were under said instruction, to find that plaintiff was "in some way" forcibly ejected from the train while it was in motion, other than that shown by the evidence and alleged in the declaration, but that the instruction should have limited them to the precise manner in which the act was committed.—Brassel v. Minneapolis, St. P. & S. Ste. M. R. Co., 101 Mich. 5.

¶ 408. In an action for a wrongful ejection from defendant's train of a passenger presenting a ticket requiring his identification as purchaser upon request, it appeared that plaintiff's description was incorrect, but the declaration did not count on the misdescription, being based upon an unreasonable enforcement of the reasonable regulation requiring identification. Held, that an instruction that "If there was any mistake in the description of the plaintiff on the ticket, it was a mistake for which the defendant was liable," and "Defendant cannot limit its liability for the negligence of itself or its agent by any contract contained in the ticket purchased by plaintiff, upon which he was seeking transportation" condemned the defendant for negligence not declared upon and furnished ground for a verdict against it whether the regulation was reasonably enforced or not, and were therefore prejudicial.—Pierson v. Illinois Cent. R. Co., 149 Mich. 167.

§ 145. Breach of contract; failure to carry as agreed.

Breach by connecting line, see post § 240.
Actions for loss of baggage, see post §§ 255-258.

¶ 409. Where a railway passenger is not in fault in starting on a particular train, he has a right of action against the company for damages arising from its refusal or failure to take him to his destination as agreed through its ticket agent.—Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277.

¶ 410. A passenger who is ejected for refusing to pay his fare upon the refusal of the conductor to honor a transfer which, pursuant to a change of rule of which the passenger had no knowledge, did not entitle such passenger to travel on the car in question, cannot recover for breach of contract, his remedy being upon a breach, if any, by the first conductor in giving a wrong transfer.—Keen v. Detroit Electric Ry., 123 Mich. 247.

Liability of carrier for failure to transport passenger on through ticket, see note, 8 N. C. C. A. 709-716.

§ 146. ——Actions, pleading and evidence.

Form of action, see also ante ¶ 410.

¶ 411. In declaring against a common carrier of passengers for a refusal to carry, it is necessary to aver that the plaintiff offered, or was ready and willing, to pay the fare.—Day v. Owen, 5 Mich. 520.

¶ 412. A passenger suing for failure of a railroad to transport according to contract, where reasonable notice of a change in the time table has been given by the railroad but the agent has misinformed him, must count upon the common-law liability of the carrier, and can recover only actual damages.—Van Camp v. Michigan Cent. R. Co., 137 Mich. 467.

¶ 413. Plaintiff made a contract with defendant railway's proper agent, by which the latter guaranteed to carry the former to Washington by a certain day and hour. In a suit for breach of this contract, held, the schedules and time tables of defendant were not admissible to show the agent's lack of authority or his credibility, or to show the time trains were scheduled to arrive.—Hayes v. Wabash R. Co., 163 Mich. 174.

§ 147. Penalties and actions for same.

Excuse for failure to stop, see also ante ¶ 379.
Penal actions and procedure in general, see Penalties.

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¶ 414. The penalty of $100 provided in How. St., § 3324, for a railroad company's failure to transport a passenger, is recoverable by a person who, having a ticket, went to a flag-station at night intending to take a train that was accustomed to stop at each station when signaled to do so, but which did not stop for him though the usual signal was given. It was a sufficient offer to become a passenger.—Freeman v. Detroit, M. & M. R. Co., 65 Mich. 577.

¶ 415. Comp. L. 1897, § 6235, providing a penalty for failure of a carrier to transport a passenger according to contract, does not apply where reasonable notice of a change in time table has been given to the public, though the agent of the railroad misinforms the passenger, and hence such passenger can recover only actual damages.—Van Camp v. Michigan Cent. R. Co., 137 Mich. 467.

¶ 416. The penalty under Comp. L. 1897, § 6235, for failure to transport according to contract, may be recovered from a railroad where the passenger inquired of the agent and was informed of a connecting train and was shown a time table showing such train, but upon arriving at the junction point learned that this train had never been put on, and it appeared that notice of this change had been sent to some of the agents but no showing was made that the notice had been received by the agent who gave the information and sold the ticket.—Van Camp v. Michigan Cent. R. Co., 137 Mich. 467.

¶ 417. No recovery can be had under Comp. L. 1897, § 6235, for the penalty provided for failure to transport a passenger by a common carrier where the mistake in selling a ticket for use on a train which had been discontinued was the error of the local agent.—Geer v. Michigan Cent. R. Co., 142 Mich. 511.

¶ 418. A railroad company is not liable to a penalty for failing to deliver a passenger at a station where, owing to drifting snow, to the darkness, and to a freight train being close behind, it seemed to the engineer and conductor safer to stop about three-quarters of a mile beyond the station than in front of it.—Reed v. Duluth, S. S. & A. R. Co., 100 Mich. 507.

¶ 419. In an action for failure to transport under Comp. L. 1897, § 6235, where there was a mistake in selling a ticket for use on a train which had been discontinued on a proper notice of a change in schedule and a public countermand of the old schedule issued ten days before the sale of the ticket the company is not liable for the penalty, and any instruction which leaves it to the jury to pass upon the question of what

countermand of a time table would be reasonable is error.—Geer v. Michigan Cent. R. Co., 142 Mich. 511.

¶ 420. A working time table designed for the use of employees alone and not intended for use in furnishing information to the public, which on its face states it was in no case intended for public information nor as an advertisement of the time or hours of any train, and that the railroad company reserves the right to vary them at pleasure, is not for the information of the public, and it was error in an action for failure to transport under Comp. L. 1897, § 6235, to refuse to give an instruction that it was not for such public information, and any information which the plaintiff may have obtained therefrom either directly or from statements of defendant's agent does not bind defendant, and cannot be considered in determining the verdict.—Geer v. Michigan Cent. R. Co., 142 Mich. 511.

E. PERSONAL INJURIES TO PASSENGERS.

1. General Duty and Care; to Whom Owed.

§ 148. In general; degree of care, and responsibility for agents.

Who are passengers to whom duty is owing, see ante §§ 110-113.
In respect to stations and platforms, see post IV, E, 2.
In respect to tracks, trains and equipment, see post IV, E, 3.
In respect to management of trains and cars, or taking on and discharging passengers, see post IV, E, 4, 5.
Duty to protect passengers from other persons or from assaults by servants, see post IV, E, 6.
Contributory negligence of the passenger as to any of the foregoing, see post IV, E, 7.
Actions for injuries, pleading, evidence, etc., see post IV, E, 8.
Responsibility for agent's invitation to ride on improper train, see ante §§ 111, 112.
Act of agent in making special contract of carriage, see ante ¶ 343.
Right to impose limitations of liability, see ante § 127.
Necessity of alleging negligence, see post § 209, ¶ 603.
Burden of proof, evidence, and questions for jury, see post §§ 210-232.
Weight and sufficiency of evidence, see post § 216 et seq.
Sufficiency of evidence that negligence was cause of injury, see post § 219.
Instructions and requests, see post §§ 233-237.
For the general law of negligence, including its nature and elements, proximate cause, contributory negligence, etc., see Negligence.
Liability of owner of building containing passenger elevator, see Buildings.
Liability for injury to person at freight station to receive or deliver goods, see Railroads, VIII, B.
Scope of conductor's agency, see Agency, § 34, ¶ 174.
Effect of notice to agent while he was serving preceding employer, see Agency, § 74, ¶ 448.
Responsibility of employer for acts of employee, see Master and Servant, IV.
Towerman at crossing as servant of both railroads, see Master and Servant, IV.

¶ 421. Carriers of passengers are liable only for injuries resulting from their actual negligence or that of their employees.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 422. Street railways are common carriers of passengers and under their contract of safe carriage are bound to exercise a high degree of care.—Larskowski v. Detroit United Ry., 193 Mich. 409.

Act of God as relieving carrier from liability for injury to passenger, see note, 7 N. C. C. A. 507-519.
Liability of railroad company for spread of contagious disease, see note, 1 N. C. C. A. 651-657.
Liability of carrier for injury to passenger due to effort of employee to avert collision or accident, see note, 6 N. C. C. A. 801-805.

§ 149. Concurrent negligence of carrier and others.

See also post ¶ 591.
Suffering use of dangerous situation made by another, see also post ¶ 437.
Ejection by succeeding carrier, see post § 240.
Of connecting lines, see post § 242.
General rule as to, see Negligence, III.

¶ 423. In an action by a passenger against a street railway for injury caused by a collision of the car in which he was riding with a heavy ice wagon, the plaintiff may recover upon a showing that the motorman was negligent though the driver of the ice wagon was also negligent.—Thurston v. Detroit United Ry., 137 Mich. 231.

¶ 424. Where a passenger in a street car is injured by the collision of a team with the car at a cross street, he may recover if the motorman was negligent, even though the driver of the team was also negligent.—Sloan v. Detroit United Ry., 172 Mich. 68.

§ 150. Children and infirm or disabled passengers.

Duty of carrier to receive blind or infirm persons, see ante § 109.

In taking on or discharging, necessity of assistance, see also post §§ 172-174.
General rules of negligence toward persons not ordinarily self-helpful, see Negligence, I.

¶ 425. The caution required of a child riding on a railroad train is according to his maturity and capacity, to be determined in each case by the facts and circumstances; and the degree of discretion in avoiding danger depends upon the child's age and knowledge.—Ecliff v. Wabash, St. L. & P. R. Co., 64 Mich. 196.

¶ 426. A command from the conductor of a street railway car to come inside the car, addressed to a child who is riding in an exposed position, and is not of sufficient discretion to take care of itself, is not enough to exempt the railway company from responsibility for the child's safety, but obedience to the command should be compelled by the company's servants. A street railway company can plead no exemption from responsibility for the safety of such young children as it receives as passengers, unless, perhaps, when the proper guardian of the child is present. The company is required to act towards the passenger in view of his age, capacity, and the circumstances.—East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503.

¶ 427. Where a railroad company voluntarily accepts a person without an attendant as a passenger, whose inability to take care of himself is apparent, or is made known to its servants, and such condition renders special care and assistance necessary, the company is negligent if such assistance is not afforded.—Mercer v. Cincinnati Northern R. Co., 151 Mich. 566.

Liability of carrier for injuries to child passengers, see note, 7 N. C. C. A. 1029-1039.
Duty and liability of carrier towards sick passengers, see note, 4 N. C. C. A. 299-310.
Duty of carrier towards blind passenger, see note, 2 N. C. C. A. 175-182.

§ 151. Drunken passengers.

Duty in discharging passengers, see also post § 174.

¶ 428. The employees of a railroad company, unless they know that a passenger is under the influence of liquor, are not bound to use any more care for him than for any passenger in the usual condition.—Strand v. Chicago & W. M. R. Co., 67 Mich. 380.

¶ 429. The fact that the conductor of a street car knows that a person who is standing on the running board outside of the car is intoxicated imposes upon him the duty to exercise care in passing by such person for the purpose of collecting fares.—Kingston v. Fort Wayne & E. R. Co., 112 Mich. 40.

Duty and liability of carrier with respect to intoxicated passenger, see notes, 5 N. C. C. A. 621-634; 15 N. C. C. A. 502-519.

§ 152. Passengers riding free or not in ordinary way.

Care required in operating car with passengers on running boards, see post § 165.

¶ 430. The same extreme care is to be exercised by common carriers in carrying free passengers as in carrying those who pay their fare.—Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111.

¶ 431. Where an employee of a logging company was killed while riding on the defendant's logging railway without paying fare, on the assumption by himself and the employees of the defendant that there was an agreement between the logging company and the defendant company to carry free the employees of the former company, there can be no recovery, since the deceased was riding in violation of Public Acts 1909, Act No. 30 (How. St., 2d Ed., §§ 3360-3365), forbidding the furnishing of free transportation.—Van Auken v. Michigan Cent. R. Co., 182 Mich. 331. (Bird, Kuhn and Ostrander, JJ., dissenting.)

Injury to one who entered car or train upon own business, see note, 3 N. C. C. A. 340-345.
Liability of carrier to person injured while being transported on pass in violation of law, see note, 8 N. C. C. A. 314-332.
Liability of railroad company to person traveling on illegal free pass, see note, 14 N. C. C. A. 483-490.
Liability of carrier for injury to shipper accompanying shipment, see note, 6 N. C. C. A. 649-674.
Employee of street railway company as passenger while being carried to or from work, see note, 2 N. C. C. A. 165-174.

§ 153. Attendants and escorts of passengers.

¶ 432. A man went by night to the depot to meet his wife, and having occasion to urinate, no special resort being provided, he stepped off the walk, in the darkness, upon a portion of the depot grounds, and fell into a hole. Held, that he was a customer of the railway company and not a trespasser, and that he could maintain an action against the company for the injury he sustained.—McKone v. Michigan Cent. R. Co., 51 Mich. 601.

Injury to persons boarding trains to assist or meet passengers, see notes, 8 N. C. C. A. 630-648; 16 N. C. C. A. 335-349.

2. *Stations and Platforms.*

§ 154. General duty and care required.

Duty in general and under contract as to facilities for travel, see ante IV, C.
Joint stations, see post § 241.
In taking on and setting down passengers, see post IV, E, 5.
Moving other trains on station tracks when passengers are entering or alighting, see post § 185.
Weight and sufficiency of evidence, see post § 216 et seq.
Instructions and requests, see post §§ 233-237.

¶ 433. The high degree of care required of common carriers of passengers, in transporting them and in the construction and care of their vehicles for that purpose, is not required by the law in the construction and maintenance of their platforms and station grounds, only reasonable care to be determined by the surroundings, the situation, and the probable dangers being required.—Crowe v. Michigan Cent. R. Co., 142 Mich. 692.

¶ 434. Reasonable care in the construction and maintenance by common carriers of passengers of platforms and station grounds, is a relative term, to be determined by the surroundings of each case and the dangers to be apprehended and avoided.—Crowe v. Michigan Cent. R. Co., 142 Mich. 692.

Liability of railroad company as carrier for injuries caused by animals shipped or kept on premises, see note, 8 N. C. C. A. 445-459.

§ 155. Approaches to and exits from stations.

From stops made by motor cars at country highway crossings, see post ¶ 480.
Leaving or approaching by wrong route as contributory negligence, see post § 203.
Evidence as to negligence, see post § 211, ¶ 617.

¶ 435. Plaintiff, who had been a passenger on defendant's train, left its depot on a dark and rainy night, and fell into an unguarded hole on its grounds that was close to the culvert of a diagonal cross-walk used generally by the public whereon he was walking. Defendant had constructed another and safer path, but most of the travel went over the way used by plaintiff, and defendant had never objected to its use. Held, that plaintiff could recover for injuries received.—Cross v. Lake Shore & M. S. Ry. Co., 69 Mich. 363.

¶ 436. Where a railroad company has reasonable facilities for travel between its station platforms and the public highway, it is not liable to one who, seeking to reach the highway by way of the railroad track, is injured by falling into a cattle-guard, though a usual course of travel was followed.—Sturgis v. Detroit, G. H. & M. R. Co., 72 Mich. 619.

¶ 437. A railway company which neglects to provide reasonably safe and convenient means of ascending its station platform, and which with full knowledge of the facts permits an unsafe means to be provided—such as an unfastened plank reaching from the platform to the path commonly used by the public—is liable for an injury sustained from the falling of the plank, the same as if it had itself set up and maintained the dangerous way.—Collins v. Toledo, A. A. & N. M. R. Co., 80 Mich. 390.

¶ 438. A passenger who sustained injury by slipping upon ice which had formed on a beaten path which made a short cut from defendant's railroad station, the use of which path defendant had permitted to passengers, was entitled to recover, although there was a safer crushed stone walk which the passenger might have used.—Lemon v. Grand Rapids & I. Ry. Co., 136 Mich. 647.

§ 156. Platforms and places to alight.

See also post ¶ 451.
For motor cars running on steam roads for local service, see also post ¶ 480.
Negligence in setting down or embarking from platform, see post IV, E, 5.
Announcing stations, stopping for passengers to alight, and opportunity to alight, see post § 179 et seq.
Duty to provide assistance where there are no platforms, see also post § 172.
Protection of passengers from crowding, see post § 186.
Contributory negligence, see post §§ 191, 198-203.
Boarding on wrong side as contributory negligence, see post §§ 543, 545.
Evidence as to negligence, see post § 211 et seq.
Negligence in condition as jury question, see post § 222.
Instruction on want of lights, see post § 233, ¶ 756.

¶ 439. The traveling community cannot be supposed ignorant of the necessity and use of depot platforms, and passengers must conform to the reasonable business arrangements of the railways. When a railroad company has a safe and commodious platform and other facilities for safely entering and leaving the cars on the depot side of the track, the omission to have the opposite side similarly provided is not negligence.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 440. In an action by one for injuries sustained while alighting from a train by stepping into a hole at least six inches lower than the surface and a foot to two feet across and containing a chunk of cinders about six inches long by two or three inches wide, the maintenance of such a hole in a station platform constitutes a negligent defect.—Crowe v. Michigan Cent. R. Co., 142 Mich. 692.

Liability of railroad company for injury to prospective or departing passenger caused by obstruction on station platform, see note, 9 N. C. C. A. 995-1017.
Injury to passenger stepping in space between platform of station and step of car, see note, 9 N. C. C. A. 1069-1095.
Liability for injury to prospective passenger on station platform by crowded condition of same, see note, 14 N. C. C. A. 168-179.

§ 157. ——Street railway stops.

Adjacent condition of track or surroundings, see post § 161.
Duty of carrier in setting down passengers to choose proper place or assist passenger, see post §§ 172, 184.
Contributory negligence, invited stops, see post § 201.
Instructions as to ridge near alighting place, see post § 235, ¶ 779.

¶ 441. It is not the duty of a street railway to provide a street in course of repaving with a platform level with its rails for approaching passengers from the opposite side of the street or to abandon the use of its customary stop at that place, where the state of the paving work has left a smooth bed of concrete awaiting the laying of paving bricks, so that the rails extend above that level to the thickness of the bricks.—Sweet v. Detroit United Ry., 141 Mich. 650.

¶ 442. The slipping of an approaching passenger's foot as he was about to step over a street car rail and the catching of his toe thereby on the projecting rail was the cause of his fall, and not the failure of the street railway to provide a platform level with the top of the rail during paving of the street and while the concrete base for the pavement was awaiting the bricks which would bring the street level up to the rail-top, all the surroundings being familiar and lighted and the passenger having seen the rail and voluntarily tried to step over it in making a crossing.—Sweet v. Detroit United Ry.; 141 Mich. 650.

3. Tracks, Trains and Equipment.

§ 158. Care, inspection and condition in general.

In operation and management of trains, see post IV, E, 4.
Duty and care in taking on or discharging passengers, see post IV, E, 5.
Weight and sufficiency of evidence, see post § 26 et seq.
Want of safety appliances as evidence of negligence, see post § 213.
Negligence as jury question, see post § 223.
Instructions and requests, see post § 234.
Instruction on "inspection," see post ¶ 771.
Police regulations for safety of trains and operations, see Comp. L. 1915, § 8200 et seq., and also see Railroad Commission Act, Comp. L. 1915, chap. 155.

¶ 443. A carrier owes to its passengers a high degree of diligence and care in their transportation and such care involves the character of the rolling stock.—Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432.

¶ 444. A street railway company is not required to furnish its road with new cars, nor is it liable for using old ones, but in either case must keep them in good repair, and fit for use, so as not to endanger the safety of passengers.—Wormsdorf v. Detroit City R. Co., 75 Mich. 472.

¶ 445. A street railway company is not an insurer of safety. It does not contract that there are no unknown defects in its cars and appliances not discoverable by the use of reasonable means; but it does contract that except for such defects its cars and appliances are safe.—Gerlach v. Detroit United Ry., 171 Mich. 474.

¶ 446. Where, in an action for personal injuries caused by defective appliances, inspection is relied on as a defense, it should be as thorough as the dangers incident to the business make necessary.—Rouston v. Detroit United Ry., 151 Mich. 237.

§ 159. Notice or knowledge of defects.

Notice as predicate for negligence generally, see Negligence, I.

¶ 447. It is the duty of a street railway company to exercise reasonable care in selecting horses for use on its cars, and to take reasonable steps to ascertain whether they are safe for such use; and the company is chargeable with whatever knowledge a driver may have acquired or discovered with respect to the character or disposition of the horses driven by him in the course of his employment, and before an accident caused by a breach of said duty.—Noble v. St. Joseph & B. H. St. R. Co., 98 Mich. 249.

§ 160. Cars and equipment furnished by or bought from others.

¶ 448. Railway companies buying rolling stock from reputable manufacturers are not

chargeable with negligence in accepting material on such inspection as is usual and practicable, without discovering concealed defects; they cannot be held to warrant their cars.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 449. A railroad company could not evade its duty to a passenger to see that the cars which were running over its road, were properly equipped, in good condition and properly managed, by showing that it had a contract with another company to do it.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

§ 161. Tracks and roadbed and surroundings.

Negligence in manner of running over bad or dangerous tracks, see post § 169.

Liability for injury from rails and timbers at unusual place where passenger is discharged, see post § 184.

Contributory negligence in riding on running board without looking for projecting structures within line of travel, see post ¶ 556.

Sufficiency of evidence as to condition of track being cause of accident, see post § 219.

Negligence as jury question, see post § 223.

¶ 450. It is negligence in a railroad company to allow coal-bins so close to its track that persons upon an excursion car cannot safely stand, while passing them, upon the running board that stretches along the side of such a car.—Dickinson v. Port Huron & N. W. Ry. Co., 53 Mich. 43.

¶ 451. The mere piling of dirt or clay on or near a street railway track, for use in ballasting the track where it has been undermined by a washout, is not negligence on the part of the company.—Noble v. St. Joseph & B. H. St. R. Co., 98 Mich. 249.

Injury to passenger by rock rolling or falling into car, see note, 3 N. C. C. A. 505.

Liability for injury to passenger on passing train injured by explosion near track, see note, 4 N. C. C. A. 74-86.

§ 162. Steps, platforms and cars.

Open door as proximate cause of injury due to lurch, see also post ¶ 470.

Care required in operating cars with persons on running boards, see post § 165.

Riding on platforms or steps as contributory negligence, see post § 195.

Tool equipment for passenger cars, see Comp. L. 1915, § 8394.

Heating equipment, see Comp. L. 1915, § 8397.

¶ 452. It is the duty of street car companies to allow their passengers an opportunity to get on and off the cars, and the starting of the car while the passenger is so doing is negligence; but such act does not render defective the construction of a car that under other circumstances is reasonably safe.—Werbowisky v. Fort Wayne & E. R. Co., 86 Mich. 236.

¶ 453. A passenger who voluntarily jumps on or off from a moving street car does so at his own peril, and such a construction of the car as is only unsafe in view of such conduct cannot be said to be defective.—Werbowisky v. Fort Wayne & E. R. Co., 86 Mich. 236.

¶ 454. Plaintiff, upon alighting from a street car after dark, was injured by having her foot caught by a rope which had been attached by a trespasser to the rear of the car. It appeared that the rope had been so attached for at least some minutes and while the car traveled a mile and a half, but that it had not been discovered on account of the darkness. There was evidence that a rope had once been found similarly attached but this had not been brought to the notice of the conductor on this car. Held, that the company was not guilty of negligence in failing to discover and remove the rope.—LaFond v. Detroit Citizens' St. Ry. Co., 131 Mich. 586.

¶ 455. A railroad company which placed its dining car at the rear of a train and invited its passengers to go to and from it, was bound to provide them safe passage from one car to another.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

¶ 456. Negligence in permitting the fastenings of the door of a vestibule between sleepers to be defective, would not consist of failure to repair within a reasonable time after the defects became known or ought to have been known, where an inspection before the train was made up would at once have revealed the defective condition of the door.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

¶ 457. The use of a standard car consisting of three steps of the height and construction such as in common use by railroads is not negligence on the part of a railroad although there are also four step cars with a difference in height of about eight inches, but which cars had not been in use on this particular road for three or four years.—Crowe v. Michigan Cent. R. Co., 142 Mich. 692.

Injuries to passengers caused by overcrowding of street cars, see note, 8 N. C. C. A. 993-1005.

Duty to keep doors of vestibule of car closed, see note, 2 N. C. C. A. 686-602.
Liability for injury to passenger caused by doors, gates, windows, rails, etc., see note, 15 N. C. C. A. 618-630.
Injury to passenger caused by closing of door of car, see note, 1 N. C. C. A. 232-250.
Liability of carrier for injury to passenger caused by act of employee in closing door of car, see note, 1 N. C. C. A. 239-243.
Injuries to passengers by reason of vestibule or trapdoors which have been opened or raised at times or in a manner inappropriate for the reception or debarkation of passengers, see note, 13 N. C. C. A. 764-780.
Injury to one on steps of vestibuled car, see note, 2 N. C. C. A. 680-681.
Liability of carrier for injury to passenger on platform of vestibuled car or train, see note, 2 N. C. C. A. 688-694.
Passengers injured by gates or other appliances on steps or platforms of cars, see note, 4 N. C. C. A. 142-148.
Injury to person tripping over fender or other attachment of street car, in approaching to board car or in leaving after alighting, see note, 16 N. C. C. A. 518-533.
Injury to passenger by baggage or obstruction in aisle of car or falling from rack, see note. 2 N. C. C. A. 346-362; 5 N. C. C. A. 27-30.
Injury to passenger by parcel in passageway or falling from rack in car, see note, 2 N. C. C. A. 363-366.
Injury to prospective or departing passenger struck by object thrown or falling from train or car, see note, 12 N. C. C. A. 673-682.
Liability of carrier for injuries to passengers from missiles or objects thrown or falling into or from cars, see note. 6 N. C. C. A. 819-824.
Liability of carrier for injury to passenger struck by object falling or flying into car, see note, 15 N. C. C. A. 170-181.

§ 163. ——Accumulated snow or ice.

Evidence as to ice at other times, see post ¶¶631, 632.

¶ 458. If snow and ice are tracked into the vestibule of defendant's street car during a round trip a reasonable opportunity is afforded defendant company to remove it and it is its duty to remove the accumulation before starting on another trip where the car is stationary at the end of the route when the trolley pole is changed and the conductor and motorman change places.—Dorrance v. Michigan United Rys. Co., 175 Mich. 198.

¶ 459. The failure of a railway company to keep the platform and steps of a passenger car free from snow and ice during the continuance of a heavy storm, does not amount to negligence.—Meyer v. Michigan Cent. R. Co., 180 Mich. 516.

Injury to passenger by ice or snow on platform or steps of train or car, see note, 13 N. C. C. A. 470-488.

§ 164. Make up of trains; mixed trains and freight trains.

Duty to passenger riding elsewhere than caboose, see also ante ¶ 372.
Limitations of liability, see ante § 127.
Care required in operation, see post § 168.
Care required of passenger, see post § 190.
Cars loaded with logs in train, propriety of instructions, see post § 234.
Cars in front of passenger cars, see Comp. L. 1915, § 8300.

¶ 460. In an action for injury caused by the improper loading of logs upon flat cars attached to the passenger car in which plaintiff was riding, it was held that defendant could not discharge its liability to plaintiff by showing that its agents inspected the cars before starting out on the trip, if in fact the train was not in proper condition with respect to the safety of the passengers.—Keating v. Detroit, B. C. & A. R. Co., 104 Mich. 418.

¶ 461. Passengers upon freight trains are expected to recognize the difficulty of handling freight trains of varying length, upon roads of varying grade without concussions; and they assume the risks incident to the methods of the business, where the crew handles the train with the highest degree of care which good railroading requires and permits under the circumstances.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

¶ 462. One who takes passage on a freight train accompanying a car of stock, assumes the risk of the ordinary jarring, jolting and jerking incident to the making up and distributing of such train.—Frohriep v. Lake Shore & M. S. Ry. Co., 131 Mich. 459.

4. Operation and Management of Engines and Cars.

§ 165. In general.

Particular objects of care, see post §§ 166-170.
Making up trains, proper cars to be in rear, see ante § 164.
In taking on or discharging passengers, see post IV, E. 5.
Necessity of higher care under crowded conditions, see post ¶ 516.
Moving trains on tracks adjacent to tracks where passengers are embarking or alighting, see post § 185.

Care and duty to passenger discovered in peril after being negligent, see post § 205.
Pleading excessive speed, see post § 208.
Evidence as to negligence, see post § 211 et seq.
Overcrowding as evidence of negligence, see post, ¶ 626.
Weight and sufficiency of evidence, and questions for court and jury, see post § 216 et seq.
Bare fact of derailment as evidence of negligence, see post ¶ 650.
Negligence as jury question, see post § 224.
Negligent collision as jury question, see post § 225.

¶ 463. A railroad engineer who, in violation of the rules and regulations of the company, and without an order from the train dispatcher, attempts to run his engine from one station to another, and comes into collision with a train belonging to the same company, is still in the line of his employment, and the company is liable for the consequent injury to a passenger upon the train.—Fitzsimmons v. Milwaukee, L. S. & W. R. Co., 98 Mich. 257.

¶ 464. The negligence of a railroad company in causing a slight collision near the station is not the proximate cause of injuries sustained by a passenger while jumping from a flat car over which he has followed other passengers in departing and alighting from the damaged and stationary train some time after the collision.—Vandercook v. Detroit, G. R. & W. R. Co., 125 Mich. 459.

¶ 465. Where a street car company operating open cars, which are entered from running boards on the side, permits a passenger to ride upon one of the running boards because of the crowded condition of the car, it is under the duty of operating the car with the highest degree of care so as not to injure the passenger while in such position.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

Injury to passenger by the making of flying switches or the kicking of cars, see note, 4 N. C. C. A. 653-657.
Liability of carrier for personal injuries sustained in derailment of train or car, see note, 5 N. C. C. A. 698-715.
Liability of street railroad company for injury to passenger occurring out of collision with railroad train, see note, 9 N. C. C. A. 933-948.
Liability of railroad company for personal injuries to passenger caused by condition of rails due to heat or cold, see note, 3 N. C. C. A. 215-220.
Injury to one on running board of street car caused by contact with vehicle, see note, 2 N. C. C. A. 696-707.

§ 166. Crew, attendants or watchmen.

Duty to afford assistance to passengers boarding or alighting, see post § 172.
Qualifications and experience required of trainmen and operating servants, see Comp. L. 1915, § 8403 et seq.

¶ 466. That a street railway company has been accustomed to have conductors on its cars the entire length of its road except for a short time before injury to a passenger does not show that it is its duty to keep a conductor upon its car the whole distance at all times, nor is there any such duty unless required by statute or ordinance, or by the terms of the contract under which the company exercises its franchises.—Gardner v. Detroit Street R. Co., 99 Mich. 182.

§ 167. Jerks, jolts and uneven speed.

In freight and mixed trains, see post § 168; see also ante ¶ 462.
Changing speed and sudden starts while passengers are boarding or alighting, see post IV, E, 5.
Evidence of jerking and rebuttal thereof, see post ¶ 630.
Negligence as jury question, see post § 224.
Jerks as cause of accident, court or jury question, see post § 221 et seq.

¶ 467. Sudden acceleration of a street car nearing a crossing would not make the company responsible, even if it were established that the accident was caused by such acceleration of speed, if it was properly due to the application of power, or the removal of the brake, to enable the car to reach the usual stopping place.—Etson v. Fort Wayne & B. I. R. Co., 110 Mich. 494.

¶ 468. An electric car approached a station with no intention on the part of its operatives to stop there, and near by the station was a switch. The motorman decreased the speed in approaching and increased it after passing the switch, so that plaintiff was jerked off the car. Held that, leaving out of consideration the duty of the company to stop its car at the station to let plaintiff alight, the mere decrease and increase of the speed did not amount to negligence by defendant.—Schultz v. Michigan United Rys. Co., 158 Mich. 665. (Blair, C. J., and Moore and Montgomery, JJ., dissenting.)

¶ 469. After entering a street car plaintiff, standing, held to a seat until a passenger moved to make room for her, and then turned to sit down, the car meanwhile having been set in motion. At that moment the car was stopped suddenly, but not with unusual abruptness, and plaintiff fell forward and was injured. No one else in the car suffered from the sudden stop. Held,

a verdict was properly directed for defendant, no negligence being shown.—Ottinger v. Detroit United Ry., 166 Mich. 106 (Moore, J., dissenting).

¶ 470. The proximate cause of the death of a passenger riding on the back platform of a pay-as-you-enter car because of the crowded condition of the car, who is thrown through the door of the car, which is open, contrary to custom, as the result of a sudden jerk of the car and the lurching of the crowd, and killed, is the negligent leaving open of the car door.—Larskowski v. Detroit United Ry., 193 Mich. 409. (Brooke, J., dissenting.)

Passengers thrown from street car rounding curve, see note, 8 N. C. C. A. 698-708.
Liability for injury to or death of passenger caused by lateral motion of car rounding curve, see note, 10 N. C. C. A. 334-341.

§ 168. Mixed trains and freight trains.

Care required in making up trains and arranging cars, see ante § 164.
Care required of passenger, see post § 190.
Entering too soon as contributory negligence, see post ¶ 548.
Contributory negligence in choosing insecure seat, see post ¶ 550.
Burden of proof and shifting, see post § 210.
Negligence as jury question, see post § 224.
Instructions, see post § 233.

¶ 471. In the handling of a freight train carrying passengers as an accommodation, if less than the highest practicable degree of care is bestowed upon the management of the train, it is negligence; and, if a passenger is injured thereby, without being in fault himself, the company is liable.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

¶ 472. One who takes passage on a freight train cannot insist upon the same equipment as is usual upon regular passenger trains. He will be presumed to understand that different cars, couplings, and brakes are used, and that cars must be coupled and shifted in the course of yard work at the various stations; that jars and jolts are incident to the ordinary management, and necessarily affect the equilibrium of persons standing in the car.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

¶ 473. Common carriers of passengers, especially where they are running freight cars only a short distance behind passenger cars, and up and down steep inclines, are required to exercise a very high degree of care in seeing that their appliances are in proper condition, and are properly managed.—Rouston v. Detroit United Ry., 151 Mich. 237.

Right of passenger on freight or mixed train to recover for injuries caused by jerks or jolts, see note, 9 N. C. C. A. 1096-1117.

§ 169. Running over defective or dangerous places.

Over crossings, see post § 170.
Sufficiency of evidence, see post § 216 et seq.

¶ 474. Where a street railroad is not responsible for the condition of its roadbed due to the failure of a city to make repairs to the foundation, it is chargeable with notice of such condition, and in the operation of its cars is required to exercise the care made necessary by conditions.—Bury v. Detroit United Ry., 198 Mich. 447.

¶ 475. The motormen of street cars approaching on opposite tracks, on which derailments have occurred, should govern their cars with reference to all known conditions which make for danger for the loads carried and each observe the other approaching car. —Bury v. Detroit United Ry., 198 Mich. 447.

¶ 476. While perilous forest fires were raging about the town of Metz, defendant sent its train to the rescue. Plaintiff's decedent got aboard. The train pulled south and after going some miles approached a point where the fires and smoke were closely approaching the track. Defendant's engineer attempted to pass the point, the rails spread, and the passengers, including plaintiff's decedent, and the engineer, were killed. Held, no negligence of the defendant could be predicated upon its duty not to take the decedent away from a safe place or not to carry him into a dangerous one or upon its duty to warn the decedent of approaching danger.—Konieczny v. Detroit & M. Ry. Co., 164 Mich. 66.

§ 170. Crossing other tracks or highways.

Approaching other street car at crossing discharging passengers, see post § 185.
Passenger misled by slowdown at crossing into assuming that station was reached, see also post ¶ 497.
Evidence as to negligence, see post § 211 et seq.
Negligence as jury question, see post § 225.
General duty at crossings, see Railroads, VIII, C, D; Street Railways, IV.
Operation at railroad crossings, see Comp. L. 1915, § 8303.

¶ 477. The establishment of an interlocker system does not relieve an engineer from the duty of looking out for trains with-

¶ 494. 'A railroad company is not obliged to notify passengers at an intervening railway crossing, merely because it has announced the succeeding station as such; and it has a right to expect that passengers will sit in the cars until stations are called, or, if they do not, that they will inform themselves of their whereabouts.—Minock v. Detroit, G. H. & M. R. Co., 97 Mich. 425.

¶ 495. In an action by an adult passenger who was riding on a vestibuled train for damages for injuries received as a result of his stepping off the train at a dark place while the train was still in motion, but after the station had been called and the vestibule door opened, held that the defendant was not guilty of negligence.—Hooker v. Blair, 189 Mich. 278.

§ 180. Misleading stops and starts.

See also post ¶ 501.

¶ 496. To run a railroad train beyond the usual stopping place at the station before coming to a standstill, or to pause after it is brought to a stop, for a period necessary to reverse the motion so as to back to the usual stopping place, is not negligence unless the stop is so made and for such a length of time as to indicate that it is an invitation to passengers to alight, and the movement backward is made without warning while they are alighting in response to such invitation.—Sherwood v. Chicago & W. M. R. Co., 82 Mich. 374.

¶ 497. A train approaching a station where there was a crossing of railway tracks stopped, as required by law, several hundred feet from the crossing before proceeding to cross the track. The name of the station had just been called, and a woman passenger hurried to the door to alight. The train was not at its proper point for landing passengers, and as she climbed down it started to go on to the depot platform, and she fell and broke her ankle. The conductor and brakeman did not know she had left her place in the car, and it did not appear that anything was done that was out of the usual course. The accident happened by daylight. Held, that the injury to the passenger was purely accidental, unless the passenger was herself negligent, and that the company was not liable since there is no legal liability for purely accidental injuries.—Mitchell v. Chicago & G. T. Ry. Co., 51 Mich. 236.

Liability for personal injury to person attempting to board street car brought to standstill at point not a regular stopping place, see note, 16 N. C. C. A. 100-109.

§ 181. Carrying beyond station.

See also ante ¶¶ 484, 496.

Setting down before reaching station, see also post ¶ 519.

Pleading and variance, see post § 604.

As jury question, see post § 227.

¶ 498. A carrier's negligence in carrying a passenger beyond his station and misinforming him as to where he was, was held not to be the proximate cause of an accidental injury suffered by him after he had ascertained his situation and while he was approaching the right road.—Lewis v. Flint & P. M. R. Co., 54 Mich. 55.

Liability for injuries to passengers carried past destination, see note, 4 N. C. C. A. 664-673.

§ 182. Slowing down and suddenly starting or stopping.

To pass switch, see also ante ¶ 468.

Contributory negligence, see post § 199.

Pleading negligence, see post § 208.

Questions for jury, see post § 226.

¶ 499. Plaintiff, a passenger in an electric car, left her seat and went to the door to alight, in expectation that the car, which had slackened in its speed, would stop at a station. Held, that it was not negligence in the motorman of the car, in ignorance of plaintiff's intention, to heighten its speed.—Schultz v. Michigan United Rys. Co., 158 Mich. 665.

¶ 500. When a passenger has reached the platform of a train in his efforts to alight and finds the train moving, it is negligence to cause the train to be so suddenly stopped as to throw the passenger down, when no reasonable effort has been made to secure his safety.—Smalley v. Detroit & M. Ry. Co., 131 Mich. 560.

¶ 501. A railway passenger, after the name of the station was called, went to the platform while the train was slacking up, and asked the conductor if it would stop there for water. The conductor said it would. The passenger then got upon the lower step of the platform, and when the train stopped at the usual landing-place tried to step off. But immediately, and without any notice or signal, the train started with a jerk and drew up at the water-tank, a few feet further on, throwing the passenger to the ground and severely injuring him. Held, that he had a right of action against the railroad company.—Wood v. Lake Shore & M. S. Ry. Co., 49 Mich. 370.

§ 183. Premature or sudden start while alighting.

While preparing to alight, see also ante § 182.

Starting while passenger was trying to resume place left by mistake, see also ante ¶ 492.
Contributory negligence, see post § 198.
Pleading and variance, see post §§ 208, 209.
Weight and sufficiency of evidence, see post § 216 et seq.
As jury question, see post § 226.
Instructions and requests, see post § 235.

¶ 502. Passengers upon a street car are entitled to sufficient time in which to get off, and until the passenger is free from the car the carrier's duty is not discharged.—Finn v. Valley City Street & C. R. Co., 86 Mich. 74.

¶ 503. It is the duty of street railway carriers to allow passengers an opportunity to get on and off of cars, and the starting of the car while the passenger is doing so is negligence.—Werbowisky v. Fort Wayne & E. R. Co., 86 Mich. 236.

¶ 504. A railroad company is required to stop its train at a station a sufficient time to permit passengers, moving with reasonable promptness and speed, to alight, and if the train is crowded this fact may be considered in determining what is a reasonable time.—Smalley v. Detroit & M. Ry. Co., 131 Mich. 560.

¶ 505. It is the duty of street car operatives not to start a car which has stopped under circumstances inviting passengers to alight, who have signalled for a stop, until it is seen that they have safely alighted or that no one is in the act of alighting.—Selby v. Detroit Ry., 141 Mich. 112.

¶ 506. For a street car to start suddenly while a passenger is alighting at a regular alighting place and the car has stopped there for that purpose is negligence.—Burke v. Bay City Traction & Elec. Co., 147 Mich. 172.

¶ 507. A street railway owes to a passenger the duty of stopping its car long enough to enable a passenger to alight, and get away, so as to be out of danger from the movements of the car.—Hazen v. Bay City Traction & Electric Co., 152 Mich. 457.

¶ 508. In a suit for personal injuries against defendant street railway for starting up its car while plaintiff was alighting, thereby causing her injury, it is not necessary in order to establish defendant's negligence to show that the start was unusually sudden or violent.—Dykstra v. Grand Rapids, G. H. & M. Ry. Co., 165 Mich. 13.

¶ 509. The time of stoppage required of a street car must be such as to enable the passenger attempting to get on or off to reach a place of safety, either on the street or in the car, before it is started.—Beattie v. Detroit United Ry., 158 Mich. 243.

¶ 510. When street cars have stopped for such a time that anyone capable of entering or alighting with reasonable celerity ought to have done so, the conductor, in the absence of notice to the contrary, may rely somewhat upon the presumption that the purpose of bringing the cars to a stop is accomplished.—Keeley v. City Electric Ry. Co., 168 Mich. 79.

¶ 511. Passengers are entitled at a stopping place to a reasonable time in which to get off after the car has stopped, and the duty of the carrier is not discharged until the passenger, alighting with reasonable expedition and exercising due care, with given time to exercise it, is free from the car.—Tuttle v. Detroit, J. & C. Ry. Co., 193 Mich. 390.

¶ 512. The duties of conductors of night trains, in looking out for the safety of passengers leaving the cars, when starting and stopping, considered. Every conductor must have the responsibility of starting his train, and it would be very perilous to allow him to depend on anything but his own personal observation as to the safety of starting. He cannot be expected to be on the lookout for passengers to get aboard from both sides of the train, and is not at fault for not seeing a passenger attempting to get on from the wrong side.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

Liability of carrier for injuries to passengers alighting from trains and street cars, see note, 4 N. C. C. A. 457-478.

§ 184. Proper place or conditions for alighting.

Condition of place or of surroundings of roadbed, see ante §§ 156, 157, 161.
Trailing rope or object after cars, see ante § 454.
Contributory negligence in getting in crowds, see post ¶ 541.
Contributory negligence in alighting at wrong place, see also post § 201.
Evidence of conditions at other times, see post § 212.
Questions for jury, see post § 226.
Wrong place as jury question, see post § 227.

¶ 513. A street car company owes the duty of seeing that the place of alighting is safe.—Spangler v. Saginaw Valley Traction Co., 152 Mich. 405.

¶ 514. Where a passenger alights from a street car at night, in a dark place, near a dangerous excavation in a street recently smooth and level, and no proper warning is given of danger, the company's duty does not terminate the moment of alighting, but it is liable for injury to plaintiff by falling into the excavation in crossing the street, and the facts support a judgment against defendant.—Spangler v. Saginaw Valley Traction Co., 152 Mich. 405.

¶ 515. The rules about alighting at unusual and irregular stops on ordinary steam railroads with regular stations have little or no application to street railways.—Selby v. Detroit Ry., 141 Mich. 112.

¶ 516. It seems that crowded conditions of traffic at night with many cars in service and forced stops at irregular places entail a higher care and watchfulness to avoid injury to passengers attempting to alight from street cars.—Selby v. Detroit Ry., 141 Mich. 112.

¶ 517. A place where a passenger on a street car is invited to alight is not unsafe though at such alighting place there is a depression in the pavement 12 inches by 12 inches in area and 3 inches in depth.—Fuller v. Detroit United Ry., 176 Mich. 135.

¶ 518. Where a railroad train pulls up at a platform so that nothing but the forward end of the smoking car is at the platform, passengers in the rear cars, especially ladies, are not bound to go through the smoker to alight; and if, in consequence of the position of the train, they are injured in getting off from the car in which they have been riding, it is the fault of the company.—Cartwright v. Chicago & G. T. Ry. Co., 52 Mich. 606.

¶ 519. When defendant's train stopped at a coal chute some distance from the station to which plaintiff, a passenger, was bound, and the conductor informed plaintiff that he would have to "take his chances" and would have to get off there because the train would not stop at the station, defendant, being obliged to furnish safe and convenient egress, was liable for an injury to plaintiff from an obstruction of timbers lying on its premises which the darkness prevented him from seeing and over which he fell.—Burnham v. Wabash W. R. Co., 91 Mich. 523.

¶ 520. A railroad company is negligent towards a passenger who is injured by alighting, upon a brakeman's invitation and unwarned at a point beyond where the station platform extends, and by slipping on a rail hidden by snow.—Mensing v. Michigan Cent. R. Co., 117 Mich. 606.

Duty and liability of steam railroad carrier with regard to passengers alighting from standing trains elsewhere than at regular stations, see note, 11 N. C. C. A. 438-462.

Liability of steam railroad carrier for injuries to passengers where accident occurs while passenger is alighting from standing car at regular station, see note, 11 N. C. C. A. 512-530.

Injury to passenger after alighting by overhang of car on curve, see note, 16 N. C. C. A. 503-508.

§ 185. Moving trains or cars on adjoining tracks.

Contributory negligence, see also post ¶ 542.

Contributory negligence of passenger and neglect of last clear chance, see post §§ 202, 205.

¶ 521. A railroad which has provided a station room and platform for those who desire to depart from or enter its trains, is not liable for injury to one who, intending to take a train but before its arrival, walked along a parallel track for the purpose of entering a car at the front of the train and was struck by a switch engine on such other track.—Spaven v. Lake Shore & M. S. R. Co., 130 Mich. 579.

¶ 522. A street car motorman operating a car on the same street in the opposite direction to other cars should not ignore the fact that he is approaching a car going in the opposite direction from which passengers are alighting.—Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131.

Injuries to intending passengers crossing before approaching train or car, see note, 4 N. C. C. A. 435-438.

Passengers injured while crossing intervening tracks at station, see note, 4 N. C. C. A. 447-449.

Liability of steam railroad carrier for injury to intending or departing passenger struck by train while standing or walking in space between tracks on which cars are moving, see note, 11 N. C. C. A. 681-696.

Liability of steam railroad carrier for injury to intending or departing passenger struck by train while on station platform, see note, 11 N. C. C. A. 718-727.

6. Protection of Passengers from Other Persons.

§ 186. In general; negligence of third persons.

Contributory negligence in getting in crowds, see also post ¶ 537.

Pleading negligence, see post § 208.

Burden of proof, see post § 210.

Evidence of other previous occurrences, see post § 212.

Questions for jury, see post § 228.

¶ 523. A railroad company is not primarily liable for the negligence of the mail agent, but it does owe the duty of not permitting dangerous habits of the agent in delivering heavy packages from the car in such manner as to endanger persons lawfully on its premises to continue; and evidence of such a prac-

tice continued for a considerable time is notice to the company.—Shaw v. Chicago & Grand Trunk R. Co., 123 Mich. 629.

¶ 524. Defendant railway had a platform in an amusement park where it stopped to take on passengers. Owing to the crowds, the cars often stopped in a sandy place west of the platform. Plaintiff, in rushing with the crowd on the sand to take the car, was pushed under it, and injured. Held, that it was open to the jury to find the defendant negligent in not providing a sufficient guard to prevent such an accident.—Cousineau v. Muskegon Traction & Lighting Co., 152 Mich. 48.

Liability of carrier for injury to passenger by setting of brakes by fellow passengers, see note, 13 N. C. C. A. 451-457.

§ 187. Protection from assault or attack.

Who are passengers, see ante § 110.
Questions for jury, see post § 228.
Instructions and requests, see post § 236.
Responsibility of the carrier as depending on whether the assault was by a servant in line or course of duty, see Master and Servant, IV.
Ejection from station or car without warrant or with excessive force as criminal assault, see Assault, § 8.
Misconduct of passenger as justification for assault, see Assault, ¶ 14.

¶ 525. While the liability of a carrier to passengers carried for hire for tortious acts of servants is absolute, and that for the acts of strangers or fellow passengers is relative, contingent and qualified, if the servant of the carrier has or should have knowledge that the condition or actions of a passenger threatens the safety of other passengers, or that mischief is to be reasonably apprehended, the duty to exercise the highest degree of care to insure the safety of passengers at once arises failing in which the carrier is liable for damages.—McWilliams v. Lake Shore & M. S. R. Co., 146 Mich. 216.

¶ 526. It is the duty of a carrier to protect its passengers against injury from the wilful misconduct of its employees, whether acting within the scope of their employment or otherwise.—Johnson v. Detroit, Y. & A. A. Ry., 130 Mich. 453.

¶ 527. A street railway company was not responsible for an attack upon a passenger riding from its amusement park, by a deputy sheriff appointed to preserve order at such park and on the cars returning therefrom, where such officer acted solely in his capacity as an officer, and not under the direction of the conductor of the car, although the expense of such police protection was borne by the company.—Foster v. Grand Rapids Ry. Co., 140 Mich. 689.

Liability of carrier for injury to passenger growing out of intoxication of fellow-passenger, see note, 8 N. C. C. A. 96-100.
Liability of carrier for injury or indignity to passenger by police officer not in its employ, see note, 11 N. C. C. A. 1025-1035.

7. Contributory Negligence of Passenger.

§ 188. In general; proximate cause.

Duty to sleeping passengers and infants, infirm or drunken persons, see ante §§ 172-174.
Negligence of carrier after discovering danger of negligent passenger, see post § 205.
Going to platform as proximate cause, see also post ¶ 563.
Riding on platform, proximity in cause to injury in escaping from danger, see also post ¶ 552.
Burden of proof and presumptions, see post § 210.
Evidence of contributory negligence or to rebut it, see post § 214.
Sufficiency of evidence of cause of injury, see post § 219.
Questions for jury and court, see post §§ 230, 231.
Instructions and requests, see post § 237.
Imputed negligence of parent to child or of one to another person, see generally Negligence, IV.
Imputation of carrier's negligence to passenger suing another, see Negligence, IV.

¶ 528. Every one is bound to know that a railway conductor has no general power to run his train except in conformity to the schedule.—Lake Shore & M. S. R. Co. v. Pierce, 47 Mich. 277.

¶ 529. Railway passengers are presumed to know the every-day incidents of railway travel, and it cannot be expected that they will be put under restraint or treated like children.—Mitchell v. Chicago & G. T. Ry. Co., 51 Mich. 236.

¶ 530. A passenger on a railroad car should not incur that which would impress the mind of an ordinarily prudent man with a belief of danger. If the danger would not be apparent he is not negligent in acting on that assumption.—Strand v. Chicago & W. M. R. Co., 64 Mich. 216.

¶ 531. A passenger's negligence in going to the platform of a car while it is still moving does not affect his right to recover for an injury suffered in properly alighting after the train has stopped.—Wood v. Lake Shore & M. S. Ry. Co., 49 Mich. 370.

Failure of passenger to protect himself during altercation on car or train as contributory negligence, see note, 3 N. C. C. A. 379.

§189. Age, infirmity or drunkenness as factor.

Duty of carrier towards children or infirm persons, see ante § 150.
Duty of carrier towards drunken persons, see ante § 151.
Sufficiency of evidence, see post § 216 et seq.
Question for jury, see post § 230.
Instructions, see post § 237.

¶ 532. A passenger cannot recover against a railroad company for injuries received in alighting from a train, if his being under the influence of liquor at the time contributed to the injury.—Strand v. Chicago & W. M. R. Co., 67 Mich. 380.

¶ 533. The caution required of a child riding on a railroad train is according to his maturity and capacity, to be determined by the circumstances in each case; and the degree of discretion in avoiding danger depends upon the child's age and knowledge.—Ecliff v. Wabash, St. L. & P. R. Co., 64 Mich. 196.

§ 190. Care required in riding on freight trains.

Risks assumed by passenger, see also ante ¶¶ 461, 462.

¶ 534. The court is not justified in holding a passenger on a freight train guilty, as a matter of law, of negligence contributing to injuries received by him from the shunting of cars against the one in which he was riding, on the ground that he failed to guard against the danger, unless it clearly appears that he did not take the precautions usually exercised by ordinarily prudent men under the same circumstances.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

§ 191. Approaching and boarding trains.

Right to rely on information given by servants of carrier, see ante § 132.
Entering too soon, see post § 193.
Getting on from wrong side, see also ante ¶ 512.
Leaving waiting rooms to board train before time, see also ante ¶ 521.
Getting on when in motion, see post § 192.
Instructions and requests, see post § 237.

¶ 535. A passenger at a railroad station, who, upon seeing his train approaching, walks along the platform, knowing it to be insufficiently lighted, towards the place where he thinks the train will stop, and who, in the darkness, steps off the platform upon the track, and is struck by the engine, is guilty of contributory negligence, precluding a recovery against the railroad company because of its failure to keep the platform properly lighted.—Bradley v. Grand Trunk R. Co., 107 Mich. 243.

¶ 536. Plaintiff was in charge of the semaphore signals and the switches at a railroad junction and upon completing his day's work was accustomed to taking a train for home at the junction station. When the train was due, and seeing a headlight which he thought was that of his train, he left the platform and walked up a parallel track, as was his custom, so as to enter a car next the engine, such track being 20 feet away with open space between upon which he could safely have walked. He proceeded without looking back, though he knew engines were liable to pass at any time, and when he had gone 100 feet he was struck by a switch engine which approached without blowing any whistle or ringing any bell. Held that he was guilty of such contributory negligence as precluded recovery, though the rules of the company required that switch engines take special precautions at the junction.—Spaven v. Lake Shore & M. S. R. Co., 130 Mich. 579.

¶ 537. A passenger was not guilty of contributory negligence, as a matter of law, where, in an action for personal injuries received by being thrown between the motor car and trailer of defendant company as its train was coming into the station of their amusement park, it appears that the person injured, a girl about 16 years old, and her girl companion, took a position in the front rank of the crowd waiting for the train, in an effort to get a seat for the return trip home, and that while so standing on the station platform, as the train was coming into the station, the crowd rushed forward pushing her between the cars of the moving train to her injury.—Cousineau v. Muskegon Traction & Lighting Co., 145 Mich. 314.

¶ 538. Plaintiff's deceased was going on foot along defendant railway's track, carrying a basket of goods. Upon reaching a point about 300 feet from defendant's station, he saw a car approaching at a point about 150 feet the other side of said station. He signaled the car to stop, setting down his basket on the track and taking his stand on the ties west of the track. Defendant's motorman did not stop at the station and continued full speed. After the car passed the station plaintiff's deceased again signaled the car to stop, but it kept right on. When the car was about fifty feet away, plaintiff's deceased bent over the rail to get his basket and was hit and killed. The accident occurred in broad daylight. In a suit by plaintiff administrator under the survival act, held, the deceased was guilty of contributory negligence and a verdict for defendant was properly directed.—Levy v. Houghton County St. Ry. Co., 164 Mich. 572.

¶ 539. An intending street car passenger who, with the intention of taking a west bound car on the southerly of two tracks in a city at a street intersection, where cars from the north were accustomed to turn by means of a "Y" on the northerly track, observes a north bound car standing still at a point where it was necessary that it be backed to the east in order that it may enter on the east track of the "Y" to proceed north, and perceives that there is no conductor on the rear platform of such car, as is required by ordinance to give warning to pedestrians and vehicles whenever the car is about to be backed, and proceeds to cross behind such car without again looking at the standing car, and is struck, is not guilty of contributory negligence as a matter of law.—McManigle v. Detroit United Ry., 193 Mich. 530.

¶ 540. An intending passenger who is thoroughly acquainted with a railroad crossing on a highway, having traveled over it weekly for two years, is guilty of contributory negligence where, on a bright day with abundant time to catch a motor car, and, with knowledge of wet and slippery conditions under foot, she catches her foot between a rail and a board plank constituting part of the crossing while on her way across the track to reach the point where she intended to take the car.—Switzer v. Ann Arbor R. Co., 190 Mich. 35, 16 N. C. C. A. 198.

¶ 541. Defendant's cars running into an amusement park were accustomed from time to time to stop in a sandy place west of the station platform, to take on passengers. Plaintiff, in rushing with the crowd upon the sand to take the car, was pushed under it, and injured. Held, that plaintiff was not, as a matter of law, contributorily negligent from the fact of her going upon the sand to take the car.—Cousineau v. Muskegon Traction & Lighting Co., 152 Mich. 48.

¶ 542. A decedent was guilty of contributory negligence when, while riding upon a bicycle towards the defendant's station with the intention of boarding a passenger train, she approached a spur track upon which an engine was backing, and in dismounting as she got close to the track was struck either by the engine or part of a reach thereon and killed; it appearing that decedent was familiar with the surroundings and knew that the engine did not run on schedule and was liable to come at any time, and where there was no occasion to stop and listen as sight alone would have given all the warning needed; and the fact that decedent's husband beckoned to her to approach after the conductor had promised to hold the train for her if she hurried up, did not relieve decedent from using the precautions required of any traveler. —Smith v. Detroit & M. Ry. Co., 136 Mich. 282.

¶ 543. Passengers have a right to a reasonably sufficient time to get off and on trains. But one who reaches the depot before the cars, and, having plenty of time to go upon the platform, deliberately waits upon the ground on the opposite side of the track, and attempts to get on board from that side, especially after dark, and is thrown off by the starting of the cars before she is securely on, is not free from contributory negligence. —Michigan Cent. R. Co. v. Colman, 28 Mich. 440.

§192. ——Cars in motion.

Person boarding car in motion as passenger, see ante § 110.

Weight and sufficiency of evidence, see post § 216 et seq.

As question for jury, see post § 231.

¶ 544. Plaintiff's conduct in running towards an approaching train and in attempting to board such train was held not excused by his belief that he could reach a given point before the train reached it, or by his being so confused when he reached the train that his act in attempting to board it was involuntary.—French v. Detroit, G. H. & M. R. Co., 89 Mich. 537.

¶ 545. A verdict for the defendant street railway company is sustained by evidence that the plaintiff's intestate was killed while boarding a moving car on the wrong side.—Thompson v. Citizens' St. Ry. Co., 125 Mich. 249.

¶ 546. Where a conductor of a street car, after being informed by plaintiff of his purpose to board the moving car, gives the starting signal and the speed of the car is increased, the plaintiff in attempting to get on at a point other than a regular stopping place assumes the risk of his attempt, but not of the negligence of the conductor in accelerating the speed.—Orth v. Saginaw Valley Traction Co., 162 Mich. 353.

¶ 547. Defendant's street car stopped at a railroad crossing. After going ahead to see that the track was clear, the conductor signaled the car to start, and swung on it as it came along. Plaintiff had told the conductor and signaled the motorman that he wished to get on, and attempted to board the car, just after the conductor. The latter gave the two-bell signal for starting the car, and its speed was increased. There was evidence, which was disputed, that the car was going six miles an hour when plaintiff, weighing some two hundred pounds, attempted to get on and was injured. Held, plaintiff was not as a matter of law guilty of contributory negligence.—Orth v. Saginaw Valley Traction Co., 162 Mich. 353.

§ 193. Entering a train too soon.

¶ 548. A passenger who enters the detached caboose of a mixed train carrying both passengers and freight, upon being informed by the conductor that the train would leave in a few minutes, is not guilty of contributory negligence in entering the caboose and taking a seat although the rest of the train is then backing towards it.—Stoody v. Detroit, G. R. & W. R. Co., 124 Mich. 420.

¶ 549. A passenger was not guilty of negligence per se in entering a car which was standing upon the main track, while the engine and other cars were detached, without looking to see whether the other cars were backing when he was so invited to enter, nor was he guilty of negligence per se in not taking the first seat and in taking his time to select his seat.—Moore v. Saginaw, T. & H. R. Co., 119 Mich. 613.

Liability for injury to passenger who has entered, or attempted to enter, train or car before same ready, see notes, 3 N. C. C. A. 121-127; 13 N. C. C. A. 558-564.

§ 194. Riding in wrong place.

Duty to prevent riding in unsafe place, see ante § 131.
Boarding on wrong side, see ante §§ 191, 192.
Taking wrong place at invitation or by leave, see post § 196.
Negligence in operating cars with respect to passengers not riding seated, see ante IV, E, 4.
Questions for jury, see post § 230.

¶ 550. A passenger who enters the caboose of a freight train while the door is still open so that he knows that the crew is still switching, and takes a loose seat intended for the conductor, instead of the fixed seats which were available, is guilty of contributory negligence, and cannot recover for injuries caused by being thrown from the chair by the impact of a car against the caboose.—Freeman v. Pere Marquette R. Co., 131 Mich. 544.

¶ 551. A person who is accepted as a passenger on a street car and required or permitted to ride on the platform is not guilty of negligence per se, and he does not assume all risks except the gross, wilful and wanton misconduct of the company.—Larskowski v. Detroit United Ry., 193 Mich. 409. (Brooke, J., dissenting.)

¶ 552. Where a passenger attempts to escape from a street car which has run off the track, and, while alighting, is injured either by a kick from one of the horses or by jumping from the car, the fact that the passenger was riding upon the platform of the car at the time cannot be said to have been the proximate cause of the injury, it appearing that the like attempt to escape would have been made had she been inside the car, and that such attempt was in fact made by inside passengers.—Noble v. St. Joseph, B. & H. St. R. Co., 98 Mich. 249.

Liability of carrier for injury to passenger riding in baggage car or compartment, see note, 10 N. C. C. A. 96-101.

§ 195. ——On platforms and running boards.

See also ante ¶ 551.
By leave or invitation of trainmen, see post § 196.
Care required of carrier in operating car with passengers on running board, see ante § 165.
Going on platform as proximate cause, see also ante ¶ 531.
Nonliability to person riding on platform or in wrong car when seats are provided inside passenger cars, see Comp. L. 1915, § 8313.

¶ 553. Passengers who ride upon car platforms, and the companies that permit them to do so, are equally guilty of violation of duty, and where the concurrent negligence of the two results in an injury, the law will not suffer the injured party to recover from the other. But duty can be predicated of those only who have capacity to understand and ability to perform it.—East Saginaw City Ry. Co. v. Bohn, 27 Mich. 503.

¶ 554. It is not negligence per se to ride upon the front platform of a street car, even though there is room within; and in the absence of regulations prohibiting such riding it is error to charge that it precludes recovery for an injury occasioned by the company's negligence; the question is for the jury.—Upham v. Detroit City R. Co., 85 Mich. 12.

¶ 555. A passenger who, by reason of the crowded condition of a street car and of the rear platform, is obliged to ride on the front platform, has a right to do so in the absence of regulation to the contrary, and in so doing is not guilty of negligence.—Archer v. Fort Wayne & E. R. Co., 87 Mich. 101.

¶ 556. A passenger on an excursion train was allowed to leave one car and go into another to sell tickets. He had left his wife on the first car, which was an open one, the seats being reached from an outside running board instead of an inside aisle. The running board was used by the conductor and trainmen in passing from point to point. Held, that it was not necessarily negligent for the passenger to suppose that he also could use it safely, and try to do so in returning to the car where his wife was. And supposing it to be safe, as it should be, it was not negligence to omit to look out for structures so close

alongside the track as to endanger persons who had to be on the running board while passing them.—Dickinson v. Port Huron & N. W. Ry. Co., 53 Mich. 43.

¶ 557. One riding outside a street car on the rear bumper, injured by being struck lightly by the car behind, is guilty of contributory negligence as a matter of law where no invitation, sanction, or custom is shown, the employees were instructed not to permit it, and the conductor testified that he had warned the passenger to wait for another car two or three minutes later.—Nieboer v. Detroit Electric Ry., 128 Mich. 486. (Moore J., and Montgomery, C. J., dissenting on the ground that the facts warranted the question of contributory negligence being left to the jury.)

¶ 558. Under Comp. L. 1897, § 6303, limiting liability to passengers riding on platforms, a passenger on a railroad train is not guilty of contributory negligence, as a matter of law, in leaving his standing position on a crowded passenger car on account of faintness due to conditions caused by the overcrowding and going upon the platform, where he lost consciousness and fell from the train.—Morgan v. Lake Shore & M. S. R. Co., 138 Mich. 626. (Hooker and Grant, JJ., dissenting on the facts.)

Risks assumed by passenger on running board of street car, see note, 2 N. C. C. A. 700.

§ 196. ——By invitation or leave of trainmen.

Sufficiency of evidence, see post § 220.

¶ 559. It is contributory negligence for a passenger of ordinary common sense to sit on the driving-bar of a street car, even at the driver's invitation, if there is room for him inside the car.—Downey v. Hendrie, 46 Mich. 498.

¶ 560. A street car conductor is not guilty of negligence in requiring a boy to point out a person sitting in another part of the car who, the boy claims, has paid his fare, where such person is visible from the inside of the car, and there can be no recovery for injuries caused by the boy's unnecessarily going upon the running board to make the designation, and falling from the car.—Goodfellow v. Detroit United Ry., 155 Mich. 578.

¶ 561. Where an invalid was placed by her husband and brother, neither of whom was experienced in railroading, under the direction of defendant's baggageman and with the knowledge of defendant's conductor, both of whom were experienced railroad men, in defendant's baggage car upon a cot near a pile of trunks which, upon a sudden stopping of the train, toppled over upon and injured her, and there was room in the car for her to be placed so the trunks would not fall upon her, held that such invalid could not be held to have assumed the risk.—Tozer v. Michigan Cent. R. Co., 195 Mich. 662.

¶ 562. Where an invalid, plaintiff's decedent, riding in defendant's baggage car was placed by defendant's baggageman, with the knowledge of defendant's conductor, both experienced railroad men, on a cot near a pile of trunks, which, upon a sudden stopping of the train by the engineer when he discovered something wrong with the engine, toppled over upon and injured the decedent, and, had she not been so placed one or more of the trunks would not have fallen upon her, held that the proximity of the cot to the trunks was the proximate cause of the injury, and due to the act of the baggageman.—Tozer v. Michigan Cent. R. Co., 195 Mich. 662.

§ 197. Walking in moving cars.

¶ 563. A passenger's negligence in going to the platform of a car while it is still moving does not affect his right to recover for an injury suffered in properly alighting after the train was stopped.—Wood v. Lake Shore & M. S. Ry. Co., 49 Mich. 370.

¶ 564. A passenger expecting a car to stop for her to alight, is not guilty of contributory negligence as a matter of law from the mere fact that she walks towards the door while the car is in motion, as it approaches the station.—Schultz v. Michigan United Rys. Co., 158 Mich. 665.

§ 198. Alighting from train or car.

Walking in train preparatory to alighting, see ante § 197.

Passenger tardy because fallen asleep, see also ante ¶ 483.

From moving car or after stop, see post §§ 199, 200.

Questions for the jury, see post § 230.

Instructions and requests, see post § 237.

¶ 565. It is not negligence in a railway passenger to leave a car at its rear end in the absence of any rule or general custom making the forward end the only proper place.—Cartwright v. Chicago & G. T. Ry. Co., 52 Mich. 606.

¶ 566. A passenger may assume that the place where he is invited to alight by the train brakeman is a safe place, the passenger being a stranger there.—Mensing v. Michigan Cent. R. Co., 117 Mich. 606.

¶ 567. For a street car passenger to attempt to alight at a regular alighting place where the car came to a stop for the purpose of

permitting the passengers to alight, cannot be said to be negligence as a matter of law.—Burke v. Bay City Traction & Elec. Co., 147 Mich. 172.

¶ 568. A passenger who in the daytime, in alighting from a street car at a point where paving is in progress, steps on and is thrown by loose paving block, is, as a matter of law, guilty of contributory negligence, where the danger was as apparent to him as to those in charge of the car.—Whitmore v. Detroit United Ry., 185 Mich. 46.

¶ 569. A verdict is properly directed for the defendant in an action against a street railway company for injuries sustained by a passenger while alighting from a car in the daytime, by stepping on loose paving blocks in a street undergoing repair, where the danger was as apparent to him as to those in charge of the car.—Whitmore v. Detroit United Ry., 185 Mich. 46.

¶ 570. Where it is customary at a place where a street railroad crosses a railroad to stop the car while the conductor goes forward to ascertain whether the street car can make the crossing in safety and to allow passengers to get off at such point, a passenger who gets up before the car has come to a stop and goes to the back part of the car and comes back to a seat near the rear and waits until the car comes to a full stop, when she gets up and is injured while attempting to alight from the car as a result of the fact that she is not given a reasonable time to get off is not guilty of contributory negligence.—Kirkpatrick v. Muskegon Traction & Lighting Co., 195 Mich. 519. (Steere, Ostrander and Brooke, JJ., dissenting.)

§ 199. ——From moving train or car.

As question for jury, see post § 231.

¶ 571. In an action against an electric railway company for personal injuries, the evidence showed that the conductor at a certain point called out the name of plaintiff's destination; that the car soon came to a stop and plaintiff prepared to alight, but that when she was on the bottom step the car suddenly started, and threw her violently to the ground; that the accident occurred at night, and plaintiff could not see where she was alighting. Held, that plaintiff was not necessarily guilty of contributory negligence because this was not a regular stopping place, it being a point of junction with a railroad company, where for safety's sake, all of defendant's cars stopped.—Smith v. Detroit United Ry., 155 Mich. 466.

¶ 572. To attempt to alight from a moving street car is not negligence as a matter of law, such being a question for the jury, depending upon the circumstances, the most important of which is the rapidity of motion.—Burke v. Bay City Traction & Elec. Co., 147 Mich. 172.

¶ 573. It is negligence for a passenger to leap from a moving train for the mere purpose of getting off at a station where the train should stop, but does not do so, even though he takes that course in order to save others distress on account of his absence.—Lake Shore & M. S. R. Co. v. Bangs, 47 Mich. 470.

¶ 574. For a woman eighteen years old to alight from a train after it has passed her station, and is running at the speed of four miles an hour, is such contributory negligence as precludes recovery.—Jacob v. Flint & P. M. R. Co., 105 Mich. 450.

¶ 575. In an action by an adult passenger against a railroad company for damages for injuries received as a result of his stepping off the train in a dark place after his station had been called and the vestibule door opened, but while the train was still in motion, held that plaintiff was guilty of contributory negligence as a matter of law.—Hooker v. Blair, 189 Mich. 278.

§ 200. ——After stop or slowdown.

See also ante ¶ 497.

¶ 576. passenger who, in attempting to alight from a street car, has reached a point where it is difficult to turn back, is not negligent in continuing his descent after the bell has rung for starting, although in so doing he is thrown from the car by its being suddenly started before such descent is completed.—Lacas v. Detroit City R. Co., 92 Mich. 412.

¶ 577. After a train has stopped it is not negligence per se for a passenger, the brakeman inviting and assisting, to alight, though, while so doing, the train starts again, unless the speed is so great that the danger is obvious.—McCaslin v. Lake Shore & M. S. R. Co., 93 Mich. 553.

§ 201. Alighting at wrong or unusual place.

Duty to assist passengers, see ante § 172.
Alighting beyond platform where train does not stop conveniently, see also ante ¶ 518.
On direction of trainmen, see also ante ¶¶ 519, 520.
At rear end of car, see also ante ¶ 565.
Questions for jury, see post § 230.
Instructions, see post § 237.

¶ 578. It is proper as a matter of law for a passenger to assume an invitation to alight in the street opposite the middle of an inter-

secting way instead of waiting for a regular stop at the farther side of the crossing, where, having signaled for a previous stop and having been carried past, a further signal is given and the car stops apparently in response thereto, though in fact the conductor testifies that the stop was enforced by other cars ahead, which fact the passenger could not have known because it was night and the reasons for the stop could not be seen. —Selby v. Detroit Ry., 141 Mich. 112.

¶ 579. Defendant maintained pleasure grounds at a summer resort near the city in which it operated its road. For the more convenient carriage of passengers to and from the resort, its double track had been extended and formed into a loop at the resort terminus, and cinders had been spread on the side of the loop next to the resort, so as to form a safe landing place, from which a walk led to the pleasure grounds. Plaintiff, in attempting, after the car had come to a stop opposite said path, to alight inside the loop, fell and was injured. She sued the company, claiming that the cause of the accident was its negligence in permitting a ridge of earth to remain at a point where one alighting inside the loop would be likely to step upon its ledge, and slip backward, as she testified she did. Defendant insisted that, having provided a safe landing place on the side of the loop nearest the pleasure grounds, its full duty to passengers was performed. Held, that under the circumstances of the case, and in view of plaintiff's testimony that she had previously been helped off the car by defendant's conductors inside the loop, and of the common practice of passengers, as established by the testimony, to alight on either side of the cars indiscriminately, said cars being so constructed as to enable them to do so, and of the absence of any warning or notice to passengers to step off only on the side nearest the landing place, it cannot be said, as matter of law, that it was negligence for plaintiff to attempt to alight inside the loop.—Poole v. Consolidated St. R. Co., 100 Mich. 379.

§ 202. Crossing tracks on alighting.

See also ante ¶ 539.

Sufficiency of evidence, see post § 220.

¶ 580. A business man of intelligence and familiar with street cars, who after alighting from a street car crosses in the rear of the car and is struck by a car on the other track going the other way, is guilty of contributory negligence so as to bar recovery for injuries sustained.—Doty v. Detroit Citizens' St. Ry. Co., 129 Mich. 464.

¶ 581. Plaintiff alighted from a westbound street car running on the north track and stood until said car had proceeded some fifteen feet, when she looked to the west, was able to see down the tracks about 125 feet, saw no approaching car, and thereupon, without again looking for a car, proceeded to cross the street, and was injured while on the south track by an eastbound car. Held, she was precluded by contributory negligence from recovering.—Clark v. Detroit United Ry., 168 Mich. 457.

¶ 582. A street car passenger, upon alighting from a car on a street having two tracks, should, if he desires to cross the street, exercise reasonable diligence for his own safety to avoid a car coming from the opposite direction on the other track.—Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131.

¶ 583. A street car passenger of mature age and unimpaired faculties, who is reasonably familiar with the surroundings and of the use of double tracks by the street railroad, is guilty of contributory negligence as a matter of law when, after alighting from a northbound car on the north side of an intersecting street, although his view is unobstructed for 1,700 feet save by the car from which he alighted, he tries to cross the southbound track without getting into a position so that he could see an approaching southbound car.—Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131.

§ 203. Leaving station by improper route.

See also ante ¶ 436.

Crossing in rear of cars to other track, see ante § 202.

Gross negligence and last clear chance, see also post ¶ 587.

¶ 584. The plaintiff's intestate, a boy of eight years, in alighting with the plaintiff and others from a train at the depot was killed while running across a number of tracks and switches to reach the street, instead of going out by the way provided, through the depot. The people of the town were accustomed to go out the way the boy did and had worn a beaten path, but the railroad company had up signs warning against such acts. Held, the company had used due care and was not liable.—Perego v. Lake Shore & M. S. Ry. Co., 153 Mich. 225.

§ 204. Acts done in face of danger.

See also ante ¶ 544.

Alighting from train in motion, see also ante ¶ 576.

Acts in face of peril as negligence generally, see Negligence, I, IV.

¶ 585. The jumping from the car of which the motorman had lost control, as it was turning a curve, by the passenger in question, would not have been contributory negligence,

under the danger and excitement incident to an imminent collision.—Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432.

§ 205. Supervening negligence; last clear chance.

Towards person on platform, see also ante ¶ 551.
Starting up speed while passenger is negligently boarding, see ante ¶ 546.
Pleading gross negligence of carrier, see post § 208.
Questions for the jury, see post § 232.

¶ 586. In an action for an injury caused by falling off the front rail of a street car, and being run over, the defendant's testimony, which was not contradicted, showed that the driver made every effort to rescue the plaintiff as he fell, and stopped his car as soon as he could. Held, that so far as running over him was concerned there was no question of negligence, on defendant's part, to go to the jury.—Downey v. Hendrie, 46 Mich. 498.

¶ 587. Where a boy eight years old in alighting from a train is killed while running across other tracks to reach the street, instead of going by the way provided, through the depot, the railroad company is not guilty of gross negligence by reason of the fact that the fireman who saw the boy and reasonably thought he had time to get across, did not warn the engineer to stop.—Perego v. Lake Shore & M. S. Ry. Co., 158 Mich. 225.

¶ 588. Where the plaintiff, who was standing on the rear bumper of an overcrowded street car, which suddenly stopped as it was leaving a switch, was injured by a collision with a slowly moving car, also just starting to leave the switch, the carrier is not liable, on the theory of the subsequent negligence of the motorman of the following car, who was aware of the plaintiff's danger, in not stopping it, where he used every possible effort to do so after the sudden stoppage of the preceding car, but by reason of the wet and slippery condition of the rails was unable to do so in time to prevent the collision.—Ruscyk v. Detroit United Ry., 180 Mich. 399. (Kuhn and Bird, JJ., dissenting, holding that the question of subsequent negligence, under the facts, was a question for the jury.)

¶ 589. Notwithstanding that the plaintiff, by riding on the rear bumper of an overcrowded street car, was chargeable with negligence, the carrier will be liable for injuries received by him in a rear end collision, if the motorman of the following car, after discovering the paintiff's danger, was grossly negligent in failing to make a reasonable effort to stop his car in time to avoid the collision.—Ruscyk v. Detroit United Ry., 180 Mich. 399.

¶ 590. Contributory negligence of a street car passenger who attempts to cross a street, after having alighted from a car, and is struck by a car coming from the opposite direction, will not prevent a recovery where the defendant knew, or ought to have known, of the precedent negligence of the passenger.—Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131.

8. Actions for Injuries.

§ 206. In general.

[Note. It is not intended to collect here any of the general law of pleading and practice, but merely to collect applications of such rules to the specific action for personal injuries to passengers. In addition to the matter in the section lines following, see general topics such as Abatement and Revival; Damages. Death by Wrongful Act; Discontinuance; Evidence; Examination of Witnesses; Judgments; Pleading; Trial; Verdicts.]
Actions for ejection, see ante §§ 142-144.
Actions for loss of baggage, see post §§ 255-258.
Improper argument in action for injury to passenger, see Argument of Counsel.
Measure and elements of damages, see Damages.

§ 207. Parties; joinder.

Liability where negligence concurs with another's, see ante § 149.
Evidence as to party in control of road, see post § 215.
General law of parties, see Parties.

¶ 591. A passenger upon one vessel injured by its collision with another in consequence of the negligence of the officers of both may sue them jointly.—Cuddy v. Horn, 46 Mich. 596.

§ 208. Pleading; Parties.

Issues made under the pleadings and variance in proof, see post § 209.
Necessity of alleging breach of ordinance, see post ¶ 600.
General law of pleading, see Pleading.
Pleading damages, see Damages.
Necessity of specially pleading that assault on passenger was due to negligence in discovering that he was drunk, see also Assault, ¶ 76.

¶ 592. It is sufficient in pleading a carrier's rule or regulation to state the rule or regulation, that plaintiff comes within it,

and aver its reasonableness. The facts upon which the party relies to establish its reasonableness need not be spread upon the record.—Day v. Owen, 5 Mich. 520.

¶ 593. Where the declaration in an action against a railroad company for injuries to a passenger alleges that the train started before the plaintiff had reasonable time to alight safely, it sufficiently avers that the train was negligently started while the plaintiff was in the act of alighting.—McCaslin v. Lake Shore & M. S. R. Co., 93 Mich. 553.

¶ 594. An allegation in a declaration in a personal injury case against a railroad, that the defendant "made a practice" of permitting a mail pouch to be ejected in a manner and at a place which subjected persons who might lawfully be upon the premises to hazard, implies knowledge on the part of the defendant, and is sufficient if not demurred to.—Shaw v. Chicago & Grand Trunk R. Co., 123 Mich. 629.

¶ 595. In an action by a passenger against a street railroad for damages for injuries sustained by plaintiff after alighting from a northbound car on the north side of the intersecting street and while attempting to cross the southbound track, as a result of being struck by a southbound car, a declaration alleging that defendant wholly and wantonly failed to give any warning of the approach of the car which did the injury; that the car was driven negligently and wantonly at an unreasonable and improper rate of speed; that by the gross negligence, omission and fault of defendant plaintiff was struck and injured, and further alleging with a videlicet that the car which injured plaintiff was traveling at the rate of 35 miles per hour, held to allege gross negligence.—Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131.

¶ 596. An averment in a declaration for personal injury "that while the plaintiff was standing at the door holding onto the hand railing on the end of the car, he became and was unconscious by reason of said foul and unwholesome air and fell from said train while the same was running at a high rate of speed and struck with great force on the ground," is sufficient to establish the chain of causation between the injury and the speed of the train.—Morgan v. Lake Shore & M. S. R. Co., 138 Mich. 626.

¶ 597. In an action for personal injuries, a declaration alleging that plaintiff was a passenger on defendant company's car, and that, such car being crowded, he was compelled to stand on the rear platform, and that defendant "caused to be suspended a live electric wire from the roof or ceiling of the car in a manner and at a place where passengers standing on the rear platform, as plaintiff was, would easily come in contact therewith; and that the wire suspended as aforesaid looked very much like the rope which is ordinarily and commonly suspended by the defendant on its motor cars for the purpose of raising and lowering the trolley arm on said cars, and, believing the wire aforesaid to be a rope, the plaintiff's hand came in contact therewith, and without any fault or negligence on his part and without contributing in any way thereto, he received, suffered and sustained a severe shock," etc., and "was unable to release his hands from contact therewith until relieved by the power being shut off," is not demurrable because it fails to state why he took hold of the wire, and is sufficient to sustain a judgment based thereon.—Hopkins v. Michigan Traction Co., 144 Mich. 359.

¶ 598. In a suit for personal injuries, the declaration charged liability against defendant railway because it slackened its speed and, while plaintiff was standing on the step waiting to alight, suddenly started up the car and threw plaintiff off. Held, the declaration was not bad because it failed to state specifically by what means the car was started, the implication being that it was started up by defendant's motorman.—Schultz v. Michigan United Rys. Co., 158 Mich. 665.

§ 209. Issues and variance.

Conformity of instructions to various theories, see post § 233.

General law as to issues requiring proof and as to variance, see Pleading, IX, X.

¶ 599. An ordinance prescribing qualifications of car drivers and conductors cannot be proved under a declaration for common-law negligence wherein the ordinance is not pleaded.—Gardner v. Detroit St. R. Co., 99 Mich. 182.

¶ 600. In a suit for personal injuries against a street railway for negligently starting a car and thereby throwing plaintiff to the ground and injuring her, it is immaterial if the car was in fact started negligently, whether it was the fault of the motorman or the conductor.—Krouse v. Detroit United Ry. Co., 170 Mich. 438.

¶ 601. The question of whether or not the conductor of a street car is acting within the scope of his authority in informing a blind man alighting from the car that the way is clear, becomes immaterial when the way was in fact clear at the time.—Wilson v. Detroit United Ry., 167 Mich. 107.

¶ 602. The question of the fitness of the place where plaintiff was put off the train

is eliminated, in an action against the railroad for personal injury, where it appeared that plaintiff before the injury went to a place in a public and well frequented street 25 feet from the railroad.—Gaukler v. Detroit, G. H. & M. R. Co., 130 Mich. 666.

¶ 603. A railway passenger trying to board the wrong train fell and was killed in consequence of the sudden movement of the train. Held, that there could be no recovery for the passenger's death as caused by the wrongful act, neglect or default of the railway company, on a declaration alleging it to have been the company's duty to receive and transport such passenger by that train.—Flint & P. M. R. Co. v. Stark, 38 Mich. 714.

¶ 604. A declaration as for injury to plaintiff in being wrongfully put off the train at a place remote from the railway station will not support a recovery where the proof shows that the injuries suffered, which were very great, were mainly due to the passenger's being carried by but finally landed near the station so late that the carriage which had called for him had gone again, the driver supposing that he had not come, and when all places of shelter were closed, and all conveyances gone, it being after midnight, so that he was obliged, while suffering from fever, to walk home three-quarters of a mile in a freezing rain.—Harding v. Chicago & G. T. R. Co., 56 Mich. 628.

¶ 605. In an action by a passenger for injuries the declaration alleged that when the car started plaintiff was standing on the lower step of the car, but the proof showed that she stood near the door. Held, that the variance is immaterial, the gist of the action being that the train started while plaintiff was proceeding to alight.—McCaslin v. Lake Shore & M. S. R. Co., 93 Mich. 553.

¶ 606. In a suit for personal injuries plaintiff alleged in his declaration that as he was boarding defendant railway's car it started forward suddenly by means of a quick application of electricity. At the trial plaintiff testified that the car started slowly in the usual manner and, as he was reaching for the second step with his foot, made a sudden jerk. Held, the variance was not such as to call for a directed verdict for defendant upon plaintiff's refusal to amend.—Formiller v. Detroit United Ry., 164 Mich. 653.

¶ 607. In a suit for personal injuries against defendant street railway, plaintiff's declaration alleged that while in the act of alighting from defendant's car said car was carelessly and negligently started by defendant's agent before plaintiff had sufficient time to alight, and by means thereof plaintiff was jerked and thrown violently to the ground and injured. Plaintiff proved that as she was standing on the bottom step of the car, the car jerked, causing her to fall and be injured. Held, there was no fatal variance between the declaration and the proof.—Dykstra v. Grand Rapids, G. H. & M. Ry. Co., 165 Mich. 13.

¶ 608. The fact that a railroad company did not provide "suitable and proper apparatus, methods and appliances" for signaling its motor cars to stop or a safe place to signal, as alleged in the declaration, is not available to an intending passenger who was injured by catching her foot in between a rail and a board plank while simply crossing the railroad at a highway crossing to reach the place where she intended to take the car, the train stopping on signal by a friend who stayed on the opposite side for the purpose of signaling, at her request.—Switzer v. Ann Arbor R. Co., 190 Mich. 35, 16 N. C. C. A. 198.

§ 210. Burden of proof and presumptions.

Inferable ownership, see post § 218.
Sufficiency of evidence to support burden, see post § 216 et seq.
Necessity that evidence appear showing negligence in addition to injury, see post § 219.
Mere loss as prima facie negligence in shipment of goods, see ante § 88.
Instructions on burden, see post §§ 233-237.
Instruction on sufficiency of prima facie case, see post § 233.
Right of conductor to assume that passengers have alighted after reasonable time to do so, see also ante ¶ 510.
Right to assume that safe place to alight is chosen, see also ante ¶ 566.
In actions for loss of baggage, see post § 257.
General law of presumptions and burden, see Evidence, II.

¶ 609. In an action by a passenger against a carrier for personal injuries, the burden of proof rests upon the plaintiff to show negligence.—Thurston v. Detroit United Ry., 137 Mich. 231.

¶ 610. The burden of showing that plaintiff in an action for a railway injury was guilty of contributory negligence is upon defendant.—Guggenheim v. Lake Shore & M. S. R. Co., 66 Mich. 150.

¶ 611. A passenger hurt while alighting of her own accord from a train which, owing to an air-cock's turning so that the air-brakes failed to work, was moving beyond its station, cannot hold the company as negligent in failing to stop at the station—the burden being upon her to show that the air-cock turned through the company's negligence—or in failing to assist her to alight when the station had not been announced, or in

a sudden starting of the train, not shown to have occurred while she was alighting.—Porter v. Chicago & W. M. R. Co., 80 Mich. 156.

¶ 612. In an action against a railroad for injuries sustained by a waiting passenger through the throwing of a mail bag from a passing train through a depot window, where it appeared that it was the practice of the mailing clerk to throw a mail bag in a negligent way from the train while passing the station in question, it was not necessary to establish notice to the carrier for plaintiff to show that the bag had previously struck at this precise place, and the question of negligence was for the jury.—Shaw v. Chicago & Grand Trunk R. Co., 123 Mich. 629.

¶ 613. In a personal injury action by a passenger against a carrier, the burden to show due care is shifted to the defendant if it appears that any part of the caboose in which the passenger was seated gave way and fell when one part of the mixed train in question backed with customary caution into the caboose, and if the train was backed with such force as to cause the part to give way, negligence is established to which proof of a properly constructed car would be no reply.—Stoody v. Detroit, G. R. & W. R. Co., 124 Mich. 420.

¶ 614. If other circumstances, with the fact that an accident has occurred, give rise to an inference of negligence, the inference may be rebutted by showing that the appliances of a street car are in proper condition and order, and that the servants of the carrier did all that a high degree of care required in the conduct of the business.—Bury v. Detroit United Ry., 198 Mich. 447.

§ 211. Admissibility of evidence.

See also post §§ 212-215.

What facts are in issue under the pleadings, see ante § 209.

As to recognition of tickets by successor road, see also ante ¶ 346.

Weight and sufficiency, see post § 216 et seq.

General rules for competency of evidence, see Evidence, IV-IX.

Admissibility of subsequent tests as evidence of conditions in question, see Evidence, IX.

Evidence on damages, see Damages, XI.

¶ 615. Testimony as to the cost of rolling stock is irrelevant to the question of negligence in respect to a derailment caused by a defective axle in a car in the running of passenger trains.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 616. Proof of the general reputation of a street-car horse, among the drivers and employees of the company, as unsafe and unreliable, is admissible as tending to show the company's negligence in providing such an animal, and using it after the company knew or should have known its unfitness.—Wormsdorf v. Detroit City R. Co., 75 Mich. 472.

¶ 617. In an action for an injury occasioned by the falling of a plank used in lieu of a step from a station platform to the customary path, evidence as to how long and how much the path had been used by the public is competent.—Collins v. Toledo, A. A. & N. M. R. Co., 80 Mich. 390.

¶ 618. In a suit against intersecting railroads for injury due to a collision, it is not error to refuse the defendants permission to introduce an order of the railroad commissioner approving the interlocker, and regulating the speed of trains, where the evidence is clear that both railroads habitually ignored the speed regulations of the commissioner.—Van Orman v. Lake Shore & M. S. Ry. Co., 152 Mich. 185.

¶ 619. Evidence with reference to a platform where passengers alighted on the night of an accident to a passenger who was injured while attempting to reach a stool in front of the car steps, held to be admissible as bearing upon the negligence of the parties.—Chisholm v. Ann Arbor R. Co., 187 Mich. 214, 11 N. C. C. A. 438.

¶ 620. Evidence as to the condition of the right of way at the point where a passenger alighted from a train, as to whether it was slanting or not, and as to what it was covered with, held admissible in an action for damages for personal injuries as bearing upon the negligence of the parties.—Chisholm v. Ann Arbor R. Co., 187 Mich. 214, 11 N. C. C. A. 438.

¶ 621. In an action against a street railroad to recover for the death of a passenger due to the car, in the vestibule of which deceased was riding, colliding with a car on the opposite track which became derailed, held that evidence that it was the duty of the city to relay foundations for the track and that it had refused to do so was admissible to explain the condition of the roadbed.—Bury v. Detroit United Ry., 198 Mich. 447.

¶ 622. More than ordinary speed is not necessarily evidence of negligence in running a train.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 623. In an action by a passenger for injuries received from the sudden backing of a train as she was alighting, the absence

from the depot platform of conductors or trainmen to assist passengers in alighting may be testified to in order to show the surroundings, plaintiff disclaiming any right to recover for that reason.—Sherwood v. Chicago & W. M. R. Co., 88 Mich. 108.

¶ 624. It was not error to admit testimony as to the speed of the train and the absence of a bell cord, coupled with an instruction that the evidence could only be considered as bearing upon the question of whether it was negligence to load the cars in the manner in which they were loaded, having reference to these conditions.—Keating v. Detroit, B. C. & A. R. Co., 104 Mich. 418.

¶ 625. Testimony of a witness who got off a car at the same stop as did the plaintiff, held in an action for personal injuries competent to be considered for its bearing upon the plaintiff's assertion that the car had stopped and started up again before he had time to get clear of it in alighting therefrom.—Tuttle v. Detroit, J. & C. Ry. Co., 193 Mich. 390.

¶ 626. The acts of a street railway company in carrying passengers greatly in excess of the seating capacity of its cars, and in permitting them to stand on the platforms and steps are evidence of negligence.—Larskowski v. Detroit United Ry., 193 Mich. 409 (Brooke, J., dissenting).

§ 212. ——Conditions or acts at other times or places.

Testimony of fellow passengers, see also ante ¶ 625.

General rule as to res inter alios acta, see Evidence, III.

¶ 627. In an action for railway injury, defects in the track at other times and places than those of the accident cannot be shown in proof of negligence contributing to the injury.—Grand Rapids & I. R. Co. v. Huntley, 38 Mich. 537.

¶ 628. In a suit by a passenger against a railroad company for an injury caused several years before by alleged negligence in providing convenient means for getting on the cars in safety, evidence of the location and dimensions of the platform and other depot surroundings at the time of the trial, for the purpose of showing the state of things at the time of the accident, would be improper, unless it is also shown that there had been no change, or, if there had, how it had been made.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 629. In an action for personal injuries against a railroad for suffering a mail bag to be thrown from a passing train through a depot window, where, as evidence that it was the practice of the mailing clerk to throw a mail bag from the train passing the station in question, a witness, against objection, was permitted to state that he saw a man struck by a mail bag on the platform, and where it developed on cross-examination that such occurrence happened about 13 years prior to the accident in question, such testimony was subject to be stricken for remoteness, but in the absence of such a motion, there was no error.—Shaw v. Chicago & Grand Trunk R. Co., 123 Mich. 629.

¶ 630. Plaintiff was injured while boarding a street car. He introduced evidence to show that the injury was due to the jerking of the car. Defendant put in evidence that its cars were equipped with a device to prevent jerking. Held, evidence that witnesses had experienced jerking on other cars of defendant was admissible in rebuttal.—Orth v. Saginaw Valley Traction Co., 162 Mich. 353.

¶ 631. In an action for injuries where it is alleged that plaintiff slipped on ice and snow in the vestibule of a street car, it is proper to admit testimony by one who was a passenger on the car on a subsequent trip as to the condition of the vestibule as he found it to show climatic conditions, that snow was tracked at the time in question and that it was congealing.—Dorrance v. Michigan United Rys. Co., 175 Mich. 198.

¶ 632. Where it is alleged that plaintiff slipped on ice in the vestibule of defendant's street car, it is prejudicial error to admit testimony by one who was a passenger on the car on a subsequent trip as to the condition of the car as he found it to show its condition at the time of the accident where there is no showing that the conditions were the same and it seems that they were not the same.—Dorrance v. Michigan United Rys. Co., 175 Mich. 198.

¶ 633. In a suit for negligence for injury sustained by passenger on a street car, testimony that the street car company after an accident separated the horses attached to its car, is incompetent for the purpose of raising a presumption that they were vicious, and that proper care had not been taken in selecting them.—Noble v. St. Joseph & B. H. St. R. Co., 981 Mich. 249.

¶ 634. Evidence as to where a passenger train stopped on former occasions held admissible in an action by a passenger against a railroad company for damages for personal injuries received while attempting to alight from the train as bearing upon the negligence of the parties.—Chisholm v. Ann Arbor Railroad Co., 187 Mich. 214, 11 N. C. C. A. 488.

§ 213. ——Violation or disregard of law or ordinance.

Breach of statute or ordinance as negligence or evidence of negligence, see Negligence, I, V, B.

¶ 635. Where an act designed to regulate the operation of street cars is intended for the protection of the general public, a failure to furnish appliances prescribed by it, is evidence of negligence, even without any express provision making the company liable for such omission.—Fortin v. Bay City Traction & Electric Co., 154 Mich. 316.

§ 214. ——On contributory negligence or to rebut it.

¶ 636. In an action for injuries received while alighting from defendant's moving car, plaintiff may testify, to show her reason for so alighting, that on a former occasion the car on which she had taken passage left the main line before reaching her destination, and was driven into defendant's barn, where on leaving it she was insulted by a man in said barn; that on the occasion of the accident the car again started for the barn, when she rang the bell, but the signal was disregarded; and that for fear of a repetition of her former experience she left the car and was injured.—Ashton v. Detroit City R. Co., 78 Mich. 587.

¶ 637. The fact that a passenger alighted from a train either upon the erroneous advice of a trainman that he had arrived at his destination or upon a misconception of the trainman's direction due to the passenger's deafness, is too remote to be considered upon the question of the passenger's contributory negligence in attempting to reboard the train after discovering his mistake.—Foley v. Detroit & Mackinac Ry. Co., 179 Mich. 586.

§ 215. ——As to ownership, control or operation of road.

Sufficiency of evidence, see post § 218.

¶ 638. Where the injury for which suit was brought occurred January 2, 1892, and where defendant admitted it was in possession of the road April 1, 1892, a mortgage dated May 15, 1893, given by defendant, had no tendency to show that defendant was in possession of the road at the time of the accident.—Williams v. Cleveland, C., C. & St. L. R. Co., 102 Mich. 537.

¶ 639. On the question whether the operating or the owning corporation was in possession of the road at the time of the accident, it is proper to show that the accident occurred on the railroad and that the ticket was purchased of the operating company through the agent at that place; and for this purpose testimony of the passenger as to the purchase, the name of the agent, and as to her supposition that it was defendant's station and the ticket over defendant's road, and the agent's testimony that the place of injury was "on the company's ground" is admissible even if not specific that defendant was the company in possession at the time of injury.—Williams v. Cleveland, C., C. & St. L. R. Co., 102 Mich. 537.

¶ 640. A traffic agreement between defendant and the corporation owning the road together with a mortgage made pursuant to that agreement and signed by the officers of both companies are admissible to show possession by defendant of the road at a later period when an accident occurred.—Williams v. Cleveland, C., C. & St. L. R. Co., 102 Mich. 537.

§ 216. Sufficiency and weight of evidence.

As to negligence being cause of injury, see post § 219.

Weight, sufficiency or condition of proofs as warranting submission to jury, see post §§ 221-232.

Instruction on sufficiency of prima facie case, see post § 233.

Variance of proofs from allegations, see ante § 209.

In actions for loss of baggage, see post § 257.

Res ipsa loquitur rule of inferred negligence, see also Negligence, V, B.

As to amount of damages and causes and elements of damage, see Damages, XI.

¶ 641. A passenger on a street car who wanted to smoke, and knew the driver, went to the front platform for the purpose. A large traveling trunk prevented his getting on the platform, and he stood on a lower step, hanging on by the driving-bar and the iron at the side of the car. He rode some distance, and after the car stopped and the horses were watered the driver told him to go to the rear platform if he wanted to smoke. He started a minute later to do so, but as he was stepping down and his foot was nearly on the ground, the driver let go the brake, the car started and he was thrown down and injured. Held, that in an action against the railway company for the injury these facts did not make out a cause of action.—Brown v. Congress & B. St. Ry. Co., 49 Mich. 153.

¶ 642. A motion for a new trial on the ground that the verdict is contrary to the evidence is improperly denied in an action by a passenger against a railroad company where the evidence shows that he made no complaint for more than two years, but waited until the station agent had moved from the state, and the ticket was destroyed in the due course of business, where he relied on his own testimony alone, where five ex-

perienced men testified that it was impossible to start the train in question with a jerk as claimed by the plaintiff, where the defendant's records show that none of the men alleged to have been in charge of the train was in fact in the crew, the crew actually in charge testified that there was no such occurrence and the other accused employees testified that there never had been any such occurrence while they were in charge of the train.—Baldwin v. Grand Trunk R. Co., 128 Mich. 417.

¶ 643. Plaintiff was injured while alighting from a street car and alleged that the car was negligently started as she was alighting. She testified that the car was not in motion when she attempted to alight and her testimony was corroborated by other evidence. The conductor and six passengers testified that the car was in rapid motion Plaintiff recovered and defendant's motion for new trial on the ground that the verdict was not supported by the evidence, was denied. Held that the motion was properly denied.—Bartle v. Houghton County St. R. Co., 132 Mich. 290.

¶ 644. While perilous forest fires were raging about the town of Metz, defendant sent its train to the rescue. Plaintiff's decedent got aboard. The train pulled south and after going some miles approached a point where the fires and smoke were closely approaching the track. Defendant's engineer attempted to pass the point, the rails spread and the passengers, including plaintiff's decedent, and the engineer were killed. There was evidence that the engineer had drunk intoxicating liquor at Metz, but none that he was under its influence or that he was negligent. In a suit for negligent death, held, a verdict and judgment for defendant were proper.—Koniecany v. Detroit & M. Ry. Co., 164 Mich. 66.

¶ 645. Where the Supreme Court has held that a plaintiff is as a matter of law not entitled to recover against defendant owner of a dock for injuries sustained by her while crossing over private property in attempting to reach defendant's dock, the failure to establish defendant's negligence is not cured by proof on a second trial that a pathway over said private land could be seen from the point at which plaintiff started to cross.—Woods v. White Star Line, 165 Mich. 73.

¶ 646. In an action for personal injuries sustained by a woman in alighting from a railroad car, where plaintiff's claim was that defendant failed to exercise that measure of care incumbent upon it in the case of sick and infirm passengers, evidence held sufficient to warrant the jury in answering in the affirmative a special interrogatory as to whether defendant failed to exercise such care.—Steketee v. Waters, 193 Mich. 177.

¶ 647. In an action by a man 65 years of age against a street railroad company for damages for personal injuries sustained as a result of the sudden starting of a car while he was attempting to alight, evidence held sufficient to sustain the verdict.—Pawlicki v. Detroit United Ry., 191 Mich. 536.

¶ 648. A verdict for the plaintiff should be set aside and a new trial granted where the overwhelming weight of the evidence shows that the plaintiff's injuries were sustained while attempting to board a moving train from which he had just alighted in the night, at a point he supposed was a station stop.—Brown v. Ann Arbor R. Co., 183 Mich. 574. (McAlvay, C. J., Brooke and Kuhn, JJ., concurring in result only.)

¶ 649. In an action by an interurban car passenger against the railroad company for damages for personal injuries sustained while attempting to board one of defendant's cars, held that the evidence was sufficient to sustain a verdict for plaintiff.—Musliner v. Detroit United Ry., 197 Mich. 409.

¶ 650. Derailment of a car, in and of itself, is not evidence of negligence.—Bury v. Detroit United Ry., 198 Mich. 447.

¶ 651. In an action for the death of a street car passenger, due to a collision between cars going in opposite directions, one of which became derailed, evidence held to support an inference of negligence of defendant.—Bury v. Detroit United Ry., 198 Mich. 447.

¶ 652. In an action against a street railroad to recover for the death of a passenger due to the car, in the vestibule of which deceased was riding, colliding with a car on the opposite track which became derailed, evidence held insufficient to show such a condition of the roadbed as to warrant defendant in refusing to operate cars because of the failure of the city to repair the foundations.—Bury v. Detroit United Ry., 198 Mich. 447.

¶ 653. The testimony of the crew of a freight train that the shunting of cars, whereby plaintiff, a passenger upon the waycar, was injured, was done with the highest degree of care consistent with the practical handling of the train, is not necessarily conclusive that such care was in fact exercised.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

Application of doctrine of res ipsa loquitur in actions by passengers against carrier, see note, 5 N. C. C. A. 8-35.

§ 217. ——As to character of plaintiff as passenger.

See also ante ¶ 324.

¶ 654. A finding that a person accompanying a shipment of stock on a drover's pass was actually placed in charge of the shipment, is justified where there was evidence that, though he had not before been employed by the shipper, the latter told the agent of the carrier to give him a pass, and that he expected that if anything happened he would take hold and help, that he helped to load the stock and told the conductor that he was in charge and signed the statement to that effect, and that he wore overalls, and that in various ways he showed that he expected to earn his passage by doing what was necessary.—Weaver v. Ann Arbor R. Co., 139 Mich. 590.

§ 218. ——As to control or operation by defendant.

¶ 655. It may be inferred by the jury that a corporation, which had a contract right to take possession of a railroad and operate it on consideration of issuing bonds and improving the road, had taken possession where it had issued the bonds.—Williams v. Cleveland, C., C. & St. L. R. Co., 102 Mich. 537.

§ 219. ——As to cause of injury.

As to contributory negligence and causation, see post § 220.

Sufficiency to make jury question, see post §§ 221-232.

¶ 656. Where plaintiff seeking to alight from defendant's street car was thrown and injured by a sudden motion of the car, he could not recover in the absence of evidence tending to show the cause of the sudden motion or tending to show some neglect of duty on defendant's part.—Bradley v. Fort Wayne & E. R. Co., 94 Mich. 35.

¶ 657. In an action to recover for an injury received while attempting to alight from defendant's street car, plaintiff's testimony was to the effect that she was in the act of stepping off the car when it started, that she was thrown back, that her clothing caught, that she pulled her skirt and a bolt came out from the platform, and that the bolt had no part in throwing her down aside from the jerking of the car. Held, that the jury had a right to construe the facts, and that there was room for it to conclude that plaintiff's clothing was caught upon the bolt without her knowledge, thus throwing her to the ground.—Tunnicliffe v. Bay Cities Consol. R. Co., 102 Mich. 624.

¶ 658. Evidence that a passenger upon an electric car platform, where he was standing preparatory to alighting at the crosswalk a few feet ahead, was thrown from the platform by a sudden jerk of the car, for which the company is not shown to have been in any way responsible, is insufficient to warrant a recovery against the company for the injuries sustained.—Etson v. Fort Wayne & B. I. R. Co., 110 Mich. 494.

¶ 659. In case of injury to a passenger who while seeking a seat in a car standing on the main track was injured by the backing of detached cars into such other car, it was a fair inference from the surrounding circumstances that the shock was caused by backing or in some manner running the cars in front against the detached cars, and that such act was the work of the defendant, and the severity of the shock was evidence to justify the conclusion that this was negligently done.—Moore v. Saginaw, T. & H. R. Co., 119 Mich. 613.

¶ 660. Testimony by plaintiff that she started to alight from a street car, and while holding the rail with her left hand, with her foot out to step on the ground, she heard the bell ring, became insensible, and when she regained consciousness, found her left arm pulled out of its socket, clearly warranted the inference, by the jury, that the car started while she was alighting.—Bartle v. Houghton County St. R. Co., 132 Mich. 290.

¶ 661. Where a passenger was last seen alive when passing out of the front of one car to cross the vestibule into another car of a train which lurched considerably, and his dead body was found next morning lying near a switch which the train had just passed over, the manner of his death was not mere conjecture, but the fair inference was that he was thrown through the vestibule door by the lurching of the train.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

¶ 662. In an action by a street car passenger, where plaintiff claimed that as he was in the act of alighting the car started, and he held on and was thrown about 75 feet from the stopping place, and defendant claimed that plaintiff jumped from the car, the fact that plaintiff fell at the point in question was not conclusive that he jumped from the car, and the question was one for the jury.—Lucas v. Marquette, C. & P. I. Ry. Co., 136 Mich. 142.

¶ 663. Where a passenger on a street car, immediately upon ringing of the bell, arose, went to the edge of the car, put one foot on the step and the other on the platform and his hand on the rail, and was thrown from the car by a sudden jerk, he cannot recover for the injury sustained in the absence of evidence to show what was the cause of the sudden jerk.—Conroy v. Detroit United Ry., 139 Mich. 173.

¶ 664. In an action against a street railway company for personal injuries caused

by a sudden jerk of the car which threw plaintiff to the ground from the platform of the car where he was standing preparatory to alighting at the next stop, testimony by witnesses that the jerk was caused by the sudden application of the brakes is not sufficient to show negligence where the witnesses did not see the motorman apply the brakes, but inferred the cause solely from the result.—Conroy v. Detroit United Ry., 139 Mich. 173.

¶ 665. In an action for personal injuries sustained by a passenger of an electric railway resulting from an alleged shock of electricity, there can be no recovery where there is no evidence as to what caused the injuries.—Dolbee v. Detroit, Y., A. A. & J. Ry., 144 Mich. 656.

¶ 666. Where it is alleged that plaintiff slipped on ice and snow and fell in the vestibule of defendant's street car held, that the jury were warranted in finding that plaintiff's fall was caused by her feet slipping from under her and not by the sudden stopping of the car.—Dorrance v. Michigan United Rys. Co., 175 Mich. 198.

¶ 667. Evidence that there were rotten ties in the vicinity where a train was derailed while running at a high rate of speed, held to sustain the allegations of a declaration of the defendant's negligence in an action against a carrier for injuries received by a passenger.—Marshall v. Wabash R. Co., 184 Mich. 593.

¶ 668. A verdict for the plaintiff in an action for injuries sustained by a passenger from the derailment of a train as the result of the rotten condition of the ties, held sustained by the evidence.—Marshall v. Wabash R. Co., 184 Mich. 593.

¶ 669. In an action by a street car passenger to recover damages for personal injuries sustained while plaintiff was attempting to alight from the car, where it appeared that plaintiff was a man 95 years of age and showed lapses of memory, evidence held sufficient to sustain a finding that the car suddenly started forward while plaintiff was attempting to step to the ground and before he was given a reasonable chance to get to a place of safety, resulting in his hand being caught in the handle and his being dragged along with the car for a considerable distance and becoming injured.—McKay v. Detroit United Ry., 195 Mich. 88.

§ 220. ——On contributory negligence.

As to cause of injury, see also ante § 219.

¶ 670. As between plaintiff's testimony that he was thrown to the street by the car driver's whipping up the horses while plaintiff was alighting and the testimony of a fellow passenger that plaintiff stepped off in an improper way clinging to the hand rail, further testimony by the fellow passenger that he "thought plaintiff was pretty full," and plaintiff's testimony that he was not intoxicated though he had taken two drinks that day, is material only as bearing on the probability that plaintiff's account of the cause of the accident rather than the other's was true.—Britton v. Grand Rapids St. R. Co., 90 Mich. 159.

¶ 671. Evidence held to show contributory negligence on the part of a blind man alighting from a street car preventing his recovery for injuries sustained by being struck by another car at a transfer point.—Wilson v. Detroit United Ry., 167 Mich. 107.

¶ 672. Where a plaintiff rushed along with a crowd to take a car, and was pushed under the car, and injured, and there was evidence that plaintiff had seized hold of the handle of the car while moving, it was not against the weight of the evidence for the jury to hold her guiltless of contributory negligence, since she may have seized hold to protect herself.—Cousineau v. Muskegon Traction & Lighting Co., 152 Mich. 48.

¶ 673. It must be presumed that a passenger on an open street car with seats extending crosswise, and which was entered from running boards extending along the sides of the car, was riding on the running board at the time of his injury with the permission and consent of the company where it appeared that passengers were frequently permitted to ride upon the running board and, at the time of his injury he was riding thereon because of the crowded condition of the car.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

¶ 674. A passenger who has a through ticket calling for connections with another railroad at a certain point is not guilty of contributory negligence in failing to discover a train of the connecting carrier while on the premises of the connecting carrier and on an unlighted board crosswalk used for the transfer of passengers by both companies where, when she started across the walk under directions of the agent of the initial carrier, her view of the oncoming train was partially or wholly obscured by a large pile of snow and a building and she was not informed and did not know that the train was due or approaching at the time, and it appeared that the walk was laid flush with the rails and by reason of the darkness she did not discover the track as she approached it, that the train came into the station quietly without giving the usual warnings, and that the locomotive headlight was so dim that

it might easily have been mistaken for a switch light.—Boyle v. Waters, 199 Mich. 478.

§ 221. Questions for court and jury; directing verdict.

Respecting particular acts and incidents of carriage, see post §§ 222-232.
In actions for loss of baggage, see post § 258.
General rules as to directing verdicts, see Directing Verdict.
Questions of damages, see Damages, XII.

¶ 675. In the absence of evidence showing that plaintiff jumped from the street car in question when a collision was imminent, there was no occasion to submit the question of her so jumping to the jury.—Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432.

¶ 676. In an action for injuries to a passenger who was thrown or jumped from a car of which the motorman had lost control, where defendant claimed that plaintiff could not recover if she jumped, as the declaration alleged that she was thrown, there was no occasion to submit to the jury the question of her jumping, where plaintiff testified that she did not jump, and a witness testified that as the car turned a curve she was thrown against some one, and the testimony indicated that it was at this point that plaintiff was thrown from or left the car, and no one testified to having seen her jump.—Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432.

¶ 677. The question as to whether a railroad company had waived its rule prohibiting passengers from riding on freight trains, was one for the jury in an action by a lumber scaler who was injured by the derailment of a train loaded with logs.—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557.

¶ 678. In an action for personal injuries sustained by a lumber scaler while riding on a freight train, the question as to whether defendant had waived its rule prohibiting passengers from riding on freight trains, was properly submitted to the jury, where plaintiff testified that he had obtained about 30 permits to ride on such trains, but did not know that imperative instructions were issued against permitting passengers to ride on the trains; that he often rode without permits and had so ridden when the trainmaster was aboard, sometimes paying his fare in money and again by mileage, and where there was testimony from other witnesses that it was customary for persons to ride on these trains upon payment of fares, and where the fares and mileage collected were reported to the company.—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557.

¶ 679. In an action for personal injuries sustained by being thrown to the ground through the starting of an interurban car while the plaintiff was alighting, testimony that the conductor called the station, that the car stopped, that passengers boarded the car, that passengers were in the habit of leaving the car at that place, that there was nothing to show that it was not a proper place to alight, is sufficient, though contradicted by other testimony, to go to the jury on the question of negligence and contributory negligence.—Richard v. Detroit, R., R. & L. O. Ry., 129 Mich. 458.

¶ 680. Plaintiff who was riding in the caboose of a freight train testified that he was lying half asleep on a narrow bunk with nothing to prevent his falling off, and that he suddenly found himself on the floor, having been jolted or shaken from the bunk, and then heard the cars bumping together. In an action to recover for the injuries sustained from the fall, held that such evidence was insufficient to show negligence and a verdict for defendant should have been directed.—Frohriep v. Lake Shore & M. S. Ry. Co., 131 Mich. 459.

¶ 681. In a suit for personal injuries against a railway company, the plaintiff testified that she approached the rear door to get off, and asked the conductor if he was going to stop, and he answered "Yes." The next thing she knew she was lying on the ground by the car. Held, that these facts with the other evidence, failed to prove any negligence of the conductor, and a verdict for the defendant was properly directed.—Snyder v. Michigan Traction Co., 154 Mich. 418.

¶ 682. Where a plaintiff, after alighting from a street car, is injured while crossing the street, by falling into an excavation made by the company, it is for the jury to say whether there was sufficient warning of danger, and whether plaintiff exercised proper care.—Spangler v. Saginaw Valley Traction Co., 152 Mich. 405.

¶ 683. Where defendant railway's car starts in the usual manner and, after plaintiff has stepped on the first step and is reaching with his foot for the next, makes a sudden jerk and plaintiff is injured, it is a question for the jury whether the accident was caused by said sudden jerk.—Formiller v. Detroit United Ry., 164 Mich. 653.

¶ 684. The evidence in an action for injuries sustained by a passenger from the derailment of a train, held sufficient to take the case to the jury.—Marshall v. Wabash R. Co., 184 Mich. 593.

¶ 685. Where an invalid passenger on defendant's railroad train was placed by de-

fendant's baggageman for transportation on a cot in the baggage car with the knowledge of defendant's conductor, who collected full fare for such transportation, held that there was a proper case for the jury to determine the question of defendant's liability for injuries sustained by such passenger while being so transported.—Tozer v. Michigan Cent. R. Co., 195 Mich. 662.

§ 222. ——Negligence respecting stations and platforms.

¶ 686. Plaintiff, a passenger on defendant's road, while alighting on the platform at its station, stepped on a nut and bolt about one and one-half inches long and was injured. Plaintiff offered no evidence as to how long the object had lain on the platform, where it came from, or how it got there. Said nut had no marked peculiarities and there was no evidence that the same had been used by defendant except plaintiff's general statement that he had seen such nuts around the tracks of railroads many times. Held, no evidence was offered sufficient to justify the trial court in leaving the question of defendant's negligence to the jury.—Serviss v. Ann Arbor R. Co., 169 Mich. 564.

¶ 687. In an action by a passenger against an initial and connecting carrier to recover for personal injuries received as the result of being struck by a train of the connecting carrier while on the premises of the connecting carrier on an unlighted crosswalk maintained by both carriers for transfer of passengers, held that it was a question for the jury whether it was necessary to light the walk so as to make it reasonably safe for passage and whether such duty had been discharged.—Boyle v. Waters, 199 Mich. 478.

§ 223. ——Condition of trains, tracks and equipment.

¶ 688. In an action of negligence against a street car company it was error for the court to submit to the jury the question of defendant's negligence in adopting a style of car which had apertures between the springs on each side of the car and the footboard where there was no testimony to show that the small openings or apertures were unnecessary, improper, dangerous, defective or not properly guarded, and it was almost impossible for a passenger in alighting or entering the car to put his foot into such an opening.—Werbowisky v. Fort Wayne & E. R. Co., 86 Mich. 236.

¶ 689. In a collision case where there was testimony that the brake-rod on the car in which plaintiff was and of which the motorman lost control, had broken the day previous to that of the accident, and that it was repaired, that the brakeman had no reason to doubt the efficiency of the brake until he tried to use it, when it failed, and where it was found after the accident that the brake-rod was useless for want of a bolt; the question of negligence was properly left to the jury.—Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432.

¶ 690. In an action for injuries sustained by a passenger by being either thrown or jumping from a street car of which the motorman had lost control, where there was testimony that the brake-rod had broken the day previous to the accident but was repaired and that the motorman had no reason to doubt its efficiency until he tried to use it, when it failed, and where it was found after the accident that the brake-rod was useless for want of a bolt, the circumstances might justify an inference of negligence, and the question of negligence was properly left to the jury.—Howell v. Lansing City Elec. Ry. Co., 136 Mich. 432.

¶ 691. It seems that a verdict for defendant should be directed in an action for injury to a passenger caused by a train being derailed, where the only evidence that the accident was due to defect in the track was that some rotten ties were found in the track, while there was overwhelming evidence that the ties were sufficiently good to make a first-class track, and there was strong and convincing evidence that the rail had been intentionally removed, tools for that purpose being found near which had been stolen from a toolhouse of another road near by, and suspicious characters having been seen soon after hastening away—Whipple v. Michigan Cent. R. Co., 130 Mich. 460.

¶ 692. In a suit for personal injuries arising from the derailment and turning over of defendant's car in which plaintiff was a passenger, the plaintiff and others testified that soon after the accident he examined the track and found the rails spread, the ties rotten, and the spikes pulled out. Held, the court was in error in directing a verdict for defendant on the ground that there was no evidence of negligence to go to the jury.—Schulte v. Michigan Cent. R. Co., 162 Mich. 76.

¶ 693. In an action for damages for personal injuries sustained by the giving way of a handhold on defendant's car which was stopping on signal, and where plaintiff predicated his case not only upon the fact that the handhold pulled out and the accident happened, but upon evidence that the wood underneath was decayed, and that inspection would have disclosed this fact, the court is warranted in submitting to the jury the question of negligence of the defendant.—Gerlach v. Detroit United Ry., 171 Mich. 474.

¶ 694. Plaintiff, a man weighing over two hundred pounds, who was holding to the handhold of defendant's car when the car was stopping, was thrown to the pavement by the reason of the fact that the metal brackets which held the handhold in position gave way. Plaintiff's evidence in an action for damages tended to show defective condition of car and improper inspection. Defendant's evidence tended to show proper inspection and negligence on part of plaintiff. Held, that the case was one for the jury under proper instructions.—Gerlach v. Detroit United Ry., 171 Mich. 474.

§ 224. ——Management of cars and equipment.

¶ 695. In an action by a passenger who is injured by the falling upon him of a bed from the top of the car when the train bumped against the caboose of a mixed train, composed of passenger and freight cars, in which he was seated, the question of negligence in backing the freight cars against the caboose and whether such negligence caused the accident, are questions for the jury.—Stoody v. Detroit, G. R. & W. R. Co., 124 Mich. 420.

¶ 696. Plaintiff sued defendant to recover for injuries received, as he claimed, by reason of the improper loading of logs upon flat cars attached to the passenger car in which plaintiff was riding at the time of the accident. The testimony tended to show that some of the loads were higher than usual; that the bottom tier of logs was held on the car by means of stakes about 18 inches high, placed on either side of the logs; that the logs were piled in pyramid shape, the bottom tier containing five logs; that the top or cap log on one of the loads lay upon a log which was crooked at one end, and was held in place by a block placed under it, and a wedge driven into the bottom log; that by reason of the manner of loading, when shaken from its place, one of the logs rolled down, struck the switch timber, and broke it, moving the switch rails just as the train was half way over the switch, thus derailing all the cars which had not passed over the switch, including the one occupied by plaintiff, and causing the injury complained of. Held, that it was for the jury to say whether it was negligent to load the cars in the manner stated.—Kenting v. Detroit, B. C. & A. R. Co., 104 Mich. 418.

¶ 697. In an action for personal injury sustained by a lumber scaler in the derailment of a log-carrying train, caused by a falling log, where the method of loading logs was in issue and there was testimony that in case of a sudden jar upon starting or stopping the train, peeled hemlock logs would slip more readily when not chained than when chained, the court refused to hold as an undisputed fact, that the unchained hemlock logs in question were properly loaded.—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557.

¶ 698. A case for the jury is made out by testimony in an action for personal injuries, by a passenger on a street car, that the switch between two intersecting railway lines is in a public place, not fastened, opened and closed by a small iron bar which was left on the ground near the switch, that the car approached at 15 miles per hour, that the motorman failed to notice the open switch and the plaintiff was injured.—Leslie v. Jackson & Suburban Traction Co., 134 Mich. 518.

¶ 699. In an action for personal injuries by a passenger of the defendant railroad where the injuries were alleged to have been received from a sudden jerking of the cars, held that the trial court properly directed a verdict for the defense without a submission of the case to the jury, in view of the fact that the evidence showed no jerking of the car which was not incident to the ordinary running of electric cars over suburban lines.—Quick v. Wyandotte & Detroit River Ry., 143 Mich. 443.

¶ 700. Plaintiff was injured by the derailment of a street car in passing a switch. The usual running time of the car was eight miles an hour. The rules of the defendant company required the slowing down of the car in passing switches. Plaintiff and another witness testified that the car was going full speed. Evidence that the streets were very muddy, and that a stick or root was seen near the switch after the accident, were introduced to show possible causes of the accident. Held, the trial court on the question of negligence properly refused to direct a verdict for defendant.—Niedzinski v. Bay City Traction & Electric Co., 160 Mich. 517.

¶ 701. In an action against a street railway company for injuries sustained by a passenger who was thrown from the platform of an electric car by a sudden jolt, due to the motorman's losing hold of the brake, while getting a new hold, he erroneously supposing the dog of the brake ratchet to be caught to hold it in place; it was a question for the jury whether the occurrence was a pure accident, or was due to a lack of skill on the part of the motorman, who was without experience.—Etson v. Fort W. & B. I. R. Co., 114 Mich. 605.

¶ 702. A passenger was entitled to reasonable protection against the dangers incident to the motorman's lack of knowledge that he could stop the car in question of which he had lost control, by reversing his motor, his brief tutelage, his failure to turn off the

current and his loss of judgment in the emergency; and it was not necessarily a defense that he was confronted with an imminent and unexpected danger of collision causing him to lose his usual ability to control his car; and the question of negligence accordingly was for the jury.—Howell v. Lansing City Electric Ry. Co., 136 Mich. 432.

¶ 703. In an action for the death of a street car passenger who was riding upon the rear platform of a crowded pay-as-you-enter car with other passengers and was thrown out the open door while the car was moving as the result of a sudden jerk of the car and the lurching of the crowd against him, where it appeared that it was customary to keep the doors of the car closed while the car was running, held that it was a question for the jury whether defendant was guilty of negligence in leaving the door open while passengers were riding on the platform.—Larkowski v. Detroit United Ry., 193 Mich. 409. (Brooke, J., dissenting.)

¶ 704. In an action by a passenger in a launch for personal injuries received when he jumped from the launch to a dock and was crushed between the dock and the launch while hanging from a projection from the dock, where the emergency arose as the result of a sudden storm encountered after the launch had left shore, and plaintiff claimed that the master of the launch was inefficient and incompetent, and negligent in not keeping his boat away from the shore and dock, in shutting off the power and permitting the boat to drift against the dock, and in abandoning the boat and putting the plaintiff in a perilous position, which necessitated his jumping to escape being left alone in the boat, held, that the question of defendant's negligence was for the jury.—Gordon v. Drake, 193 Mich. 64. (Brooke, Ostrander and Kuhn, JJ., dissenting.)

¶ 705. In an action by a street car passenger to recover damages for personal injuries sustained as the result of being swept off the running footboard of an open car by a pole along the right of way where it appeared that the pole was only 15 inches from the running board; that it inclined to the west, thereby bringing the upper portion thereof nearer the track; that the track was crooked, rough and uneven; that the car was driven at a high rate of speed and that by reason thereof it caused a lateral movement of the car, as well as an up and down motion, which brought the plaintiff into contact with the pole, and that no warning was given him of the danger, held that it was a question for the jury whether it was negligence to operate the car at the speed it was going over the tracks without at least warning plaintiff of the danger.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

§ 225. ——Collisions.

¶ 706. Question of the motorman's negligence is for the jury in an action by a passenger against a street railway for injuries caused by a collision of an ice wagon with the car in which he was riding, where the testimony showed that the car was going down grade at high speed, that the horses and wagon approached the track while the car was 225 feet away and that the horses were on the track when the car was 40 feet away, and the car struck the front wheels of the ice wagon.—Thurston v. Detroit United Ry., 137 Mich. 231.

¶ 707. Plaintiff in a personal injury suit testified that in riding on a street car as it was approaching a crossing a team of horses came plunging down the street apparently out of the control of their driver; that the tongue of the wagon penetrated the car, causing her injury; and that the team was traveling some distance in view of the motorman before the car was struck. Held, a prima facie case of the motorman's negligence was established making it error for the trial court to direct a verdict for defendant.—Sloan v. Detroit United Ry., 172 Mich. 68.

¶ 708. In a suit against two intersecting railroads for injury due to a collision, it is for the jury, from the conflicting evidence, to decide which road was given the clear track signal, and whether the signals were changed by the towerman, suddenly, upon discovery by him of the danger.—Van Orman v. Lake Shore & M. S. Ry. Co., 152 Mich. 185.

¶ 709. In an action against a carrier for personal injuries caused by a collision between a passenger car and a freight car following it, the questions of defective air brakes, the thoroughness of inspection by the company's inspector, and the degree of care taken by the motorman are for the jury, where the latter knew the passenger car was ahead of him, and saw its lights within one thousand feet ahead, and where he shut off his current only as he started down the incline, in the direction of the passenger car, at the rate of fifteen miles an hour.—Rouston v. Detroit United Ry., 151 Mich. 237.

¶ 710. Plaintiff testified that he boarded a street car of defendant company; that the car collided with another ahead which had stopped to let off passengers; that the force of the collision threw plaintiff forward and injured him, and that the car ahead was pushed forward seventy-five feet by the impact. Held, that a prima facie case of defendant's negligence sufficient to go to the jury was made out.—Sewell v. Detroit United Ry., 158 Mich. 407.

¶ 711. Plaintiff, a passenger in a defendant's street car, was injured in a collision with a car ahead. The motorman of defendant company testified that he attempted to stop the car; that the air brake and hand brake gave out and the fuse burned out, leaving no way to control the car; that it was going five miles an hour; and that the head car was knocked twelve feet by the collision. The motorman's evidence was contradicted on some of these points. Held, it was a question for the jury whether the prima facie case of defendant's negligence had been rebutted, and a verdict for defendant should not be directed.—Sewell v. Detroit United Ry., 158 Mich. 407.

¶ 712. In an action for the death of a street car passenger due to a collision between cars going in opposite directions, one of which became derailed prior to the collision, where it appeared that the track was rough and wavy, held that it was a question for the jury whether either or both cars in meeting were handled with the high degree of care required by known conditions.—Bury v. Detroit United Ry., 198 Mich. 447.

§ 226. ——Negligence in taking on or setting down passengers.

Wrong place as jury question, see post § 227.

¶ 713. Reasonableness of the length of a stop to permit passengers to alight from a crowded car is a question for the jury on conflicting evidence.—Smalley v. Detroit & M. R. Co., 131 Mich. 560.

¶ 714. Whether a street railway company is negligent in not guarding its cars so as to prevent passengers from getting on or off the front platforms, is for the jury.—Archer v. Fort Wayne & E. R. Co., 87 Mich. 101.

¶ 715. Whether it is negligence to stop a street car at a place unsafe for passengers to alight, is a question for the jury.—Whitmore v. Detroit United Ry., 185 Mich. 46.

¶ 716. In an action for personal injuries sustained by a passenger while alighting from an electric car evidence held to present an issue for the jury.—Tuttle v. Detroit, J. & C. Ry. Co., 193 Mich. 390.

¶ 717. In suit against a cable railway company for an injury to plaintiff while attempting to alight, plaintiff testified that he waited for the train, composed of a grip-car and one coach, to stop, and that when it had stopped, and while he was alighting, the conductor disconnected the coach from the grip-car, turned off the brakes on the coach, and jumped for the grip, whereupon the coach started in the opposite direction, in which there was a slight down grade, throwing plaintiff to the ground. Held, that the question of the probability or possibility of such movement of the car was for the jury.—Finn v. Valley City Street & C. R. Co., 86 Mich. 74.

¶ 718. A directed verdict for a street car company was reversed, where plaintiff, who had been directed by the conductor to go towards the platform while the car was in motion, was thrown from such platform by a sudden jerk of the car; as the question of negligence in so directing plaintiff was for the jury.—Hennessy v. Muskegon Traction & Lighting Co., 135 Mich. 29.

¶ 719. In an action for personal injuries sustained in alighting from a train it cannot be said as a matter of law that there was an absence of negligence on part of defendant's agents where it appeared from the evidence that the plaintiff, aged 55, with her brother, had boarded defendant's train at a certain station to go to the next station, and as the latter station was announced from the front door of the coach and as the train was slowing up the conductor entered, and the train stopped as he approached them, and he passed without taking their tickets, and she then went out and while on the platform or steps the train started with a jerk, and plaintiff was thrown to the ground and injured; there was no evidence as to the whereabouts of the conductor or brakeman when she attempted to alight, nor evidence that either of them knew she intended getting off there.—O'Dea v. Michigan Cent. R. Co., 142 Mich. 265.

¶ 720. Plaintiff, a large man, with a grip in his right hand, started to board the rear end of a west-bound street car. He took hold of the rod dividing the platform with his left hand, and stood on the lower step, whereupon the conductor, who was watching him, started the car, and plaintiff was thrown off and injured. Held, the defendant was negligent as a matter of law.—Beattie v. Detroit United Ry., 158 Mich. 243.

¶ 721. Plaintiff, a passenger on defendant's street car, sat near a door or entrance which was at the middle of the car. The car stopped to let off passengers and several alighted from the rear door where the conductor stood. The conductor leaned out and looked along the car to the side entrance and seeing no one about to get off there, gave the bell to start. Plaintiff was at that moment standing up approaching the side door to alight. Held, the question of defendant's negligence in starting up the car was properly left to the jury.—Reese v. Detroit United Ry., 159 Mich. 600.

¶ 722. Where the evidence is conflicting as to whether a passenger attempted to alight

from a street car while in motion, or whether it was suddenly started as he was alighting, so as to throw him to the pavement, the question of the carrier's negligence held properly submitted to the jury.—Vultee v. Saginaw-Bay City Ry. Co., 186 Mich. 523.

¶ 723. The question of the defendant's negligence is for the jury where a passenger, while standing on the steps of a street car preparatory to alighting, as the car approached a stopping place, was thrown off and injured by the sudden acceleration of the speed of the car on a signal from the conductor, who was aware of the passenger's peril.—Braun v. Grand Rapids, G. H. & M. R. Co., 183 Mich. 569.

¶ 724. In an action for personal injuries alleged to have been sustained by the plaintiff while alighting from an electric car, the testimony held to present a question for the jury as to whether the car had stopped and quickly started again while the plaintiff was in the act of alighting.—Tuttle v. Detroit, J. & C. Ry. Co., 193 Mich. 390.

¶ 725. Defendant's street car stopped at a railroad crossing. After going ahead to see that the track was clear, the conductor signaled the car to start, and swung on it as it came along. Plaintiff had told the conductor and signaled the motorman that he wished to get on, and attempted to board the car just after the conductor. The latter gave the two-bell signal for starting, and the car increased its speed. Plaintiff was injured. The place was not one of the regular stopping points. Held, there was evidence to go to the jury of defendant's negligence.—Orth v. Saginaw Valley Traction Co., 162 Mich. 353.

§ 227. ——Discharging passengers at wrong place.

¶ 726. In an action against a railroad for personal injury, where the conductor and trainmen testified that plaintiff was put off at a junction, while one of plaintiff's witnesses testified that it was at the first stop, but did not know where that was, and another testified that it was at the first stop, but he did not think it was at the junction while two witnesses testified to seeing a train stop at a point not at the junction where a passenger was put off, the place where he was put off was for the jury.—Gaukler v. Detroit, G. H. & M. R. Co., 130 Mich. 666.

¶ 727. The question of the negligence of the defendant railroad company as well as of the contributory negligence of the plaintiff, a girl thirteen years of age, who, with a younger brother, was, on a cold, stormy night, carried past the station for which they held tickets and as a result was compelled to walk about seven miles to their destination, which caused plaintiff to contract a serious illness from the exposure to the inclement weather, is for the jury.—Moss v. Detroit & Mackinaw Ry. Co., 182 Mich. 40.

¶ 728. Where a woman and three small children were carried past their destination, a flag station in the woods where there was no agent, and on the return trip of the train the conductor failed to keep his alleged promise to hold the train at such station so that the woman might return thereon to her home if her friends were not in waiting, and as the result she and her children were compelled to remain in the open air all night, held that whether the conductor made such promise, and if he did, whether he made a reasonable effort to keep it, were questions for the jury.—Duffiny v. Detroit & Mackinac Ry. Co., 186 Mich. 40.

§ 228. ——Failure to protect passengers.

¶ 729. Question of negligence in not keeping order and in failing to stop and let off plaintiff, held to be for jury, where rough characters boarded a street car on which plaintiff was a passenger, and engaged in a fight, the evidence as to the actions of the conductor and motorman being conflicting.—Cross v. Detroit Citizens' Street R. Co., 120 Mich. 137.

¶ 730. It is a question of fact for the jury to determine whether a street railway company was negligent in not making adequate provision by the way of railings, barriers, and policemen to protect the persons who had accepted the invitation to come to its amusement park, against the dangers incident to such a great crowd, where, in an action against such company for personal injuries, it appears that when the motor car and trailer of such company appeared at the station in the park the crowd made a rush for the train and pushed the plaintiff between the moving cars to her injury.—Cousineau v. Muskegon Traction & Lighting Co., 145 Mich. 314.

¶ 731. In an action against a railroad for injuries sustained from an assault committed by a fellow passenger by being shot on defendant's train, the conductor cannot be said as a matter of law to have performed his full duty in merely threatening to eject the drunken passenger if he did not desist in shooting his revolver, because the combination of the Fourth of July, a crowded train, a revolver loaded with blank cartridges in the hands of a drunk with a penchant for discharging it is threatening and likely to cause mischief, and where the agent of the defendant was possessed with the powers of a sheriff, whether he was not required to either disarm the man or keep him under close surveillance is a question for the jury to determine.—McWilliams v. Lake Shore & M. S. R. Co., 146 Mich. 216.

¶ 732. In an action for personal injuries caused by the plaintiff passenger's falling off a moving train, testimony that he was beastly drunk, that the attention of the brakeman was called to his attempts to go out on the platform, and that the brakeman made no move to stop him, justify a refusal to direct a verdict for the defendant.—Fox v. Michigan Cent. R. Co., 138 Mich. 433.

§ 229. ——Liabilities of successive carriers.

¶ 733. In an action by a passenger against an initial and a connecting carrier to recover for personal injuries received as the result of being struck by a train of the connecting carrier while on the premises of the latter on an unlighted crosswalk maintained by both carriers for the transfer of passengers which she had been directed to use by the agent of the first carrier to reach the station of the connecting carrier, held that it was a question for the jury whether the initial carrier was guilty of negligence in failing to inform plaintiff that she would be obliged to cross the track of the connecting carrier before reaching the latter's station, and in failing to warn her of the approaching train.—Boyle v. Waters, 199 Mich. 478.

¶ 734. In an action by a passenger against an initial carrier and a connecting carrier to recover for personal injuries received as the result of being struck by a train of the connecting carrier while on the premises of the latter on an unlighted crosswalk maintained by both carriers for the transfer of passengers which she had been directed to use by the agent of the first carrier to reach the station of the connecting carrier, held that it was a question for the jury whether the connecting carrier was negligent in approaching the crosswalk with its train without maintaining a proper lookout and giving due and timely warning of its approach.—Boyle v. Waters, 199 Mich. 478.

§ 230. ——Contributory negligence.

See also ante ¶¶ 538, 547, 727.
Riding on platforms as negligence per se, see also ante § 105.
Crossing tracks behind car, see also ante ¶ 539.
Going on platform because of faintness, see also ante ¶ 558.
Stepping on loose paving stones on alighting, see also ante ¶ 569.
Alighting on wrong side, see also ante ¶ 570.

¶ 735. The question whether a passenger is negligent in riding upon the front platform of a crowded street car is for the jury.—Archer v. Fort Wayne & E. R. Co., 87 Mich. 101.

¶ 736. Whether one who, while in an intoxicated condition, stood upon the running board of a street car, having been unable to obtain a seat, and was injured, was, in view of the circumstances, in the exercise of due care, a question for the jury, and an instruction to the effect that, if he was intoxicated at the time, he could not recover for his injuries, was erroneous.—Kingston v. Fort Wayne & E. R. Co., 112 Mich. 40.

¶ 737. In an action by a passenger on an open street car to recover damages for personal injuries sustained as the result of being swept off the running footboard by a pole along defendant's right of way, where it appeared that plaintiff had ridden on the line a number of times; that his attention had never been drawn to the nearness of the poles nor the particular pole; that when the accident occurred he was holding on to the stanchion with both hands; that he was not looking in the direction in which the car was going and was not looking at the poles, and there was evidence that he would not have come into contact with the pole had the car been operated consistently with the condition of the track and the nearness of the pole, and it further appeared that plaintiff was riding upon the footboard with the consent of the defendant, owing to the crowded condition of the car, held that it was a question for the jury whether plaintiff was guilty of contributory negligence.—Murphy v. Manistee Ry. Co., 194 Mich. 595.

¶ 738. In an action against a railroad company by an injured passenger, plaintiff's case showed that he was sitting within four or five feet of the door of the car when his station was called; that as soon as the train stopped he moved out with others; that in going down the steps his coat was in some way caught or held, and he fell and was hurt, the cars having started. Held, that the question of plaintiff's contributory negligence was for the jury.—Strand v. Chicago & W. M. R. Co., 64 Mich. 216.

¶ 739. Where plaintiff, while attempting to alight from defendant's street car after signaling the conductor to stop, and seeing the conductor reach for the bell rope, was injured in consequence of being thrown by a sudden jerk of the car while releasing his hold to signal again when it did not stop, his contributory negligence was a question for the jury.—Bradley v. Fort Wayne & E. R. Co., 94 Mich. 35.

¶ 740. Plaintiff riding on a crowded excursion train attempted to alight at her destination, but the train started before she reached the door, whereupon a brakeman asked her if she desired to alight, and when informed that she did, he pulled the signal cord and the train stopped suddenly and plaintiff was thrown off and injured. She carried an umbrella and a valise in one hand and the train of her dress in the other. Held

that it was a question for the jury whether she was guilty of contributory negligence in not re-entering the car, or in failing to take hold of the railing.—Smalley v. Detroit & M. Ry. Co., 131 Mich. 560.

¶ 741. In an action against a railroad for injuries sustained by a passenger in alighting from a train at a switch where the train stopped before pulling into the station, there was evidence that it was dark; that the brakeman, contrary to his usual custom, announced the station on arriving at the switch; that the conductor told the plaintiff that they were at the town; that four or five other persons got off immediately before plaintiff; and that the train started as he was alighting, in consequence of which he fell and the wheels ran over his foot. Held, that it was not error to refuse a directed verdict requested on the theory that plaintiff knew that the train had stopped at the switch and not at the station.—Foley v. Grand Rapids & I. Ry. Co., 157 Mich. 67.

¶ 742. Whether it was negligence for a passenger when about to alight from a street car, to stand with the knowledge of the conductor, on the step of the car when nearing its usual stopping place, is a question for the jury.—Braun v. Grand Rapids, G. H. & M. R. Co., 183 Mich. 569.

¶ 743. It was for the jury to say whether a passenger was negligent in alighting in the dark and going forward from a bus at a platform, where the claim was that there was a want of proper lights and that other passengers obstructed what light there was, and on the other hand that the passenger knew all about the situation and used no care.—McCormick v. Detroit, G. H. &. M. Ry. Co., 141 Mich. 17.

¶ 744. The question of whether plaintiff, who was slightly lame, was guilty of contributory negligence in attempting to alight from a train without assistance, is one for the jury, where under the circumstances, it appeared that plaintiff had to choose between the danger of alighting and that of being thrown down, in case the train started before she could alight.—Mercer v. Cincinnati Northern R. Co., 151 Mich. 566.

¶ 745. In an action to recover for personal injuries sustained by a woman in stepping from a railroad car to the ground, a distance of 16½ inches, where it appeared that plaintiff was infirm owing to an operation for female trouble, and that she paused on the last step of the car and informed defendant's servants of her trouble and requested them to provide her with an additional step in order to alight, held that plaintiff was not guilty of contributory negligence as matter of law in failing to inform such servants of her infirmity prior to starting to alight, it not appearing that she alighted voluntarily, since she might not have foreseen the distance between the car step and the ground, and had the right to hesitate and state her reasons for not alighting to the employee who was there to assist her.—Steketee v. Waters, 193 Mich. 177.

¶ 746. In an action against a street railway company by a woman passenger, injured by leaving a moving car which is bound for a car barn in which, on a previous occasion she had received insulting treatment, the question whether the treatment the plaintiff received at defendant's barn was sufficient to justify her belief that she was avoiding an actually impending danger, into which she was being taken, by leaving the car, is a question for the jury and not for the court.—Ashton v. Detroit City R. Co., 78 Mich. 587.

¶ 747. Whether plaintiff alighting from a train and stepping into a hole six inches below the surface and containing a loose obstacle in the bottom was guilty of contributory negligence is a question for the jury.—Crowe v. Michigan Cent. R. Co., 142 Mich. 692.

¶ 748. In an action by a boy 13 years of age against a railroad company for damages for sickness due to walking back a distance of eight miles on a stormy winter day after being carried past his station, held that the question of contributory negligence was one of fact for the jury.—Moss v. Detroit & Mackinaw Ry. Co., 188 Mich. 1.

¶ 749. Where an invalid was negligently placed on a cot in a baggage car of defendant by her husband and brother under the direction of defendant's baggageman near a pile of trunks which toppled over upon and injured her, upon a sudden stopping of the train, the question whether the husband and brother were contributorily negligent, held for the jury.—Tozer v. Michigan Cent. R. Co., 195 Mich. 662.

§ 231. ——Getting on or off of moving trains.

See also ante § 199.

¶ 750. While it is prima facie negligence for a passenger to alight from a moving train, it is not in all cases negligence per se to attempt to do so; and if, by the carrier's wrongful act, one is so placed that, under a sudden impulse to save himself from serious inconvenience, he tries to alight, where the danger is not imminent, and where ordinarily careful persons would make the attempt, the question of negligence is for the jury.—Cousins v. L. S. & M. S. R. Co., 96 Mich. 386.

¶ 751. As a matter of law it is contributory negligence for a person to board a moving passenger train after the carrier has given ample notice, time and opportunity to do so while the train was standing at a station.—Murphy v. Pere Marquette R. Co., 183 Mich. 435.

¶ 752. Where a passenger alighted at the wrong station under a misapprehension of directions given him by the brakeman, and upon discovering his error attempted to reboard the train which was started before he was safely on board, as a result of which he was thrown to the ground and injured, it was held that his contributory negligence was for the jury.—Foley v. Detroit & Mackinac Ry. Co., 179 Mich. 586.

§ 232. ——Gross negligence and last clear chance.

See also ante ¶ 586.

¶ 753. In an action by a passenger against a street railroad for damages for injuries sustained by plaintiff after alighting from a north-bound car on the north side of the intersecting street and while attempting to cross the south-bound track as a result of being struck by a south-bound car, held, that there was no evidence of gross negligence such as required the submission of the question to the jury.—Davis v. Saginaw-Bay City Ry. Co., 191 Mich. 131.

§ 233. Instructions and requests.

Instructions on particular subjects, see also post §§ 234-237.
General law of instructions, see Instructions.
As to damages, see Damages, XII.

¶ 754. An instruction that carriers of passengers are "legally bound to exert the utmost care and skill in conveying their passengers, and are responsible for the slightest negligence or want of skilfulness either in themselves or their servants"; that they are "bound to the utmost care and skill in the performance of their duty"; that the degree of responsibility to which they are subjected is "not ordinary care which will make them liable for ordinary neglect, but extraordinary care which renders them liable for slight neglect," etc., would fairly permit the jury to find anything to be negligence which could by any possibility be avoided. But negligence is simply failure of duty. Any instructions which overlook the fact that railroads must be conformed to a system, and cannot be likened to those means of transit in which the business of a single vehicle cannot endanger any other, or which compels a departure from the common rules of good railroad management, is directly calculated to mislead.—Michigan Cent. R. Co. v. Coleman, 28 Mich. 440.

¶ 755. An instruction in an action for injuries to a passenger on a freight train, that, if plaintiff was lawfully on the cars, defendant was bound to carry him safely, and that its responsibility for the safety of its passengers does not depend on the kind of cars in which they are carried, is misleading, as giving the jury to understand that the company is an insurer of the safety of its passengers, and that the same degree of protection is requisite on a freight train as on a passenger train.—Moore v. Saginaw, T. & H. R. Co., 115 Mich. 103.

¶ 756. Too high a standard of care was required by a charge in action against a carrier for injuries received in alighting from a bus at a platform claimed to have been ill-lighted, where the jury was told that "It is the duty of defendant to use a very high degree of care to make the place where it receives passengers safe and free from danger; and if defendant has failed to so light its platform and to use such high degree of care in keeping such point * * * safe" it is liable.—McCormick v. Detroit, G. H. & M. Ry. Co., 141 Mich. 17.

¶ 757. An instruction holding a carrier to the exercise "of the highest known care" and "highest possible degree of care" in the transportation of passengers, held erroneous.—Rathbone v. Detroit United Ry., 187 Mich. 586.

¶ 758. An instruction in an action for injuries sustained by a passenger, requiring of a carrier the exercise of "that high degree of care and caution consistent with the practical operation of its road * * * which the most prudent, careful and cautious person engaged in the same business exercises under the same or similar circumstances," held not to impose too high a degree of care.—Marshall v. Wabash R. Co., 184 Mich. 593.

¶ 759. In an action against a street railway company an instruction, given at plaintiff's request, that "if the car stopped to allow passengers to alight, and while plaintiff, being a passenger, and using reasonable care, was in the act of alighting therefrom, the car was started with a sudden and violent jerk, then the burden is on defendant to show to the satisfaction of the jury that its driver in charge of the car was not guilty of negligence or want of care in the management of the car," is erroneous: and the error is not cured by modifying the request by adding that "it is incumbent on the plaintiff, and the burden is upon him to show, in the first place, the negligence of the driver."—Gardner v. Detroit St. R. Co., 99 Mich. 482.

¶ 760. An instruction in a suit against a street car company for injuries due to the

derailment of a car is erroneous which states that after the plaintiff has proved the derailment and the injury he has established a prima facie case, and the burden to show lack of negligence is shifted to defendant.—Niedzinski v. Bay City Traction & Electric Co., 160 Mich. 517.

¶ 761. Where, in an action for injuries sustained by a passenger while alighting from a street car, it is averred as negligence that the car was started while she was standing on the steps, and that a chain, which, with a hook attached, was permitted to hang near the steps, caught her dress and dragged her with the car, it is error to instruct the jury that defendant is not liable if the hook was in place at starting but was recently displaced by a passenger, leaving out the other ground of a premature start. The jury should be further directed that to exonerate defendant the hook must be found to have been the sole or proximate cause of the accident.—Bowdle v. Detroit St. R. Co., 103 Mich. 272.

¶ 762. In an action by an interurban car passenger for damages for personal injuries resulting from his being thrown from the car, after having boarded it while in motion, a requested instruction for plaintiff, constituting a statement of plaintiff's claim, that as plaintiff was about to leave the sidewalk and board defendant's car it started and he was obliged to increase his speed to board it, and that he was prevented from getting further than the platform owing to the crowded condition of the car and was thrown from the car as it struck a switch, held properly refused as improperly containing the implication that plaintiff was denied opportunity to board the car, he having had such opportunity while the car was standing still at the station.—McKenzie v. Detroit, J. & C. Ry. Co., 195 Mich. 218.

¶ 763. The city piled bricks near the tracks of defendant street railway. The plaintiff's intestate, while on the step and running board of the car was knocked off and killed. The defendant requested the court to submit to the jury the question whether or not the act of the city in piling the bricks rather than the negligence of the defendant was the proximate cause of the accident. The court failed to do this, but charged that it was the duty of the defendant to warn its passengers of the danger and to prevent them from sitting in the dangerous position. Held, the instructions were correct.—Moers v. Michigan United Rys. Co., 158 Mich. 659.

¶ 764. In an action against a street railroad for the death of a passenger who was standing on the running board of a car, and was struck by another car passing on a parallel track, an instruction that the jury could find negligence if they believed that the defendant's employees permitted the passengers to board the car in such numbers that the deceased was crowded from the body of the car, was proper, where there was testimony upon which to base it.—Kalis v. Detroit United Ry., 155 Mich. 485. (Hooker, J., dissenting.)

¶ 765. In an action against a street railway company for the negligent killing of plaintiff's intestate, who was crushed by a car passing on the other track as he was standing on the running board, the judge gave counsel to understand that the only question he would submit to the jury was whether plaintiff's intestate was forced into the position in which he was at the time he was hurt by reason of the pressure of passengers who came upon the car after he boarded it. Later the judge instructed the jury that if they believed the bell on the passing car was not rung, it would be such negligence as to justify a verdict for plaintiff. Held, that this was error, since counsel were misled, and had no opportunity to present their views on this phase of the case.—Kalis v. Detroit United Ry., 155 Mich. 485.

¶ 766. In an action against a street railroad for the death of a passenger who was standing on the running board of a car, and was struck by another car passing on a parallel track, it was not error to refuse to charge that it would be negligence for a passenger on an open car to stand upon the inside running board, if, in order to do so, it was necessary to reach past other persons upon the running board, and hang on.—Kalis v. Detroit United Ry., 155 Mich. 485.

¶ 767. In an action by an interurban car passenger, who had boarded one of defendant's cars while it was in motion, and was thrown from the car, due to its lurching while passing from a switch to the main track, where plaintiff claimed that he had got upon the platform and had been unable to go further in the car owing to the crowded condition thereof and that the car was operated at a negligent rate of speed, and defendant claimed that plaintiff was not fairly on the car before he was injured, and that the car was operated at a moderate rate of speed, the charge of the court held to be erroneous as not defining the issues, as being conflicting and confusing as a whole, as lacking precision of statement and as being erroneous in stating the law.—McKenzie v. Detroit, J. & C. Ry. Co., 195 Mich. 218.

§ 234. ——Condition of tracks, trains and equipment.

¶ 768. In an action for personal injury sustained by a lumber scaler by the derailment of a log-carrying train, where there was testimony that a piece of the flange 19

inches in length was broken out of one of the wheels under the caboose, and that there was an old crack in the outer rim at the place where the break occurred; it was not error to instruct the jury that if this "was an essential element in the happening of the accident—that it would not have happened without it, and that it could have been observed by a proper inspection, the defendant would be negligent in that regard."—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557.

¶ 769. In an action for personal injuries sustained by a lumber scaler through the derailment of a train loaded with logs, caused by a falling log, the refusal of an instruction which properly stated the rule that if plaintiff was a passenger and the accident which caused his injury occurred while the train was being operated in the usual manner of log trains upon well-managed roads, he could not recover, was not error, as it was subject to the criticism that it omitted a reference to the specific acts of negligence alleged and relied upon; and especially where the jury had been explicitly instructed upon the subject of defendant's negligence.—Greenfield v. Detroit & M. Ry. Co., 133 Mich. 557.

¶ 770. In an action against a railroad company for the death of a passenger by being thrown through the open door of a vestibule between sleepers, it was not error to refuse to instruct that the fact that the door was open was not of itself negligence; where the train in question was running at a high rate of speed and it was evidently intended that the door should be closed, and that the one in question was open because of a defect.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

¶ 771. In an action for damages for personal injuries sustained by the giving way of a handhold on defendant's car, which was stopping on signal, an instruction with reference to the duty of inspection is proper where it is substantially as follows: "Inspection not only involves looking at cars and appliances, but as well all those tests which would ordinarily be used to ascertain the condition of cars and appliances that a reasonably prudent man would use in exercise of such an undertaking."—Gerlach v. Detroit United Ry., 171 Mich. 474.

¶ 772. Where, in an action for personal injury in a street car accident, the court instructs that the defendant is not liable unless the lack of an appliance prescribed by statute caused the accident or contributed to it, and there is evidence that the car could have been stopped with the appliance prescribed, and the accident avoided, the charge is sufficiently favorable to the defendant.—Fortin v. Bay City Traction & Electric Co., 154 Mich. 310.

¶ 773. In a suit against a street railway company for injuries alleged to have been sustained by reason of the defective flooring of a car, an instruction that plaintiff must prove that the floor was in such a defective condition as would necessarily give the defendant notice of its dangerous character, is error.—Plefka v. Detroit United Ry., 155 Mich. 53.

¶ 774. In an action for damages for personal injuries sustained by the giving way of a handhold on defendant's car which was stopping on signal, it is not error to refuse to charge substantially as follows: "If plaintiff, in attempting to alight before the car stopped, subjected the handhold to an unusual or unreasonable strain, his weight considered, and under such strain it pulled out and resulted in plaintiff's falling, plaintiff cannot recover."—Gerlach v. Detroit United Ry., 171 Mich. 474.

¶ 775. An instruction in an action for injuries sustained by a passenger from the derailment of a train, that he might recover if the accident was caused by the spreading of the rails, or by the breaking of a rail as the result of the rotten condition of the ties, held within the allegations of the declaration.—Marshall v. Wabash R. Co., 184 Mich. 593.

¶ 776. In an action against a street railroad to recover for the death of a passenger riding in the vestibule of one of its cars, due to a collision with a derailed car going in the opposite direction, an instruction that if the defendant knew or had knowledge of prior derailments of its cars on the section of track where the accident occurred it was the duty of defendant to have found and repaired the place where the derailment occurred, held properly refused, it being the duty of the city to keep the foundation in proper condition.—Bury v. Detroit United Ry., 198 Mich. 447.

§ 235. ——Taking on and discharging passengers.

See also ante ¶ 759.

¶ 777. Where there is testimony that the driver of a horse car started the horses violently and suddenly with a whip, an instruction that plaintiff cannot recover for being injured while alighting "if the driver of the horse car was conducting his business in the usual and ordinary way" is erroneous.—Britton v. Grand Rapids St. R. Co., 90 Mich. 159.

¶ 778. In an action against a street car company for injuries occasioned by the con-

ductor's alleged ringing of the bell while plaintiff was alighting, a charge which, taken as a whole, is to the effect that it was negligence on the conductor's part, if he rang the bell and started the car while the plaintiff was attempting to alight, is not open to the objection that it considered the ringing of the bell not negligence per se.—Kirchner v. Detroit City R., 91 Mich. 400.

¶ 779. An instruction that if the jury should find that the space between the outer edge of the running board of the car and the edge of the sod or little embankment, at the time and place when and where plaintiff claimed she stepped between the running board and embankment, was not more than 7 or 8 inches in width, defendant was not guilty of negligence in having such a space at that time and place, and that plaintiff could not recover, was properly refused, it appearing that plaintiff was compelled to step downward in order to alight, the running board of the car being about 18 inches above the surface of the ground, and the court not being able to say, as matter of law, that a passenger, in taking such a step, would in all cases step outward more than 7 or 8 inches.—Poole v. Consolidated St. R. Co., 100 Mich. 379.

¶ 780. In a case by a woman passenger against street railways, it was error to instruct that it is the duty of a carrier to afford such care as is reasonably necessary to look after women and children in their alighting as well as in their passage; as the jury may thereby have understood that the conductor was not only bound to give women and children an opportunity to alight with safety, but must assist them in so doing.—Selby v. Detroit Ry., 122 Mich. 311.

¶ 781. In an action for injury sustained by a street car passenger, in which the negligence relied on was the sudden starting of the car from which plaintiff was alighting after it had stopped, the refusal to charge that if the car did not stop it would not help plaintiff's case that the car started suddenly and with a jerk, was not error, where the jury was told that plaintiff could not recover upon the theory that the power was applied and the car started up and plaintiff was thrown before the car had stopped.—Hastings v. Boland, 136 Mich. 240.

¶ 782. An instruction, in an action for personal injuries alleged to have been caused by a street car, after having been brought to a stop for plaintiff to alight, starting while he was in the act of alighting and throwing him to the ground, which seems to authorize recovery if he stepped off from the moving car after a request that it stop, is error.—McDonald v. City Elec. Ry. Co., 137 Mich. 392.

¶ 783. An instruction is properly refused that assumes that defendant's street car conductor, when he started the car after stopping for one person, was not bound to use any care whatever to determine whether he would thereby endanger the safety of other persons intending to become passengers, in an action by a passenger for injuries received from the starting of the car, as she was attempting to board it immediately after another passenger for whom the car had stopped.—Smith v. Detroit United Ry., 145 Mich. 629.

¶ 784. An instruction as to the duty of a street railroad company in stopping and starting its cars in order to give passengers a reasonable time to alight, held not misleading.—Vultee v. Saginaw-Bay City Ry. Co., 186 Mich. 523.

¶ 785. Plaintiff, a boy of nine years, was riding on the front end of the rear car of defendant street railway. The train stopped at one of the cross streets, a regular stopping place, and plaintiff climbed off the car and caught hold of the rods of the rear platform of the car ahead for the purpose of boarding same. While so doing, the car started up and plaintiff was dragged and injured. The trial court instructed that when he left the step of the car and stepped down upon the ground to board the next car while it was standing still upon the track, he occupied the same position while he was upon the street, and was entitled to the same degree of caution on the part of the employees of the company, as any other person who might have been attempting to board the car while it was standing still. Held, such instruction was proper.—Keeley v. City Electric Ry. Co., 168 Mich. 79.

¶ 786. Plaintiff, a boy of nine years, was riding on the front platform of the rear car of defendant's street railway when the car stopped at a cross street, a regular stopping place. Plaintiff stepped off upon the ground and caught hold of the rods of the rear platform of the car ahead for the purpose of boarding same. While so engaged, the train started and plaintiff was dragged and injured. Held, the court, in instructing the jury as to the duty of defendant's employee, should, in view of the unusual conduct of plaintiff, have made reference to the length of time the cars were stationary, and it would have been reversible error to refuse to do so if requested by defendant.—Keeley v. City Electric Ry. Co., 168 Mich. 79.

¶ 787. Where in a suit for personal injuries the declaration charges that defendant was negligent in suddenly starting up its car as plaintiff was boarding it, it is proper for the court to instruct that the passenger was entitled to a reasonable opportunity to come

to a place of safety on the car after boarding the same.—Formiller v. Detroit United Ry., 164 Mich. 653.

¶ 788. Where in a suit for personal injuries the declaration alleges that plaintiff was injured by the negligence of defendant in suddenly starting the car, an instruction is sufficient which states that plaintiff cannot recover if he was thrown off the car after he had succeeded in boarding it, and it is not necessary in addition to give a requested instruction defining what constitutes the act of boarding a car.—Formiller v. Detroit United Ry., 164 Mich. 653.

¶ 789. In a suit for personal injuries, plaintiff alleged that the injury was caused by the defendant starting up its street car while she was in the act of alighting. On the question of negligence the court charged the jury as follows: "If this car was started up after it came to a full stop, while the plaintiff was in the position of danger, from which position the starting up of the car would have a natural tendency to throw her off the car and injure her, that would be negligence. If, on the other hand * * * the plaintiff simply slipped as she was getting off the car, while the car was at a full stop, then there is no negligence on behalf of the company, and she cannot recover." Held, the charge was sufficiently favorable to plaintiff.—Cummings v. Detroit United Ry., 163 Mich. 304.

§ 236. ——Assaults on passengers.

¶ 790. In an action against a railroad for assault and battery committed by one of its conductors as a result of a controversy over a ticket, where a ticket was introduced in evidence by the company, it was proper to modify a request to instruct that the ticket was not good for the passage claimed, by adding that this was true if this was the ticket handed by plaintiff to the conductor, where plaintiff's testimony was in conflict with the theory of the requested instruction.—Johnson v. Detroit, Y. & A. A. Ry., 130 Mich. 453.

¶ 791. In an action against a railroad for assault and battery by one of its conductors resulting from a controversy over a ticket, an instruction that the circumstances occurring before plaintiff returned to the car after being ejected therefrom were material only as they bore upon the credibility of the witnesses, and that plaintiff could not recover if he provoked the assault, is sufficiently favorable to defendant.—Johnson v. Detroit, Y. & A. A. Ry., 130 Mich. 453.

¶ 792. Where, in a suit for personal injuries due to an assault committed by a street car conductor, there is a sharp conflict of testimony as to whether plaintiff had been previously warned to wait until other passengers were off the car before boarding same, it is reversible error for the trial court to instruct as conceded facts that passengers had been previously accustomed to board the car before letting other passengers off and that plaintiff, prior to the occasion in question, had been warned against this practice.—Markoff v. Detroit United Ry., 160 Mich. 37.

§ 237. ——Contributory negligence.

As to persons on platforms and running boards, see also ante § 233.

¶ 793. It is error to refuse a charge that a passenger who had drunk whisky several times and was injured while alighting cannot recover if he was at the time under the influence of liquor and if such in any way contributed to his injury, though in the course of a colloquy brought on by a juror's question it was charged that the duty of care towards a drunken passenger by the carrier did not enter into the case for the reason that plaintiff presented no such theory and there was no evidence that the carrier's servants knew he was intoxicated. Such charge did not cover the request.—Strand v. Chicago & W. M. R. Co., 67 Mich. 380.

¶ 794. Passengers upon a street railway are entitled to assume that the car will not be started without reasonable care to ascertain whether any passenger is alighting; and instructions to the jury that as the plaintiff stood upon the platform it was his duty to alight immediately, when the car stopped, and that if the car stopped a reasonable length of time for passengers to alight, and plaintiff, without the driver's knowledge, delayed alighting beyond that time, he was guilty of contributory negligence and could not recover, are erroneous.—Britton v. Grand Rapids St. R. Co., 90 Mich. 159.

¶ 795. In an action against a street railway for personal injuries alleged to have been caused by starting the car after it had stopped, while plaintiff was in the act of alighting, a requested instruction that, while it was the duty of defendant to stop its car to give plaintiff an opportunity to alight, yet failure to do so would not give him the right to jump from the moving car, should have been given.—McDonald v. City Elec. Ry. Co., 137 Mich. 302.

¶ 796. In an action by a passenger to recover for injuries sustained by being thrown from a train as he was attempting to reboard same after having alighted at the wrong station, an instruction permitting the jury to consider whether he was induced to alight upon the representation of defendant's trainman as excusing promptitude required

by a passenger intending to board a train, held erroneous.—Foley v. Detroit & Mackinac Ry. Co., 179 Mich. 586.

¶ 797. In an action by a street car passenger for damages for personal injuries sustained as a result of the starting of the car while plaintiff was attempting to get off at a point where the car tracks crossed railroad tracks and at which it was customary to stop the street car while the conductor went forward to ascertain whether the crossing could be made in safety and to allow passengers to get off, an instruction that if, as claimed by plaintiff, before the car came to a stop she got up and went to the back part of the car, she would not be guilty of any negligence in walking back to a seat in the rear end of the car and sitting down until the car came to a stop where passengers got off; that it was the duty of the conductor, knowing the custom of passengers to get off at such place to give them a reasonable time to get off before signaling the car to start; that such passenger had the right to rely upon such duty, but that if the car had started on its way after it had come to a stop and before she had got out of her seat and had indicated in any way that she intended to leave the car at such place, and had started on and was crossing the railroad tracks, and then she got up and walked back and stepped off the car while it was in motion, she was guilty of contributory negligence, held to be correct.—Kirkpatrick v. Muskegon Traction & Lighting Co., 195 Mich. 519. (Steere, Ostrander and Brooke, JJ., dissenting.)

¶ 798. An instruction was warranted as to the contributory negligence of the plaintiff in action by a prospective passenger against a street railroad for damages for personal injuries alleged to be due to her hold upon the car and her clothing catching in the door of a folding step car, upon its being closed as she attempted to board the car, and her being dragged some distance, where plaintiff testified that the conductor shut the door in her face, while she had one foot on the step, and rang the bell for the car to move, and then described what immediately occurred, involving her position, her actions, as well as the movement of the car, and the result.—Sibert v. Detroit United Ry., 196 Mich. 117.

§ 238. Verdict, findings and judgment.

In general, see Judgments; Verdicts and Findings.

¶ 799. One of two street railway defendants cannot urge as ground for new trial that the verdict against it is not supported by the evidence in that it did not operate and had no connection with the car from which plaintiff fell, where the declaration was filed against both defendants, and both pleaded the general issue and the question was in no way raised until on such motion, and where there was some evidence tending to show liability on the part of such defendant.—Selby v. Detroit Ry., 122 Mich. 311.

¶ 800. Plaintiff was injured in a collision by the trains of two railroads at the point of intersection, and sued them jointly. Defendants did not ask the jury to determine which of them was guiltless. Held, that where there was evidence from which it might be inferred that the negligence of each road contributed to the accident, the verdict must be sustained against both.—Van Orman v. Lake Shore & M. S. Ry. Co., 152 Mich. 185.

¶ 801. In an action against the railroad company and the Pullman Company for the death of a passenger by being thrown through a vestibule door while passing between sleeping cars, the railroad company was liable for permitting the vestibule door to be defective; though there was a directed verdict in favor of the Pullman Company.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

F. CONNECTING CARRIERS AND JOINT FACILITIES.

§ 239. In general; transfers and tickets.

Continuation of passenger's character during transferring, see ante § 114.

Duty to present transfer or pay another fare, see also ante § 138.

¶ 802. The requirement that a transfer ticket from one route of a street railway to another shall not be honored unless used within fifteen minutes after delivery to the passenger is not unreasonable in the absence of any obligation on the company's part by charter, ordinance or contract to make such transfer, and to carry the passenger over both routes for a single fare: and if the ticket is not used within the time limited—provided a car passes in that time—it is void.—Heffron v. Detroit City R. Co., 92 Mich. 406.

¶ 803. A passenger's failure to read a limited transfer ticket gives him no rights which he would not have had had he read it and been advised of the limitation as to the time of use.—Heffron v. Detroit City R. Co., 92 Mich. 406.

§ 240. Ejection of passenger or breach of contract by second carrier.

¶ 804. Plaintiff having purchased a ticket from D to T. via P., and return, the conductor of the line from D. to P. took up the

going part of the ticket, but failed to give plaintiff a check to show his right to ride from P. to T. The conductor of the latter line insisted upon fare being paid, and plaintiff having refused to pay, and having been ejected without unnecessary force, brought suit. Held, that the conductor was right in requiring a ticket to be produced or fare to be paid, and in refusing to recognize the return coupon as evidence of payment; that the passenger should have paid his fare or left peaceably.—Van Dusan v. Grand Trunk R. Co., 97 Mich. 439.

¶ 805. A passenger on paying fare for a ride over the lines of two companies received a ticket of a peculiar color and print, consisting of two parts separated by a perforated line, the lower part for the company to which fare had been paid, the upper for the other. The conductor of the first company so separated the parts as to take with the lower part about one-third of the upper, and when the passenger offered the remainder to the conductor of the second company it was refused and ejection followed a refusal to pay fare. In an action by the passenger, held, as matter of law, that the conductor was bound to know that the fragment was part of a genuine ticket used upon his line, which, if whole, would have entitled plaintiff to a ride, and that it should have been received.—Rouser v. North Park Street R. Co., 97 Mich. 565.

¶ 806. A passenger on a railroad desiring to go to a station beyond that road, and which could only be reached by a connecting line, paid to the conductor on the first road the fare demanded, supposing it to be the fare to his destination. The conductor had no authority to receive fare except over his own line, and failed to inform the passenger that the fare paid entitled him to ride to the end of the first line only. The passenger being ejected from the train taken by him on the connecting line, for not paying his fare, held, that the first road was not liable for damages therefor.—Haggerty v. Flint & P. M. R. Co., 59 Mich. 366.

¶ 807. A street railway company which had a running arrangement with another company for the carriage of passengers, was liable for an attempt to forcibly eject a passenger for nonpayment of fare, who presented his ticket from which the conductor of the other company had mistakenly removed the coupon entitling such passenger to continue his ride after the conductor of defendant had taken charge of the car.—Vining v. Detroit, Y. & A. A. R. Co., 122 Mich. 248.

¶ 808. One who purchases a ticket for transportation on several railway lines and by boat is chargeable with notice of conditions printed on the ticket, that the defendant acted merely as agent and was not responsible beyond its own lines and that the purchaser should not hold any of the lines liable for damage on account of statements of employees not in accordance with the contract.—McWethy v. Detroit, G. R. & W. R. Co., 127 Mich. 333.

¶ 809. One who purchases a ticket for transportation over several railway lines and by boat cannot recover from the railway company which sold her the ticket, for injuries to health sustained through failure of a boat line to furnish a berth as called for in the contract where the ticket bears the printed statement that the seller is merely the agent and not responsible beyond its own lines.—McWethy v. Detroit, G. R. & W. R. Co., 127 Mich. 333.

¶ 810. One who purchases a ticket for transportation on several railway lines and by boat, upon refusal of the boat to give her a berth in accordance with the terms of the contract, unless she pays extra compensation, cannot recover for injuries to health sustained through spending the night on a couch in the cabin, because being able to pay it, she declined.—McWethy v. Detroit, G. R. & W. R. Co., 127 Mich. 333.

§ 241. Joint stations and facilities.

Concurrent liability, see also post ¶ 813.
Union stations and union station corporations, see Union Stations.
Order to provide joint station, see Comp. L. 1915, § 8121(b).

¶ 811. Where a crosswalk is constructed and maintained by two railroads for the purpose of transferring passengers from one station to the other the duty rests upon both companies to see that the way is properly lighted for passengers going from one station to the other, and it is immaterial that there is an arrangement between the companies that one of them should light the walk.—Boyle v. Waters, 199 Mich. 478.

§ 242. Joint and concurrent liability for injuries.

Evidence of joint liability for baggage, see post § 257.
Questions for jury, see ante § 229.

¶ 812. An electric railway company which operates cars by its own employees over the line of another railway is liable for personal injuries sustained by a passenger entitled to ride on the tracks of both companies while the car is still on the other company's track but after the switch has been thrown, notwithstanding a provision in the contract between the companies that the ownership of the track shall determine the responsibility

of the respective parties to the general public.—Richard v. Detroit, R., R. & L. O. Ry., 129 Mich. 458.

¶ 813. Where plaintiff while waiting to take a train was injured by catching his foot in a defective plank in the station platform, and it appeared that the station was used by two railroad companies jointly, held, that both defendants owed to plaintiff the duty to maintain the premises in a reasonably safe condition and that they were jointly liable for the injury.—Peters v. Detroit & Mackinac Ry. Co., 178 Mich. 481.

¶ 814. The duty of an initial carrier does not cease the moment a passenger having a through ticket alights from a train to pass over on a common crosswalk to the station of the connecting carrier, nor until the passenger has had reasonable opportunity to get away from the initial carrier's premises in the direction ordinarily taken, and until such point is reached and passed an injury to the passenger by a train of the connecting carrier due to the failure to light the crosswalk is the proximate cause of the injury.—Boyle v. Waters, 199 Mich. 478.

¶ 815. A passenger on a railroad who has a through ticket necessitating a change at a particular point to another railroad is entitled to protection by the first carrier as a passenger until she has alighted and has had reasonable opportunity to get away from the company's premises in the direction ordinarily taken to reach the station of the second railroad.—Boyle v. Waters, 199 Mich. 478.

¶ 816. The mere fact that a passenger who has a through ticket issued by one railroad calling for connection with another railroad at a certain point is off the premises of the first carrier and on the premises of the connecting carrier at the time she is struck by an engine of the connecting carrier does not relieve the first carrier from liability for injuries to her where she was pursuing her way on an unlighted passageway between the stations constructed and maintained by both railroads for general use in the transfer of passengers and which she had been directed to use by the agent of such first carrier.—Boyle v. Waters, 199 Mich. 478.

G. SLEEPING, DINING AND PARLOR CARS.

§ 243. In general.

Stateroom on boat as analogous to room in inn, see also post ¶ 830.
Duty to make safe passage to and from dining car, see ante ¶ 455.
Passenger stepping through open vestibule, see also ante ¶ 495.
Negligence in allowing car to be in bad condition, see also ante ¶ 456.
Instruction on open door as negligence, see ante § 234.
Verdict against carrier with direction for sleeping car company, see also ante § 238.
Taxation of sleeping cars lines, see Taxes.
Defined to be common carriers, see Comp. L. 1915, § 8111(e).
Statutory permission to operate and charge for service, see Comp. L. 1915, § 8348.
Liability of restaurant keepers and others for injuries to persons caused by tainted or unwholesome food, see note, 7 N. C. C. A. 111-112.
Liability for failure to provide sleeping car reservations, see note, 12 N. C. C. A. 114-143.
Liability for loss of property of passenger in sleeping or palace car, see note, 15 N. C. C. A. 363-370.

V. CARRIAGE OF BAGGAGE AND PASSENGERS' EFFECTS.

§ 244. In general; duty to receive and carry.

¶ 817. A passenger is entitled to have carried as baggage such articles as are necessary and requisite for his personal convenience.—Amory v. Wabash R. Co., 130 Mich. 404.

§ 245. What constitutes baggage.

Bicycles, baby carriages, etc., see Comp. L. 1915, § 8329.

¶ 818. A carrier is liable for merchandise carried in trunks as baggage if it has knowledge or notice that the trunks contain merchandise.—Amory v. Wabash R. Co., 130 Mich. 404.

¶ 819. Notice to the carrier that a passenger's trunks contained merchandise so as to render the carrier liable for its loss is sufficiently shown by evidence that the baggage master so stated in reference to the trunks in question, that plaintiff had traveled over the road frequently for some years with the same trunks, during which time the same baggage master was in charge, that plaintiff's business was well known, and that the trunks were delivered to the baggage master with the statement that they belonged to plaintiff, the ladies' tailor.—Amory v. Wabash R. Co., 130 Mich. 404.

¶ 820. If a passenger ships merchandise in his trunk, without notice to the railroad company the company is not responsible for the loss, but the notice need not be an express notice. Knowledge by the agent or company of the facts to put a person in inquiry is equivalent to notice.—Dahrooge v. Pere Marquette R. Co., 144 Mich. 544.

What constitutes baggage for which carrier is liable, see note, 7 N. C. C. A. 972-981.
Books or manuscript as baggage, see note, 1 N. C. C. A. 65-71,

§ 246. Delivery to carrier; checking.

Evidence of delivery, see post § 257.
Checks for baggage, see Comp. L. 1915, § 8245.

¶ 821. The plaintiff, intending to take passage on the steamboat of defendants, deposited his trunk on board in the usual place for luggage, but without putting it in charge of any person, or notifying any one employed on the boat of such deposit, or of his intention to take passage; and while temporarily absent from the boat she started on her trip, and he was left. The trunk could not afterwards be found. Held, that there was not a constructive delivery and acceptance of the trunk as the luggage of a passenger, by which the defendant could be held chargeable for its loss.—Wright v. Caldwell, 3 Mich. 51.

¶ 822. In an action against a common carrier for the loss of a trunk the fact that the defendant's transfer agent checked the plaintiff's baggage before he had procured his ticket without any authority and against instructions, is immaterial on question of responsibility for the baggage, where plaintiff afterwards procured the ticket, thereby correcting the consequences of the mistake of the transfer agent.—Wolf v. Grand Rapids, H. & C. R., 149 Mich. 75.

§ 247. Contract for carriage and limitations of liability.

Allegations as to consideration, see post § 256.
Necessity of notice of defense of limitation, see post § 256.

¶ 823. The right to recover the actual value of baggage destroyed while in the control of a carrier, is not limited, where there was no deceit or fraud on the part of the passenger in failing to disclose the actual value of his baggage when checking it, and he was not aware of a limitation of the carrier's liability in its tariff filed with the State Railroad Commission.—Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

§ 248. Charges and rates.

In general, see ante § 3.
Regulation of excess baggage rates by Railroad Commission, basis for fixing, see Public Service.

¶ 824. Where the Michigan Railroad Commission prescribes rates for excess baggage, the rates fixed are maximum rates. The carriers may within those rates fix lesser rates, provided there is no discrimination or rebating. Between competing points, where the haul of one road is longer than that of the other, the one having the longer haul may charge the same rates as are charged by the one having the shorter haul.—Michigan Cent. R. Co. v. Wayne Circuit Judge, 156 Mich. 459.

§ 249. Nature and extent of liability.

Limitations on liability, see ante § 247.
Burden of proof and evidence, see post § 257.
Damages and measure and proof of damages for loss, see Damages.

¶ 825. A railway company carrying baggage free is held to no greater diligence than any other gratuitous bailee.—Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111.

¶ 826. Where the plaintiff purchased a ticket without intention to use it but for the sole purpose of having his baggage transferred the railroad company is a gratuitous bailee liable only for gross negligence and not liable for the felonious taking of the baggage from the baggage room at the destination.—Marshall v. Pontiac, O. & N. R. Co., 126 Mich. 45.

¶ 827. A common carrier is liable for the loss of baggage or goods unless the loss is occasioned by an act of God or the public enemy.—Wolf v. Grand Rapids, H. & C. Ry., 149 Mich. 75.

¶ 828. A carrier of passengers by water is not liable for baggage accidentally burned in a warehouse at the point of destination while awaiting the arrival of its owner, who, with the carrier's consent, had stopped at an intermediate point.—Laffrey v. Grummond, 74 Mich. 186.

¶ 829. Where a passenger arrived at a station late at night and his baggage was destroyed by the burning of the station shortly afterward, a railway company is liable as a carrier where it was customary, under such circumstances, to leave baggage at the station until the following morning.—Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

Liability of carrier for loss of passenger's personal effects, see note, 4 N. C. C. A. 792-809.

§ 250. ——Hand baggage and articles in custody of passenger.

¶ 830. A passenger on board a steamboat was, with a fellow passenger, a stranger, assigned to a state room by the officers of the

boat. The state room window was broken, and the attention of the stewardess was called to it. When the first passenger retired for the night she rolled up her dress, in the pocket of which were about $30 and a gold chain, and placed it at the foot of the upper berth. Early in the morning she found the dress unrolled, that the money and chain had disappeared, and that a pillow which had been placed in the window was not in it. She testified that the woman with her could not have taken the property without awakening her, as she did not sleep soundly, and both occupied the same berth. Whether the steamboat proprietors were liable as innkeepers would be, query; the court being equally divided.—McKee v. Owen, 15 Mich. 115.

Liability of carrier for loss of property in possession of passenger by robbery or theft, see note, 9 N. C. C. A. 730-747.

§ 251. ——Termination of liability as carrier.

Baggage left on arrival until time to claim, see also ante § 249.
Reasonableness of time, see post § 254.

¶ 831. The rigorous liability of a railroad company for baggage ceases when a trunk has reached its destination and a reasonable opportunity has been afforded for taking it away; thereafter the company is liable as a warehouseman only.—Marshall v. Pontiac, O. & N. R. Co., 126 Mich. 45.

¶ 832. The strict rule of liability of a carrier for the baggage of a passenger continues after his arrival at his destination until the elapse of a reasonable time for its removal.—Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

¶ 833. The strict rule of liability of a common carrier of passengers for their baggage continues until a reasonable time for delivery after the arrival at the destination of the passenger, but after such time has elapsed the liability of the carrier is that of a warehouseman.—Wallace v. Detroit, G. H. & M. Ry. Co., 176 Mich. 128.

§ 252. ——Contributory negligence of passenger.

Failure to remove in reasonable time as jury, see post § 258.

¶ 834. Plaintiff at 2 p. m. checked his suitcase in the parcel room of the depot of the defendant railroad and paid the fee of five cents required. He told the attendant he intended to call for the same at 4:20 p. m., and did in fact make inquiry about it at 6 p. m. The suitcase was lost. Held, the plaintiff was not guilty of negligence in failing to call at 4:20 p. m.—Fraam v. Grand Rapids & I. Ry. Co., 161 Mich. 556.

§ 253. Storage and keeping while not in transit.

Baggage checked without person traveling, see ante ¶ 826.
Baggage left on arrival to be taken on following day, see ante § 249.
When carrier's liability terminates and warehouseman's begins, see ante § 251.
Evidence of negligence, see also post ¶ 856.
Contributory negligence, see ante § 252.

¶ 835. Plaintiff checked his suitcase at the parcel room in the depot of defendant railway and paid the fee of five cents required by the defendant. Held, the defendant was a bailee for hire, was bound to use ordinary care, and was liable in trover for the loss of the suitcase resulting from the failure to use such care.—Fraam v. Grand Rapids & I. Ry. Co., 161 Mich. 556.

¶ 836. Plaintiff, upon checking his suitcase in the parcel room of the defendant's depot, told the attendant to be careful as there was a lot of goods in the case. The attendant told him not to be afraid. Held, in a suit to recover for its loss than plaintiff sufficiently warned defendant of the value of the suitcase.—Fraam v. Grand Rapids & I. Ry. Co., 161 Mich. 556.

Liability of carrier for loss of property from check room, see note, 3 N. C. C. A. 211.

§ 254. Reclaiming and delivery back to passenger.

Reasonableness of time to reclaim, see ante §§ 249, 251.
Reasonableness of time as jury question, see post § 258.
Contributory negligence in delaying to reclaim, see ante § 252.

¶ 837. In determining what constitutes a reasonable time for the removal of baggage by a passenger after his arrival at his destination, the general and usual custom of the carrier in relation to the delivery of baggage at the station in question, may be taken into consideration.—Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

¶ 838. In determining what is a reasonable time within which baggage may be removed after the arrival of a passenger at his destination, the usual course or custom of the carrier's business at the station in question, including the closing thereof after the arrival of late trains, as well as the fact that baggage handlers do not customarily work at night, may be considered.—Crowley Bros. v Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

§ 255. Actions for injury or loss.

¶ 839. Articles of jewelry of a wife traveling with her husband, which were not

given or furnished by the husband, which were part of the wife's baggage carried on tickets purchased by him for himself and her, and were lost or injured, may be recovered by him in assumpsit based on the contract of carriage made with him.—Withey v. Pere Marquette R. Co., 141 Mich. 412.

¶ 840. A father, paying full fare for himself, traveling with an infant child of such tender years that by custom no fare is demanded for its carriage, may recover on the contract of carriage for loss of or injury to articles bought and used for the child, which articles are a part of, and packed and carried with his baggage, on the ground that those articles are the property of the parent, and properly a part of his proper baggage.—Withey v. Pere Marquette R. Co., 141 Mich. 412.

§ 256. ——Form of action and pleading.

¶ 841. Case seems to be the proper action for loss by a carrier of baggage which, with its owner, was carried free.—Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111.

¶ 842. Damages for the loss of luggage cannot be recovered in assumpsit against the carrier if the baggage was carried free. An action of tort, however, lies for negligent loss.—Flint & P. M. Ry. Co. v. Weir, 37 Mich. 111.

¶ 843. A declaration ex contractu against steamboat proprietors by a passenger to recover for the contents of a lost trunk must aver a consideration paid, or agreed to be paid, for the transportation of the trunk and its contents; and the averment must be supported by proof.—Wright v. Caldwell, 3 Mich. 51.

¶ 844. A defendant railway which accepts a suitcase at the parcel room in its station and takes a fee of five cents is a bailee for hire and is liable in trover for loss of the suitcase on failure to return it without excuse.—Fraam v. Grand Rapids & I. Ry. Co., 161 Mich. 556.

¶ 845. That a carrier's liability for the loss of baggage was limited by contract must, under Circuit Court Rule 7b, be specially pleaded.—Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

¶ 846. That a carrier's liability for the loss of baggage was limited by contract cannot be shown in an action of tort under the general issue.—Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

¶ 847. That a passenger bringing an action against a carrier for the loss of his baggage declares in case rather than in assumpsit does not affect the legal liability of the defendant, nor require the plaintiff to show negligence.—Wolf v. Grand Rapids, H. & C. R. Ry., 149 Mich. 75.

§ 257. ——Burden of proof and evidence.

Burden of proof of consideration for carriage, see also ante ¶ 843.
Burden of proof as to negligence, see also ante ¶ 847.
Sufficiency to go to jury, see also post § 258.

¶ 848. In an action against a railway company for compensation for baggage destroyed while at defendant's depot the contention that such baggage was destroyed by the act of God is a matter of affirmative defense and the burden of proving it by the preponderance of the evidence is upon the defendant.—Wallace v. Detroit, G. H. & M. Ry. Co., 176 Mich. 128.

¶ 849. Where action is brought against a railway company for compensation for baggage destroyed while at defendant's depot, it is not error to allow plaintiff to answer a question as to what was said with reference to the baggage when the checks were presented when it is disputed whether plaintiff had a reasonable time in which to remove the baggage and plaintiff alleges that she presented the checks to the station agent on arriving at her destination and that he stated he had no time to bother with it.—Wallace v. Detroit, G. H. & M. Ry. Co., 176 Mich. 128.

¶ 850. In an action against a carrier for the loss of baggage testimony of the transfer agent that he had delivered the trunk at the freight depot is sufficient to show that it had come into the custody of the defendant.—Wolf v. Grand Rapids, H. & C. Ry., 149 Mich. 75.

¶ 851. Where a railroad company and a steamship company advertised that they had formed a through line between two points, had a common agent who sold tickets and another common agent who checked baggage, a jury is warranted in inferring that in the carrying of passengers and their baggage the two are partners, and therefore jointly liable to a plaintiff who has sued to recover for the loss of his baggage.—Wolf v. Grand Rapids, H. & C. Ry., 149 Mich. 75.

§ 258. —Questions of law and facts.

¶ 852. What constitutes a reasonable time for the removal of baggage after the arrival of a passenger at his destination, is a question of law when the facts are undisputed.—Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

¶ 853. The fact that the trial court submitted to the jury the question of the reasonableness of the time for the removal of a passenger's baggage after his arrival at his destination, held not prejudicial to the defendant, although the testimony was undisputed.—Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

¶ 854. What constitutes reasonable time in which a passenger may remove his baggage from the custody of a carrier after his arrival at his destination, is a question for the jury when resting on disputed testimony. —Crowley Bros. v. Grand Trunk Ry. Co. of Canada, 185 Mich. 482.

¶ 855. In an action against a railway company for compensation for baggage destroyed while at defendant's depot, it is proper to leave the question to the jury as to whether a reasonable time for delivery elapsed after its arrival where it is disputed whether plaintiff presented her baggage checks to the station agent on her arrival and was told that he could not bother with it then and whether there was a dray or any means of getting the baggage away before the depot was locked for the night during which it was destroyed.—Wallace v. Detroit, G. H. & M. Ry. Co., 176 Mich. 128.

¶ 856. Plaintiff checked his suitcase at the parcel room in the depot of defendant railway and paid the fee of five cents required by the defendant. Upon calling for it, he was informed it could not be found. Defendant at the trial introduced evidence showing that the parcel room was left unattended for five or ten minutes at three different times the same afternoon, while the attendant was engaged in putting baggage on trains. Held, there was sufficient evidence of defendant's negligence to go to the jury.—Fraam v. Grand Rapids & I. Ry. Co., 161 Mich. 556.

CARRYING to CELLARS.

Cross-References.

Carrying away—
As element in larceny, abduction or other crime, see Crimes, II; Larceny; Indictment.
As element in tort, see Conversion; Trespass.

Carrying on business—
Foreign corporations in state, see Foreign Corporations.
Agreements and combinations in restraint, see Contracts, IV; Combinations and Monopolies.
Restrictive covenants as to use of property, see Buildings; Landlord and Tenant, IV.

Carrying weapons—
See Crimes, II; Indictment; Constitutional Law.

Cars—
See Carriers; Railroads; Street Railways; Master and Servant, III.

Car trusts—
See Railroads, VI.

Carts—
Use on public highways, see Highways, XII, XIII.
As exempt articles, see Exemptions.

Case, Action on—
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Case made or settled—
For review, see generally Appeal and Error.

Case reserved or certified—
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Case submitted—
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Cash—
Medium for payment, see Payment.
Payment for corporate stocks, see Corporations, VII, XXIV.
Terms of contract as to time or mode of payment, see Contracts, VI; Sales, VII; Vendors and Purchasers, IV.
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Cashiers—
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Casualty—
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Liability for negligence, see Carriers; Highways, XII, XIII; Master and Servant, III; Railroads, VIII; Street Railways, IV; Negligence; and other specific topics treating of actionable negligence.
Excuse for nonperformance of contract, see Contracts, VII; Carriers; Sales.
As excuse for or defense to crime, see Crimes; Homicide.

Casual visitors—
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Rules of negligence towards, see Negligence; Railroads, VIII, A.

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Catalogues—
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Cattle—
See generally Animals.
Carriage of, see Carriers, III.
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Caucus—
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Causa mortis—
See Gifts,
"Cause"—
In the sense of ground for action or relief, see specific topics treating of the relief or action sought, e. g., Divorce, II; Discontinuance; Injunctions; Receivers.
Showing of cause, see specific topics treating of the remedy or procedure in which cause must be shown, e. g., Motions and Orders; Injunctions; Mandamus; Quo Warranto.
Cause and effect—
Proximate cause in general, see Negligence.
Remote and proximate damages, see Damages.
Probable cause for arrest or to institute prosecution, see Arrest; Malicious Prosecution, III.
Causation as subject of expert testimony, see Evidence, VI; Indictment, VIII, B.
Cause for removal—
See Officers, V; and see Municipal Corporations, XV.
Of trustees and personal representatives, see Estates of Decedents, III, D; Guardianship, II; Trusts, V.
Cause of action—
See Actions, § 2 et seq.; and see topics treating of the specific cause of action in question.
Nature for purpose of review, see Appeal, I, III; Certiorari.
Lien of attorney on cause, see Attorneys, II, E.
Rules for pleading and joinder, see generally Pleading; Equity, VII; and see further as to pleading topics treating of the particular cause of action.
Jurisdiction of civil causes, see Courts, V; Justices of the Peace, III.
Abatement of causes and survival, see Abatement.
Assignability, see Assignments.
Merger, bar and estoppel of causes by judgment, see Former Adjudication.
Cause of death—
See Death and Survivorship; Death by Wrongful Act; Insurance; Homicide.
Autopsy or inquest, see Corpses and Burial.
Caution—
Element in care, and want of caution as negligence, see Negligence; and specific topics treating of negligence in particular relations or regarding particular things.
Cautionary instructions—
See Instructions, VI; Indictment, IX, E.
Cautioning prisoner—
As affecting voluntariness and admissibility of confession, see Indictment, VIII, B.
Caveat emptor—
See Sales; Vendors and Purchasers; Fraud; Maxims.
Cave-ins—
Liabilities of adjoining owners in making excavations, see Adjoining Owners.
On or adjacent to highway, and liability for resultant injuries, see Highways, XII.
Employers' liability for injuries by caving earth, see Master and Servant, III; Workmen's Compensation Law.
Celebration of marriage—
See Marriage.
Celebrations—
By the public or in public places, see Highways, XI; Municipal Corporations, IX.
Cellars—
Duty of adjoining owners, see Adjoining Owners.
Agreements for construction, see Building Contracts.
Encroachment on highway, see Highways, XI.
Dangerous opening near highway, see Highways, XII.
Rights of lessor and lessee, see Landlord and Tenant.

CEMETERIES.

TREATS of places for burial of the dead, excluding laws relating to Corpses and Burial which see.

Analysis.

§ 1. In general.
§ 2. Dedication or grant, and title in land.
§ 3. Lots and burial permits.
§ 4. Remedies and procedure.

§ 1. In general.

Cemetery corporations, so far as the general principles of corporation law are involved, see Corporations.

Liability on bond of officer for misappropriation of money received for cemetery lots, see Officers, VII.

¶ 1. It is the settled policy of this state, in common with the universal sentiment of mankind, to preserve and maintain the burial places of the dead.—Woodmere Cemetery Ass'n v. City of Detroit, 192 Mich. 553. (Brooke, J., dissenting.)

§ 2. Dedication or grant, and title in land.

Exemption from taxation, see Taxes, III.

Exemption from execution, see post § 4.

Burial reservation in deed of land for cemetery, see Deeds, III, D.

¶ 2. Land dedicated as an approach to a cemetery may be used by the owner of the fee in any way not inconsistent with the rights of the owners of the easement.—Township of Oneida v. Allen, 137 Mich. 224.

¶ 3. Use of a strip of land, dedicated for an approach to a cemetery, by the adjoining landowner as a lane for reaching the rear of his farm will not be restrained at the instance of the township which desired to improve the cemetery and approach, where the strip had been so used by the adjoining owner for more than 15 years and there was nothing in the dedication to show an intent to prohibit such use.—Township of Oneida v. Allen, 137 Mich. 224.

§ 3. Lots and burial permits.

Liability for disturbance of grave, see Corpses and Burial.

§ 4. Remedies and procedure.

¶ 4. Under Comp. L. 1897, § 8407, providing that lands used for burial purposes shall be exempt from mortgage or other lien or incumbrances, and section 10322 exempting cemeteries, etc., from levy under execution or other final process and under section 437 conferring general powers on a court of equity to subject property to payment of debts, but expressly excepting exempt property, a court of equity has no jurisdiction to enforce a judgment against a cemetery company by the sale of its lands used for burial purposes.—Avery v. Forest Lawn Cemetery Co., 127 Mich. 125.

¶ 5. Comp. L. 1897, § 9780, providing that the provisions of chapter 26 relating to proceedings against corporations in chancery, of which said section is a part, shall not extend to the proprietors of any burying ground incorporated under the laws of this state, did not preclude the chancery court from enforcing the payment of subscriptions to the capital stock of a cemetery corporation, in a bill filed by a creditor of such corporation.—C. H. Little Co. v. Woodworth Ave. Cemetery Ass'n, 135 Mich. 248.

¶ 6. Though Comp. L. 1897, §§ 4414, 4415, authorizes the board of health to purchase lands for cemetery purposes and hold the same in trust for the township, the latter is a proper party to a suit in equity to enforce rights relating to such cemeteries.—Township of Oneida v. Allen, 137 Mich. 224.

CENSUS AND STATISTICS.

TREATS of national or local census and of registration of vital statistics.

Health regulations, and certificates and reports incident thereto, see Health.

Census of United States as basis for apportionment, see Const. art. V, § 4.

School census, see Comp. L. 1915, §§ 3274, 5689-5692.

Of blind children, see Comp. L. 1915, § 1476.

Census for incorporation of village, see Comp. L. 1915, § 2558.

In fourth class city, see Comp. L. 1915, § 3021, par. Thirty-first.

Provisions for state statistics, see Comp. L. 1915, chap. 106.

¶ 1. Pub. Acts 1905, p. 508, relating to the making of certificates of births by attending physicians or midwives on blanks furnished by local registrars, who in turn transmit the originals to the secretary of state, is prospective only, and a birth certificate of one born before the passage of the act may be certified to by the county clerk, as provided by the old act, Comp. L. 1897, § 4605 et seq., How. St., 2nd Ed., § 1555 et seq., instead of by the secretary of state, as provided by the new act,—Breitmayer v. United States, 249 Fed. 929.

CERTAINTY to CERTIFIED QUESTIONS.

Cross-References.

Certainty—

See specific topic treating of thing questioned for certainty or uncertainty, e. g., Contracts, VI; Statutes, V; Trusts, I; Wills, VI.

Of pleadings, see Pleading; Indictment. I.

Certificates and certifications—
See generally topics treating of the document certified or of the proceeding or matter requiring a certification or a certified copy, e. g., Acknowledgments; Appeal and Error, VI; Arrest, Commitment and Bail; Building Contracts, II; Corporations; Fraternal Associations; Elections; Evidence, VIII (documents); Local Improvements; Taxes; and many others.

Certificates of deposit—
See Banking, V; Negotiable Instruments.

Certified checks—
See Banking, II, D; Negotiable Instruments.

Certified copies—
See ante "Certificates and Certifications," and see Evidence, IV, VIII; Indictment, VIII, B.

Certified questions—
For review or advice of court, see Appeal and Error.

CERTIORARI.

TREATS of the common law remedy of certiorari to bring up a record for review of the proceedings of a lower court or tribunal, and of the writ as extended by statutes. It excludes the statutory certiorari to review various special and statutory proceedings, such as Drains; Eminent Domain; Forcible Entry; Highways, II; etc., and reference should be had to such topics. Certiorari from the circuit court to Justices of the Peace, which see, and to the Probate Courts, which see, are also excluded.

Analysis.

§ 1. In general; nature of the writ.
§ 2. Ancillary certiorari.
§ 3. Prerogative of Supreme Court.
§ 4. Grounds and propriety of writ.
§ 5. ——Discretion to allow writ.
§ 6. ——Existence of other remedy.
§ 7. ——Mandamus or quo warranto as remedy.
§ 8. ——Interest and grievance of relator.
§ 9. ——Consent or pro forma orders and judgments.
§ 10. Judgments and proceedings reviewable.
§ 11. ——Proceedings after judgment.
§ 12. ——Dissolution or other proceedings on attachments.
§ 13. ——Proceedings in circuit on review from justice.
§ 14. ——Probate, administration and guardianship proceedings.
§ 15. ——Forcible entry and summary dispossession proceedings.
§ 16. ——Contempt and disbarment proceedings.
§ 17. ——Nonjudicial proceedings.
§ 18. ——Administrative proceedings.
§ 19. ——Organization or change of townships and school districts.
§ 20. ——Removal of officers.
§ 21. ——Audits and allowances of claims.
§ 22. Finality or completion of proceeding.
§ 23. Stage and time for writ; delay.
§ 24. Courts and tribunals subject to writ.
§ 25. Parties relator.
§ 26. Proper respondents.
§ 27. Application and affidavits.
§ 28. ——Assignments and specification of errors.
§ 29. ——Documents and exhibits relied on.
§ 30. Allowance and issuance of writ.
§ 31. Joinder and severance of writs.
§ 32. Form, substance and direction of writ.

§ 33. Service and return of service.
§ 34. Return to the writ; record.
§ 35. ——By whom made.
§ 36. ——Form and contents.
§ 37. ——Signature and authentication.
§ 38. ——Deficiencies and amendments of return.
§ 39. Objections to writ or return; quashal or dismissal.
§ 40. ——Moot questions.
§ 41. ——Objections to merits.
§ 42. ——Motions and showing.
§ 43. ——Retention of case for further action.
§ 44. Hearing on review.
§ 45. ——Mode of presenting error.
§ 46. ——Sufficiency of assignments or objections.
§ 47. ——Briefs and arguments.
§ 48. Scope of review in general.
§ 49. ——On certiorari to boards and nonjudicial officers.
§ 50. ——Matters outside the record or decision.
§ 51. ——Restriction to matters considered below.
§ 52. ——Immaterial or unnecessary questions.
§ 53. ——Rulings on evidence.
§ 54. ——Discretionary rulings.
§ 55. ——Review of findings and evidence.
§ 56. Construction and effect of return and record.
§ 57. ——As to jurisdiction below.
§ 58. ——Admissions by silence of return.
§ 59. ——Presumptions.
§ 60. ——Resort to affidavit or papers to show facts.
§ 61. ——Conflicts or repugnancies in record and papers.
§ 62. Judgment and disposal of cause.
§ 63. ——Construction and effect of judgment.
§ 64. ——Entry of judgment on bond.
§ 65. Certiorari from circuit courts.
§ 66. ——Matters and proceedings reviewable.
§ 67. ——Hearing, review, judgment and decision.

§ 1. In general; nature of the writ.

Nature of review on hearing and scope of review, see post § 48 et seq.
Applicability to nonjudicial proceedings, see post §§ 17-20.
Certiorari to review criminal proceedings, see Indictment, XVI, A, XVIII.
Grounds and propriety of allowance and proceedings subject to writ, see post §§ 4-21.
Effect of existence of other remedy, see post § 6.
Joining or combining separate proceedings under one writ, see post § 31.
Form and direction of the writ, see post § 32.
Framing issues of fact to be tried, see post § 44.
Nature of the judgment on certiorari, see post § 62.
Retention of certiorari as common law form of action, see Jud Act, Chap. XI, § 1; Comp. L. 1915, § 12350.

¶ 1. The office of a common law writ of certiorari is to bring up for review the proceedings of a lower court or an official body for a determination of their jurisdiction, or the manner of its exercise.—McGurrin v. Grand Rapids Township Board, 186 Mich. 475.

§ 2. Ancillary certiorari.

See also post ¶ 122.
Writ to review ancillary proceedings, see post ¶ 102.
To bring up additional record on appeal or error, see Appeal and Error, § 242.

¶ 2. Certiorari is the proper remedy for removing records from one court into another for trial.—People ex rel. Glens Falls Ins. Co. v. Jackson Circuit Judge, 21 Mich. 577.

¶ 3. Certiorari lies in aid of a writ of error in criminal cases to obtain a full re-

turn.—Henning v. People, 40 Mich. 733; Peple v. Ferguson, 48 Mich. 41; People v. Van Wagner, 51 Mich. 171.

¶ 4. Certiorari lies in connection with writ of error to review the action of a circuit judge in entering the jury room and giving instructions in the absence of counsel and of the court stenographer.—Fox v. Peninsular White Lead & Color Works, 84 Mich. 676.

¶ 5. Certiorari is a proper proceeding to compel the remanding for any lawful purpose of a record which has been certified down from a superior to an inferior court.—Lauder v. Wayne Circuit Judge, 79 Mich. 602.

§ 3. Prerogative of Supreme Court.

Issuance of the writ, see post § 30.
Effect of pendency of application to other court, see post ¶ 130.
Power of legislature to regulate procedure or jurisdiction, see Constitutional Law, II.
Disability of legislature to take away prerogative, see Constitutional Law, II.
General power of Supreme Court, see Jud. Act, Chap. I, § 9; Comp. L. 1915, § 12014.
General provisions as to the writ, see Jud. Act, Chap. I, § 11; Comp. L. 1915, § 13746.

¶ 6. Under Act No. 310, Pub. Acts 1905, the Supreme Court has exclusive authority to determine whether a writ of certiorari shall issue, and such a writ issued by a circuit court commissioner, will be dismissed for want of authority.—People v. Chamblin, 149 Mich. 653.

§ 4. Grounds and propriety of writ.

Discretion, existence of other remedy, and other considerations governing allowance, see post §§ 5-9.
Errors open to review on the writ, see post § 48 et seq.
Propriety of writ as question first raised on hearing, see post § 51.
Grounds for ancillary writ, see ante § 2.
In drain proceedings, see Drains, II.

¶ 7. Certiorari may issue from the Supreme Court in cases of want of jurisdiction or of actual imprisonment.—City of Ishpeming v. Maroney, 49 Mich. 226.

¶ 8. Certiorari issues from the Supreme Court only when necessary to prevent a failure of justice.—Adams v. Abram, 38 Mich. 302.

¶ 9. Certiorari does not lie to review proceedings under How. St., ch. 295, to compel a public officer to surrender the books and papers of the office to his successor, unless a want of jurisdiction appears, or a gross violation of the statute.—Curran v. Norris, 58 Mich. 512.

§ 5. ——Discretion to allow writ.

Dismissal for improper allowance, see post §§ 39, 41.

¶ 10. The writ is not of right, but rests in the sound discretion of the court, to be allowed or not, as may best promote the ends of justice.—In re Lantis, 9 Mich. 324; Farrell v. Taylor, 12 Mich. 113; Roediger v. Wayne County Drain Com'rs, 40 Mich. 745; Gager v. Chippewa County Sup'rs, 47 Mich. 167.

¶ 11. Certiorari is not a writ of right. It is a discretionary writ, and will not be used to enforce a strict legal right where justice cannot be done, and where the petitioners are guilty of laches in failing to take prompt action.—Baudistel v. City of Jackson, 110 Mich. 357.

¶ 12. The writ of certiorari is not of right, and is not allowed to work injustice to private rights.—Kimball v. Homan, 74 Mich. 699.

¶ 13. The issuance of certiorari is largely discretionary and will not be permitted to accomplish a palpable injustice.—Silver v. Hamilton Township Board, 146 Mich. 393.

¶ 14. Certiorari is a discretionary writ which ought not issue unless it is made to appear that an injustice has been done.—West v. Parkinson, 130 Mich. 401.

¶ 15. The statutory provisions requiring the writ to be issued within two years, and providing for its allowance out of court, do not take away the discretionary power of the court.—In re Lantis, 9 Mich. 324; Farrell v. Taylor, 12 Mich. 113.

¶ 16. The lower court sustained a demurrer on the ground that the declaration joined inconsistent causes of action, and plaintiff applied for a writ of certiorari to review the decision, and a stay of proceedings. Held, that nothing in Act. No. 310, Pub. Acts 1905, changed the common-law rule, and the granting of the writ was within the discretion of the court.—Detroit River Transit Co. v. Union Trust Co., 152 Mich. 91.

¶ 17. Even if under Pub. Acts 1905, No. 310, there are cases where the writ ought to issue to prevent injustice; yet where the defendant's demurrer to a declaration was

sustained on the ground that, by containing the common counts in assumpsit and a special count for breach of warranty for the sale of chattels, it joined two inconsistent causes of action, it was discretionary with the upper court whether it would review by the writ and meanwhile stay proceedings in the lower court.—Detroit River Transit Co. v. Union Trust Co., 152 Mich. 91.

§ 6. ——Existence of other remedy.

When writ will issue from Supreme Court rather than ordinary review, see ante § 4.

Mandamus or quo warranto, see post § 7; and see also Mandamus; Quo Warranto.

Remedy by motion to amend, see also post ¶ 41.

In cases of contempt, see also post ¶ 56.

For cases holding that appeeal or error are not proper methods for review because certiorari lies, see Appeal and Error, § 3.

Proper remedy for review of judgment of circuit on appeal from justice, see Appeal and Error, §§ 25, 26.

Matters correctable by motion on judgment, see Judgments, V.

In drain, condemnation, highway, and other statutory proceedings for which statutory modes of review are provided, see Drains, II; Eminent Domain, VIII; Highways, II, B; etc.

To review forcible entry proceedings, see Forcible Entry, II.

Alternative remedies to review highway proceedings, see Highways, II, B.

¶ 18. The writ of certiorari is usually refused by the Supreme Court where other remedies, such as appeal or certiorari from the circuit court, are available and adequate; except under peculiar circumstances where a denial would involve a failure of justice. —Farrell v. Taylor, 12 Mich. 113; Specht v. City of Detroit, 20 Mich. 168; Smith v. Reed, 24 Mich. 240; City of Ishpeming v. Maroney, 49 Mich. 226; Tucker v. Parker, 50 Mich. 5; City of Detroit v. Wabash, St. L. & P. R. Co., 63 Mich. 712; Mathias v. Mason, 66 Mich. 524.

¶ 19. Certiorari should not be favored where any other remedy is adequate, yet it will undoubtedly lie for want of jurisdiction.—Dunlap v. Toledo, A. A. & G. T. R. Co., 46 Mich. 190.

¶ 20. Where there is an adequate remedy to review the alleged errors of the trial court by a writ of error, certiorari will be denied. —People v. James, 155 Mich. 548.

¶ 21. The remedy by certiorari is not favored and will generally be refused when another adequate remedy exists.—Detroit Lumber Co. v. The Petrel, 155 Mich. 350.

¶ 22. The writ of certiorari is not usually allowed where there is another and adequate remedy.—In re Phillips, 154 Mich. 139.

¶ 23. The common-law writ of certiorari is available only where the party aggrieved has had no opportunity to avail himself of the remedies provided by statute.—Jacobs v. Wayne Circuit Judge, 132 Mich. 55.

¶ 24. Where a certiorari was sued out to review the decision of the circuit court in dismissing its certiorari issued to a commissioner to bring up for review proceedings under the statute to recover possession of land, it was held that the questions raised were such as should be raised by writ of error.—Robens v. Videto, 33 Mich. 240.

¶ 25. Certiorari will not lie to review a judgment of the circuit court allowing a contingent claim against the estate of a decedent on an appeal taken from the probate court, writ of error being the proper remedy.— John Hancock Mut. Life Ins. Co. v. Hill's Estate, 108 Mich. 129.

§ 7. ——Mandamus or quo warranto as remedy.

¶ 26. Certiorari does not lie to review the action of a circuit judge in appointing himself referee in a cause pending before him; but mandamus lies to set it aside.— Woodin v. Phoenix, 41 Mich. 655.

¶ 27. Mandamus, not certiorari, is the proper remedy to review an order of the circuit court in awarding the custody of property in a replevin suit.—Detroit & M. Ry. Co. v. Alpena Circuit Judge, 152 Mich. 201.

¶ 28. Quo warranto and not certiorari is the proper remedy to test the legality of the corporate existence of a school district after such district has been organized, officers elected, contracts made and expenses incurred by it.—Perrizo v. Kesler, 93 Mich. 280.

¶ 29. Under Sup. Court Rule 12 certiorari is the proper remedy (not mandamus) to review the denial by the circuit court of a mandamus to compel the clerk of the justice's court of Detroit to receive and file an appeal.—Graham v. Wayne Circuit Judge, 143 Mich. 360.

¶ 30. Madamus and not certiorari was the proper remedy to review an order on a defendant to produce books and papers for examination by plaintiff's bookkeeper.—Church v. Anti-Kalsomine Co., 119 Mich. 437.

¶ 31. The defeated party after an adjudication of the rights of contestants for a public office by a court of competent jurisdiction, under Comp. L. 1897, chap. 272,

§§ 9843-9851, could not review the judgment upon certiorari and thereby defeat the object of the statute, but must resort to proceedings in the nature of quo warranto, or to some other appropriate action to try title to the office.—Murta v. Carr, 140 Mich. 606.

§ 8. ——Interest and grievance of relator.

Necessity of special interest in relator when matter is public, see post § 25.
On highway proceedings, see Highways, II, B.

¶ 32. Relief will not be granted to a plaintiff in certiorari unless it appears to the court that the proceedings may, at least, damage him.—Davison v. Otis, 24 Mich. 23.

¶ 33. Certiorari does not lie where it does not appear that the plaintiff has some substantial interest and will suffer some injury if the court does not interfere.—People v. Leavitt, 41 Mich. 470.

¶ 34. Irregularities in the proceedings of a board of school inspectors which do not affect property rights or jurisdiction cannot be reviewed on certiorari to review an alteration of the district.—Donough v. Dewey, 82 Mich. 309.

¶ 35. The liability of the superintendent of an insane asylum to suit for false imprisonment for detaining an inmate on a void commitment entitles him to ask for a review of an order discharging such inmate on habeas corpus proceedings.—Palmer v. Kalamazoo Circuit Judge, 83 Mich. 528.

¶ 36. An order of the circuit court adjudging a respondent guilty of contempt, and imposing a fine for his misconduct, but refusing to order the payment by him of the damages claimed to have been sustained by the party instituting the contempt proceedings, cannot be reviewed upon certiorari at the instance of such party, the court finding affirmatively that the evidence does not show that said party has sustained actual loss or injury by reason of the acts complained of. —Montgomery v. Muskegon Booming Co., 104 Mich. 411.

§ 9. ——Consent or pro forma orders and judgments.

See also post ¶ 131.
Dismissal of certiorari because judgment was on default, see post § 39.

¶ 37. It is the duty of the circuit courts to pass judgment upon cases presented to them for determination, and then and only then does it become the duty of this court to review the conclusions reached. Circuit courts are not authorized by the constitution and the law to sit and enter judgment solely that such judgments may be taken to the Supreme Court, but a decision so made and entering into judgment must be reviewed. —Township of West Bloomfield v. Detroit United Ry., 146 Mich. 198.

¶ 38. An order of the circuit court reversing the determination of the state fire marshal condemning a house and a barn, and requiring them to be demolished, is not reviewable on certiorari in this court, where the appellant requested the court to enter the order not on the merits of the case, but entirely on the unconstitutionality of the law, Pub. Acts 1913, Act No. 213, amending Pub. Acts 1911, Act No. 79.—Hart v. State Fire Marshal, 178 Mich. 609.

§ 10. Judgments and proceedings reviewable.

In circuit courts, see post § 65.
Necessity of finality and completeness, see post § 22.
Discretion governing allowance to review decisions on dilatory pleas and demurrers, see ante § 5.
Consent and pro forma decisions, see ante § 9.
Contempt or disbarment proceedings as dilatory proceedings within statute, see post § 16.
Action of judge appointing himself as referee, see also ante ¶ 26.
Review of bastardy proceedings, see also Bastards, § 16.
Certiorari to review drain proceedings, see Drains, II.
Condemnation proceedings in general, see Eminent Domain, VIII.
Actions for violation of municipal ordinances, see Municipal Corporations, XVI, B.
Certiorari from circuit to justice, see Justices of the Peace, VI.
Decisions on pleas to the jurisdiction, demurrers, motions or other dilatory pleas, see Jud. Act. Chap. L, § 14; Comp. L. 1915, § 13749.

¶ 39. The discretionary power of the circuit courts to set aside verdicts, grant new trials, and vacate judgments, is not reviewable on certiorari.—Van Renselaer v. Whiting, 12 Mich. 449; Campau v. Coates, 17 Mich. 235.

¶ 40. Certiorari may be used to correct errors in law resulting in a judgment not authorized by the pleading and evidence, and an action brought in assumpsit where it should have been brought in tort and wherein a judgment was erroneously rendered comes within such a rule.—Plefka v. Detroit United Ry., 147 Mich. 641.

¶ 41. Certiorari will not be granted to vacate an order which might be corrected by amendment, but the most the court will do

in any event is to remand the record for correction.—Board Sup'rs Gratiot Co. v. Munson, 157 Mich. 505.

¶ 41a. Under 1897 C. C. Rule 46 regulating the practice in mandamus requiring an answer to the petition and providing that matters not answered are admitted and Sup. Ct. Rule 12 which prescribes the practice on appeal and covers only cases in which the writ is allowed or denied, an order overruling a demurrer to the petition is not reversible on certiorari.—Lauzon v. Board of Supervisors of Chippewa County, 129 Mich. 269.

¶ 42. Under the express provisions of Pub. Acts 1905, Act No. 310, the Supreme Court may review upon certiorari a decision overruling a demurrer.—Boughner v. Bay City, 156 Mich. 193.

¶ 43. Under Act No. 310, Pub. Acts 1905, §§ 12737, 12738 How. St., 2nd Ed., an order overruling a plea in abatement is reviewable on writ of certiorari instead of writ of error.—City of Sault Ste. Marie v. Minneapolis, St. P. & S. S. M. Ry. Co., 184 Mich. 681.

¶ 44. Certiorari is the proper method of reviewing an order overruling a plea in abatement.—La Vasser v. Chesbrough Lumber Co., 190 Mich. 408.

¶ 45. Since the end of certiorari is to reverse and terminate the proceeding, if found to be erroneous, it does not lie to review a ruling during the taking of testimony under letters rogatory from another state as to the legality and pertinency of the interrogatories.—Van Dyke v. Doughty, 174 Mich 351.

§ 11. ——Proceedings after judgment.

¶ 46. Where a stay of execution before a justice has been filed in the county clerk's office, and the circuit court, upon application of the judgment creditor, grants an order allowing an execution against the surety, certiorari lies to review such order.—Jerome v. Williams, 13 Mich. 521.

¶ 47. Where a transcript of a justice's judgment is filed in the circuit court and execution is issued thereon, certiorari lies to review the circuit court proceeding, it being a special one not according to the course of the common law.—Wedel v. Green, 70 Mich. 642.

§ 12. ——Dissolution or other proceedings on attachments.

Review of proceedings to dissolve attachment, see also Attachment, §§ 126, 127.
Power of circuit court to issue writ to commissioner, see post § 65.

¶ 48. Certiorari does not lie to review proceedings of a circuit court commissioner in dissolving an attachment, when attachment is not the proper remedy.—Mendelsohn v. Smith, 27 Mich. 2.

¶ 49. Certiorari is the proper remedy to correct the action of the circuit court in allowing a new affidavit in attachment to be filed in the place of the original one, which was void.—People ex rel. Bradley v. Branch Circuit Judges, 1 D. 319.

§ 13. ——Proceedings in circuit on review from justice.

See also ante ¶ 24.
Certiorari or mandamus as remedy, see ante § 7.
Necessity of final judgment above, see post § 22.
Mandamus as remedy to compel action in circuit, see Mandamus, II.
Review of justices' proceedings in circuit, see Justices of the Peace, V, VI.

¶ 50. Certiorari is a proper writ by which to review the judgment of the circuit court overruling a special appeal from justice's court for alleged jurisdictional defects.—Peterson v. Fowler, 76 Mich. 258.

§ 14. ——Probate, administration and guardianship proceedings.

See also ante ¶ 25.
Power of circuit court to issue writ, see post § 65.
Eminent domain proceedings, see Eminent Domain, VIII.

¶ 51. The action of the circuit court upon appeal from a probate order appointing a guardian is not reviewable in the Supreme Court except so far as it may be upon certiorari.—Goss v. Stone, 63 Mich. 319.

¶ 52. Certiorari is the proper remedy to review the circuit court's affirmance of the probate court's order construing a will.—In re Estate of Reid (Glover v. Reid), 80 Mich. 228.

¶ 53. Certiorari is the proper remedy to review the reversal by the circuit court of an order of the probate court granting the administrator of an incompetent person's estate leave to sue upon a guardian's bond, which is not a proceeding according to the common law, and the reversal of the order of the circuit court carries with it the reinstatement of the order of the probate court.—Welch v. Van Auken, 76 Mich. 464.

¶ 54. Certiorari will not lie to review a judgment of the circuit court allowing a contingent claim against the estate of a de-

ceased person upon an appeal taken from the probate court, writ of error being the proper remedy.—John Hancock Mut. Life Ins. Co. v. Hill's Estate, 108 Mich. 129.

§ 15. ——Forcible entry and summary dispossession proceedings.

Proper remedy to review circuit decision dismissing certiorari to commissioner, see ante ¶ 24.

Review of forcible entry and detainer cases and summary proceedings for recovery of possession of land, where judgment of commissioner or justice is attacked, see Forcible Entry and Detainer.

§ 16. ——Contempt and disbarment proceedings.

Interest in relator to sustain certiorari, see ante § 8.

Proceedings not yet final, see post § 22.

Matters reviewable on record, see post § 50.

¶ 55. Proceedings for contempt are not the usual proceedings contemplated and understood when speaking of actions commenced by writ or declaration as used in Pub. Acts 1905, No. 310, permitting certiorari to review rulings on dilatory or jurisdictional pleas.—In re Smith, 144 Mich. 39.

¶ 56. Certiorari will not lie either under the statute or under the common law to review the action of a court in denying a motion to quash proceedings for a constructive contempt; a party conceiving himself aggrieved has ample opportunity to review such proceedings after the circuit court has heard the case.—In re Smith, 144 Mich. 39.

¶ 57. An order refusing a petition for the punishment of a sheriff for contempt in omitting the performance of his duty is not reviewable by the Supreme Court on certiorari. —Schwab v. Coots, 44 Mich. 463.

¶ 58. Disbarment proceedings do not constitute an action at law so as to entitle the defendant to a writ of certiorari during their pendency, under Act No. 310, Pub. Acts 1905, to review a decision of the lower court overruling defendant's demurrer.—In re Radford, 159 Mich. 91.

§ 17. ——Nonjudicial proceedings.

Official proceedings partaking of judgment or discretion, see also post §§ 18-21.

¶ 59. The writ of certiorari will not lie to review acts which are not done in the exercise of judicial power or authority, but are merely ministerial, executive or legislative in their character.—Greenville Gas, Electric Light, Power & Fuel Co. v. City of Greenville, 165 Mich. 135.

¶ 59a. Under Pub. Acts 1889, No. 207, as amended by Pub. Acts 1913, No. 327, allowing the writ to review the record of a local option election "for error apparent on the face of the returns," and providing that "for fraudulent or illegal voting or tampering with the ballot boxes before a recount * * * all legal remedies now existing shall remain in full force," the writ will lie to review a recount had according to the statute by the supervisors, though they recounted ballots from boxes that had been tampered with, they having committed an error of law in declaring the result.—Alward v. Oakland County Sup'rs, 187 Mich. 573.

¶ 60. Where proceedings under the statutes of 1838 were had before a justice, to determine whether a mill pond was unhealthy, etc., and the proceeding was only preliminary in its character, to lay the foundation of an action, and the justice did not act judicially in it, it was held that it could not be reviewed on common-law certiorari.—Root v. Barnes, 1 Mich. 37.

§ 18. ——Administrative proceedings.

Consent orders, see also ante § 9.

Effect of delay, see post § 23.

Matters open for review, see post § 49.

Limits on judicial power to review administrative action, see Constitutional Law, II; Courts, V; and see specific topics treating of administrative action, e. g., Elections, IX; Local Improvements, VII, B; Taxes, VI, B.

Drain proceedings, see Drains, II.

Highway proceedings, see Highways, II, B.

Proceedings to lay local assessments, see Local Improvements, VII, B.

To review tax proceedings, see Taxes, VI, B.

¶ 61. Certiorari should not be allowed to disturb the action of public bodies intrusted with managing local concerns, unless on grounds indicating that actual wrong has been done.—Gager v. Chippewa Supervisors, 47 Mich. 167.

¶ 62. Where a city has passed an ordinance requiring an electric light and power company to remove its wires from a public street, the legality of such action cannot be tested in the Supreme Court by a writ of certiorari.—Greenville Gas, Electric Light, Power & Fuel Co. v. City of Greenville, 165 Mich. 135.

¶ 63. Certiorari will not lie to examine the action of the auditor-general, in settling with a county, in charging back to its certain taxes; such action being the exercise of an official discretion belonging to an executive department of the state government, and therefore not subject to judicial review.—Midland County Sup'rs v. Auditor-General, 27 Mich. 165.

§ 19. ——Organization or change of townships and school districts.

Quo warranto as remedy, see ante § 7.
Interest in relator essential to writ, see ante § 8.
Effect of delay, see post § 23.
Proper party to be relator, see post § 25.
Papers to be served with writ, see post § 33.
Matters presented by record, see post § 50.

¶ 64. Certiorari lies on the relation of a supervisor, whose official rights are involved, to inquire into the existence of a township, where the action of the board of supervisors in organizing it is subject to review.—People ex rel. Scrafford v. Gladwin Supervisors, 41 Mich. 647.

¶ 65. The action of a board of supervisors upon evidence tending to show the due publication of a notice of proceedings to organize a township will not be reviewed by the court on certiorari, especially if there is no contradictory showing.—Matthews v. Otsego County Sup'rs, 48 Mich. 587.

¶ 66. Certiorari addressed to the assessor of a school district is wholly unsuited as a remedy to test the legal organization and existence of the school district.—Jaquith v. Hale, 31 Mich. 430.

¶ 67. Certiorari is a proper remedy to test the validity of the organization of a school district where relator acts with promptness and before organization has been completed and expenses incurred.—Huyser v. Boards of School Inspectors of Townships of Zeeland, Olive and Blendon, 131 Mich. 568.

§ 20. ——Removal of officers.

Writ from circuit court, see post § 65.
Sufficiency of return, see post ¶ 120.
Presumptions on the return, see post ¶ 214.

¶ 68. Certiorari may issue to a board of supervisors to bring up its proceedings for the removal of the county treasurer.—McGregor v. Gladwin County Sup'rs, 37 Mich. 388.

¶ 69. A writ of certiorari by the Supreme Court will not lie to review the discretion of the Governor in removing, under the authority of Comp. Laws 1897, § 1159, How. 2nd Ed., § 1310, the mayor of a city.—Germaine v. Ferris, 176 Mich. 585.

§ 21. ——Audits and allowances of claims.

Party relator on claim allowed against county, see post § 25.
Remedy by mandamus to compel payment, see Mandamus, III.

¶ 70. The discretion of the circuit court in allowing an item in a coroner's account of and claim for fees and expenses of an inquest cannot be disturbed on certiorari; and unless there has been some illegal claim allowed beyond the power conferred the writ will not be sustained.—Auditor-General v. Calhoun Circuit Judge, 101 Mich. 212.

§ 22. Finality or completion of proceeding.

For cases holding judgments final or not final for purposes of error, see Appeal, III, B.
Orders in condemnation proceedings, see Eminent Domain, VIII.

¶ 71. Certiorari will not lie to review a proceeding in the circuit court before an adjudication in the case by that court.—Palms v. Campau, 11 Mich. 109; People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

¶ 72. Certiorari will not lie, in advance of final judgment, to review the action of the circuit court in overruling the errors assigned on a special appeal from a justice's judgment.—Culver v. Travis, 108 Mich. 640.

¶ 73. Quaere: whether an order setting aside a judgment in attachment, not being final, is reviewable on certiorari.—Meads v. Belt Copper Mines, 125 Mich. 456.

¶ 74. Certiorari will not lie to a pending contempt proceeding not yet determined.—Toepel v. Wayne Circuit Judge, 138 Mich. 302.

§ 23. Stage and time for writ; delay.

See also ante ¶ 67.
Discretion to deny though full time has not elapsed, see also ante § 5.
Completion of proceeding and finality of judgment, see ante § 22.
Dismissal or quashal for delay, see post § 39.
Dismissal of writ after questions become moot, see post § 40.
In drain proceedings, see Drains, II.
In condemnation proceedings, see Eminent Domain, VIII.
In highway proceedings, see Highways, II, B.
Statutory provisions as to time, see Jud. Act, chap. L, § 13; Comp. L. 1915, § 13748.

¶ 75. Certiorari to review proceedings to carry out public improvements should not be granted after any considerable delay in suing out the writ, unless the court is satisfied that the delay is not due to the petitioner's neglect.—Bresler v. Ellis, 46 Mich. 335.

¶ 76. Certiorari to bring up proceedings for the formation of a school district will not be sustained if after its issue, and without good reason, it has been allowed to sleep until the organization has been completed, a tax voted and contract made for building a school-house, and interests established which cannot be overturned without public inconvenience and injury, and individual damage.—Parman v. Boards of School Inspectors, 49 Mich. 63.

¶ 77. Proceedings of a board of supervisors in organizing a new township from part of an existing township are not reviewable upon certiorari after a lapse of fourteen months, during which time it may be inferred that officers have been elected and property assessed for taxation; quo warranto against the township or its officers is the proper remedy.—Atlee v. Wexford County Sup'rs, 94 Mich. 562.

¶ 78. Where the objections to action altering school district boundaries are jurisdictional, delay for nearly a month in taking out certiorari, and neglect to serve the writ until a week after the organization of the new district was complete, will not be ground for sustaining the proceedings.—Gentle v. Board of School Inspectors of Township of Colfax, 73 Mich. 40.

¶ 79. Where fifteen months have elapsed before suing out certiorari to review the discontinuance of a highway, the case should be one of flagrant injustice, and the excuse for delay should be very satisfactory, to warrant interference with so old a proceeding.—Kimball v. Homan, 74 Mich. 699.

¶ 80. Certiorari to review proceedings in a circuit court vacating a plat, which operated to close a street, is barred by a delay of over eight months in filing the petition, where it appeared that in the meantime an injunction proceeding against a company to restrain the closing of the street had been begun and a bond to pay damages had been given but that the proceedings had been apparently abandoned and the company had immediately, upon giving the bond, taken possession of the street and had incurred large expense in building a plant.—Beutel v. Bay Circuit Judge, 124 Mich. 521.

¶ 81. Certiorari will not lie at the instance of a property owner to review the action of the common council of a city in discontinuing and vacating a part of one street and laying out and establishing another upon the property of a railroad company, where the company made expenditures in furtherance of the proposed change, and the petitioner, though fully cognizant of the proceedings and of the expenditures, did not apply to the court to restrain the same.—Baudistel v. City of Jackson, 110 Mich. 357.

§ 24. Courts and tribunals subject to writ.

Issuance from Supreme Court to justice as ground for dismissal, see post § 39.
From circuit court, see post § 65.
Certiorari from circuit to justice, see Justices of the Peace, VI.
Certiorari to probate courts from circuit, see Probate Courts, III.

¶ 81a. There is no practice allowing writs of certiorari from the Supreme Court to justices of the peace; because it would be difficult for this court to reach and decide the numerous cases that would come, the calendar already being overcrowded.—White v. Boyce, 88 Mich. 349.

¶ 82. Certiorari will not issue from the Supreme Court to a justice's court as a general rule, but it will lie where the remedy by certiorari to the circuit court has been lost by lapse of time, and it is necessary to prevent a failure of justice.—People v. Turja, 157 Mich. 530.

¶ 83. A common-law certiorari to a justice of the peace will lie to bring to the Supreme Court for review a case begun by attachment, where no personal service is had and no appearance entered, and where the defendants had no notice of the proceedings until after the statutory remedy was gone.—Withington v. Southworth, 26 Mich. 381.

¶ 84. Judgments in extraordinary and special proceedings before justices of the peace are removable by certiorari only to the Supreme Court.—Warner v. Porter, 2 D. 358.

¶ 85. Bastardy proceedings in the county court being special proceedings could not be reviewed in the circuit court by certiorari, and therefore certiorari lay directly from the Supreme Court.—Perkins v. Lapeer County Superintendents of Poor, 1 Mich. 504.

§ 25. Parties relator.

Proper respondents, see post § 26.
To review drain proceedings, see Drains, II.
To review formation of township, see also ante ¶ 64.
Interest and grievance as ground for writ, see ante § 8.
Dismissal or quashal for improper relator, see post § 39.
Declination of points made by respondent, see post § 48, ¶ 157.
Remand to allow amendment seeking relief in altered personal right or capacity, see post § 62, ¶ 233.

¶ 86. Certiorari to review an allowance against a county may be sued out by the clerk of the board of supervisors, and it is assumed that in doing so he has the author-

ity of the board if it does not repudiate his action. And it is unimportant that he sues it out as county clerk.—County of Alcona v. White, 54 Mich. 503.

¶ 87. A writ of certiorari is not available to an individual who has no direct or particular interest in the proceeding sought to be reviewed unless he shows that he will suffer special injury beyond that which will affect him in common with the public or others similarly situated.—Board of Education of Hastings v. Gilleland, 191 Mich. 276.

¶ 88. In certiorari to review the granting of mandamus compelling the board of auditors of claims against the disorganized county of Manitou to audit certain claims, the officers of the townships whose taxpayers were liable to be taxed to pay the award in controversy, were proper petitioners; as the tax was also to be collected by such officers. —Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

¶ 89. A writ issued to review the proceedings of the board of supervisors in reconstructing a burned court house out of the insurance money is properly brought in the name of the attorney general.—Attorney General ex rel. Gibson v. Montcalm County Sup'rs, 141 Mich. 590.

¶ 90. The school board of a district whose organization was set aside by the action of the township board cannot bring certiorari to review the action of the township board.—Silver v. Hamilton Township Board, 146 Mich. 393.

¶ 91. It is assumed but not decided that Pub. Acts 1905, No. 310, providing for certiorari on denying dilatory pleas, authorizes a stranger to the record, without an order of court permitting him to intervene, to interrupt the proceedings in an action, by removing it to the Supreme Court on denial of an interlocutory application to dismiss it for want of jurisdiction of the court.—Morning Tel Pub. Co. v. S. B. Hutchinson Co., 146 Mich. 38.

§ 26. Proper respondents.

See also ante ¶ 66.
Proper relators, see ante § 25.
Proper persons to make return to the writ, see post § 35.

¶ 92. The persons or body whose action is to be reviewed, and in whose hands the record of such action remains, are the proper body or persons to make return to a writ of certiorari to review such proceedings, and are therefore proper parties defendant to the writ.—Crawford v. Scio & Webster Township Boards, 22 Mich. 405.

¶ 93. A writ of certiorari to review proceedings before a justice of the peace and a jury under Comp. L. 1857, § 1087 (amended; see Comp. L. 1871, § 1290), relative to encroachments on highways, must be directed to the justice, and to the commissioners of highways also, if necessary to bring up their final action or the documentary evidence annexed to it. The township clerk is not a member of the board of commissioners, and a record of their proceedings made up by him, the service upon him of a writ of certiorari directed to them, and a return by him thereto, are each without authority of law.—Roberts v. Cottrellville Highway Com'rs, 24 Mich. 182.

¶ 94. Where, in certiorari to review the proceedings of a highway commissioner discontinuing a highway, it appears that his action was predicated upon the alleged discontinuance of the highway by the board of supervisors of the county, and the proceedings of said board are returned by the county clerk, who is joined as a respondent, an objection that the board of supervisors should also have been joined is untenable. —Curry v. Place, 99 Mich. 524.

§ 27. Application and affidavits.

In circuit courts, see post § 65.
Specifying errors and setting out documents, see post §§ 28, 29.
Service of papers with writ, see post § 33.
Resort to affidavit and papers to show facts extrinsic to return, see post § 60.
Proper practice, see Jud. Act, chap. L, § 11; Comp. L. 1915, § 13746.
Allowance on application from decision on dilatory plea or demurrer, see Jud. Act, chap. L, § 15; Comp. L. 1915, § 13750.

¶ 95. On certiorari to review the action of a board of supervisors in a matter of such importance as the honest use of public money, the party applying for a review should at least swear to merits.—Gager v. Chippewa Sup'rs, 47 Mich. 167.

¶ 96. Where a certiorari is applied for to review a highway opening, the oath of the party himself, showing why he is justified in resorting to this remedy, should, if practicable, be presented.—Nightingale v. Simmons, 66 Mich. 528.

§ 28. ——Assignments and specification of errors.

Assignments as mode of presenting error on hearing, see post §§ 45, 46.
Limitation of review to errors assigned, see post § 48.
Effect of return traversing averments, see post § 56.

¶ 97. An affidavit for certiorari asking a review of rulings should present them as they actually occurred, as in a bill of exceptions; it should not combine in one recital a series of detached rulings on points that were not connectedly presented.—Knapp v. Gamsby, 47 Mich. 375.

§ 29. ——Documents and exhibits relied on.

Described in writ but not in affidavit, see post ¶ 111.

¶ 98. In applications for certiorari all record evidence relied upon should be brought before the court as exhibits in the shape of copies certified or authenticated, and not by bare recitals of its existence.—Hewitt v. Oakland County Probate Judge, 67 Mich. 1.

§ 30. Allowance and issuance of writ.

Grounds for allowance, see ante §§ 4-9.
Effect of pendency of other application, see post ¶ 130.
Exclusiveness of Supreme Court's power to allow writ to review decisions on dilatory pleas, see ante ¶ 6.
Dismissal or quashal for improper allowance, see post §§ 39, 41.
Want of notice as ground for dismissal, see post § 39.
By whom allowed, see Jud. Act, chap. L, § 12; Comp. L. 1915, § 13747.

¶ 99. A circuit court commissioner may allow the writ even where the proceedings took place outside of his county.—Loder v. Littlefield, 39 Mich. 374.

¶ 100. Under Comp. L. 1897, § 10498, expressly giving power to allow such writ, the circuit court commissioner may allow a writ of certiorari to review the proceedings of a board of supervisors in ordering the reconstruction of a burned court house out of the insurance moneys realized.—Attorney General ex rel. Gibson v. Montcalm County Sup'rs, 141 Mich. 590.

§ 31. Joinder and severance of writs.

See also post § 159.

¶ 101. Different proceedings cannot be brought up by the same writ of certiorari.—Dickinson v. Van Wormer, 39 Mich. 141.

¶ 102. A separate writ is necessary to bring up for review an auxiliary proceeding by garnishment, but such proceedings will fall to the ground when the judgment in the principal case is set aside.—Withington v. Southworth, 26 Mich. 381.

¶ 103. A writ of certiorari may lie to two circuit court commissioners to bring up distinct proceedings pending before them separately for the removal of the same cause to another county for trial.—Comfort v. Stockbridge, 37 Mich. 472.

§ 32. Form, substance and direction of writ.

Proper party respondent, see ante § 26.
Direction of writ to review highway proceedings, see Highways, II, B.
Necessity of separate writs, see ante § 31.
Objections, quashal and dimissal, see post §§ 39-43.
Provisions of statute, see Jud. Act, chap. L, § 11; Comp. L. 1915, § 13746.
Test and return day, see Sup. Ct. Rule 4.

¶ 104. Dismissal of a writ of certiorari for being improperly addressed was denied where the accompanying affidavit made the error harmless, and a return had in fact been made.—Wilson v. Gifford, 41 Mich. 417.

§ 33. Service and return of service.

Return to the writ by respondents, see post §§ 34-38.
Notice of issuance, service and affidavit of service, see Sup. Ct. Rule 5.
Service of copy of petition or application and papers and brief attached, see Sup. Ct. Rule 60.

¶ 105. Where certiorari issues to bring up proceedings for the formation of a school district, the papers on which it was allowed must be served with it.—Parman v. Board of School Inspectors, 49 Mich. 63.

¶ 106. The courts will not upon certiorari set aside the erroneous conclusion of a board of supervisors upon a recount of votes, where the writ has not been served upon said board, until the board has had time to make return to the writ.—Alward v. Board of Sup'rs of Oakland County, 187 Mich. 573.

§ 34. Return to the writ; record.

Method of bringing documents and exhibits in as part of affidavit, see ante § 29.
Return of service of writ, see ante § 33.
Further returns, see post § 38.
Objections to return, quashal and striking, see post §§ 39-43.
Limitation of review to matters of record, see post § 50.
Construction and effect of return, see post §§ 56-61.
Presumptions arising on the return, see post § 59.
Conflicts or repugnancies in record, see post § 61.
In drain proceedings, see Drains, II.
In condemnation proceedings, see Eminent Domain, VIII.
Time for return, see Sup. Ct. Rule 4.

Form and style of printed record, see Sup. Ct. Rules 35-38.
Necessary contents, see Sup. Ct. Rule 56.
Time for filing, see Sup. Ct. Rule 6.
Extension of time for filing, see Sup. Ct. Rule 7.

¶ 107. On a certiorari to a township board in a highway case, the township clerk, under Comp. L. 1857, § 5643 (see How. St., § 9010), was entitled to fees, and could not be compelled to make return until the fees are paid.—People ex rel. Sage v. Springwells Township Board, 13 Mich. 246.

§ 35. ——By whom made.

See also post ¶¶ 116, 117.
By former judge of the court, see also post ¶ 113.

¶ 108. Where the upper court issues a writ of certiorari to the circuit court to review its action, and there is any question as to what was submitted to the circuit court for its decision, the judge, and not the clerk of the circuit court, is the only proper person to make the return.—Stevens v. Ottawa Probate Judge, 154 Mich. 509.

¶ 109. A return of one inspector and the clerk of a school board to a certiorari to review proceedings to establish a new district will be taken as the return of the board as against a return by a dissenting inspector made separately.—Smelser v. Board of School Inspectors of Township of Big Prairie, 125 Mich. 666.

§ 36. ——Form and contents.

Jurisdictional showing, see also post § 57.
Silence of return as admission of facts, see post § 58.
Original as overcoming printed record variant therefrom, see post § 61.
Deficiencies and how supplied, see post § 38.
Necessary contents of printed record, see Sup. Ct. Rule 56.

¶ 110. On certiorari to a bastardy conviction where the party on account of poverty applies for leave to substitute a typewritten instead of a printed record, the practice of copying the entire proceedings is not justified, since it imposes unnecessary labor on the court.—People v. Jamieson, 124 Mich. 164.

¶ 111. When a writ of certiorari identifies the documents to be returned, the respondent must return them even though no affidavit is appended to the writ.—Whistler v. Lenawee County Drain Com'r, 39 Mich. 303.

¶ 112. A judge's personal answer to a writ of certiorari directed to the court is a voluntary proceeding and not properly part of the return.—Woodin v. Phoenix, 41 Mich. 655.

¶ 113. The answer of an ex-circuit judge to a certiorari directed to the circuit court over which he presided is a voluntary proceeding and not a component part of the return.—People v. Brennan, 79 Mich. 362.

¶ 114. The properly certified return by the commissioners of the documentary evidence, consisting of such documents relating to the controversy as are on file in the township clerk's office, including the finding of the jury, is sufficient to bring them upon the record of a proceeding to remove highway encroachments.—Roberts v. Cottrellville Highway Com'rs, 25 Mich. 23.

¶ 115. The return to a common law certiorari should set out the evidence upon which the conviction or other judicial act complained of was founded.—Jackson v. People, 9 Mich. 111.

§ 37. ——Signature and authentication.

Mode of signing and authenticating bills of exceptions, see Appeal, VI, D.

¶ 116. In proceedings under Comp. L. 1857, chap. 23, § 2, as amended Laws 1861, p. 153, for an encroachment upon a highway, neither the highway commissioners nor the township clerk have official authority to take down or file the oral evidence given on the trial, nor to return it upon a writ of certiorari to bring up the proceedings. If returned by the clerk, not authenticated by the justice, it will not be considered. Such return can be made officially only by the justice who presided over the proceedings.—Roberts v. Cottrellville Highway Com'rs, 25 Mich. 23.

¶ 117. A township clerk may certify papers legally in his custody, and when such papers become properly a part of a return to a writ of certiorari, directed to the commissioners of highways, the commissioners may annex such certified copies and return them, certifying under their signatures, substantially: "Our return to the within writ appears by the schedules hereto annexed, certified by our clerk."—Roberts v. Cottrellville Highway Com'rs, 24 Mich. 182.

§ 38. ——Deficiencies and amendments of return.

¶ 118. Where an affidavit for certiorari to review proceedings before a circuit court commissioner assigns as error the entire absence of evidence on a specified point, it is the commissioner's duty to return fully; if

he does not, the defendants in certiorari should apply for a further return.—Hitchcock v. Sutton, 28 Mich. 86.

¶ 119. The return to a writ of certiorari must ordinarily show everything on which the plaintiff relies for relief, and cannot be supplemented by his affidavit for the writ; if it is insufficient he must have it amended.—Whitbeck v. Village of Hudson, 50 Mich. 86.

¶ 120. Where, on certiorari by the superintendents of the poor of a county to review the action of the board of supervisors in removing them from office, the return of the board shows that, by mutual consent, the making of a record of the testimony in the case was dispensed with, plaintiffs are not in position to complain that the evidence is not returned.—Burt v. Iron County Sup'rs, 108 Mich. 528.

¶ 121. A further return may be required where the one made does not answer the allegations of an affidavit in support of an application for a writ of certiorari.—McGurrin v. Grand Rapids Township Board, 186 Mich. 475.

¶ 122. Where a writ of error brings before the Supreme Court the record of the circuit court, in a case brought before that court by certiorari to a justice, the Supreme Court has no power to require a further return of the justice to the certiorari.—Wight v. Warner, 1 D. 384.

§ 39. Objections to writ or return; quashal or dismissal.

Dismissal because unwarrantably issued by commissioner, see ante ¶ 6.
Failure of writ because of failure of cause on which it depends, see also ante ¶ 102.
Objection to parties, see also ante ¶ 94.
Improper direction, see also ante ¶ 104.
Dismissal because questions have become moot, see post § 40.
Questions going to merits, see post § 41.
Motion, form thereof and showing, see post § 42.
Declination of questions going to merits or become moot, see post §§ 40, 41.
Right of attorney to resist dismissal of writ to protect lien, see Attorneys, ¶ 196.
Dismissal for delay in filing return, see Sup. Ct. Rule 8.

¶ 123. Where a circuit judge in his return to a writ of certiorari from the upper court, includes immaterial matters, a motion does not lie to strike such matters from the files, but they will be excluded at the hearing.—Stevens v. Ottawa Probate Judge, 154 Mich. 509.

¶ 124. The objection that a writ of certiorari is issued by a circuit court commissioner who has no such authority, cannot be brought to the court's attention by the return but should be raised by motion to dismiss.—Tweddle v. Grand Rapids Superior Court Judge, 134 Mich. 237.

¶ 125. The allowance by a proper officer is not conclusive upon the court, which may dismiss the writ if improvidently issued.—In re Lantis, 9 Mich. 324; Farrell v. Taylor, 12 Mich. 113.

¶ 126. The allowance of the writ of certiorari by a proper officer is not final and conclusive upon the court, which may at any time consider and determine the propriety of the allowance, and dismiss the proceeding if the writ was improvidently allowed.—Greenville Gas, Electric Light, Power & Fuel Co. v. City of Greenville, 165 Mich. 135.

¶ 127. Certiorari was improvidently allowed to review the finding of a circuit court commissioner upon an objection to a small excess in the allowance of costs.—Antiau v. Nadeau, 53 Mich. 460.

¶ 128. Where a writ of certiorari has been properly allowed and issued it should not be dismissed for any delay in suing it out within the statutory period allowed, unless meanwhile rights have arisen in reliance on the proceeding attacked.—Willson v. Gifford, 42 Mich. 454.

¶ 129. Certiorari to review proceedings to remove an encroachment upon a highway will not be dismissed on the ground that the plaintiff in the writ does not formally appear by the record as an original party, when it does show that he has rights which were affected by the proceedings, and that he was recognized as a substantial party.—Campau v. Button, 33 Mich. 525.

¶ 130. Whether a pending and undetermined application to the circuit judge of the county where the proceedings were taken, for a writ of certiorari to review proceedings before a circuit court commissioner on a writ of habeas corpus, would render a like application to a justice of the Supreme Court nugatory, quaere; but where it appeared that the commissioner's decision had not in fact been rendered when the first application was made, the Supreme Court denied a motion to dismiss its writ.—Rowe v. Rowe, 28 Mich. 353.

¶ 131. The allowance of certiorari from the Supreme Court to a justice of the peace is exceptional, and only favored when necessary to prevent a failure of justice. Writ

dismissed where, after personal service and appearance on return day in justice's court, defendant did not appear at trial.—White v. Boyce, 88 Mich. 349.

¶ 132. The Supreme Court in its discretion to entertain or refuse certiorari may dismiss on motion a writ brought to review an order opening a default granted on petition of one claiming under the judgment defendant, where it appears that a just defense may exist to the judgment and no injustice to the relator in certiorari can result from opening it.—Meads v. Belt Copper Mines, 125 Mich. 456.

¶ 133. Certiorari issued to review proceedings of a township board setting aside the action of the board of school inspectors in organizing a school district will be dismissed where it appears that two of the five districts and the new district proposed to be formed would be unable to maintain their schools without imposing greater burdens than the residents could bear.—Silver v. Hamilton Township Board, 146 Mich. 393.

¶ 134. On June 7th a writ of certiorari was issued, returnable June 29th and the return was filed in the upper court June 22nd. On June 26th the appellant for the first time gave notice to appellee of the writ. Appellee had previously contended that certiorari, and not a writ of error, was the proper way to appeal. Held that although, under Supreme Court Rule 5, the appellee was entitled to notice of the issuance, the date, and the return day of the writ, the court would still not dismiss the writ when the case was before it with printed records and briefs and justice did not require such action.—Ullman v. Sandell, 158 Mich. 396.

¶ 134a. The writ should be quashed where it was issued to review the action of the board of supervisors in recounting the votes on a local option election and to set aside the preamble and resolution declaring that the general liquor law had been suspended, and where the original and subsequent canvass of votes supported such preamble and resolution.—Alward v. Oakland County Sup'rs, 187 Mich. 573.

§ 40. ——Moot questions.

Right to review as affected by fact that order was on consent, see ante § 9.

¶ 135. On certiorari to review the action of a circuit judge in denying a writ of mandamus to compel the president and board of trustees of a village to reconvene and approve relator's application and bond to engage in the retail liquor business for the remainder of the license year, where it appears that no relief can be granted because the period covered by the application has passed moot questions only are presented and will not be determined.—Carlson v. Wyman, 189 Mich. 402.

¶ 136. Proceedings for certiorari to review the action of a superior court judge in denying the petition of the owner and operator of a motor bus for a writ of mandamus to compel the common council of a city to accept a surety bond proffered by him to enable him to operate a motor bus line within the city will be dismissed where it appears that relator's license has expired and that the surety company has failed to renew its license to do business in the state, as the questions remaining are moot questions and any action by the court would be futile.—Schouwink v. Ferguson, 191 Mich. 284.

¶ 137. Where the period covered by an application for a liquor license has passed, the Supreme Court, in a certiorari proceeding to review the action of the circuit judge in denying relator's prayer for a writ of mandamus to compel the president and board of trustees of a village to reconvene and approve the application and bond, in view of the fact that no relief could be granted, will dismiss the writ without discussing abstract questions of law presented by the litigation.—Carlson v. Wyman, 189 Mich. 402.

§ 41. ——Objections to merits.

Objection that writ improperly issued, see also post ¶ 166.

Dismissal because of futility, see also ante § 39, ¶¶ 132, 133.

Dismissal because record supports action and shows no error, see also ante ¶ 134a.

¶ 138. Where a certiorari has been granted by a competent officer upon a sufficient application, the Supreme Court will not review his discretion in granting it on motion to dismiss.—Rowe v. Rowe, 28 Mich. 353.

¶ 139. The question whether a case is proper for a writ of certiorari relates to the merits, and will not be entertained on a motion to dismiss the writ in advance of the hearings.—Rowe v. Rowe, 28 Mich. 353.

¶ 140. Questions touching the merits on certiorari must be brought up on the hearing of the cause, and will not be considered on motion to quash.—Maybee v. Miner, 44 Mich. 207.

§ 42. ——Motions and showing.

Necessity of motion, see also ante ¶ 124.

General practice on motions, see Motions and Orders.

Motion practice in Supreme Court, see Sup. Ct. Rules 27-33.
Allowance of motion or denial on conditions, see Sup. Ct. Rule 9.

¶ 141. A motion to dismiss which does not state its grounds will not be entertained.—Jaquith v. Hale, 30 Mich. 163.

¶ 142. In the case of a motion to dismiss a certiorari brought to review the proceedings of township boards for the removal of the plaintiff in error from the office of director of a school district within said townships, said motion being based upon such acquiescence of the plaintiff in error in subsequent proceedings of the district to elect a successor to him as would estop him from contesting the validity of the proceedings for his removal; it was held that the motion could be granted only when such acquiescence was undisputed.—Crawford v. Scio & Webster Township Boards, 22 Mich. 405.

§ 43. ——Retention of case for further action.

¶ 143. Where a writ of certiorari to review the ruling of the circuit court is dismissed by the Supreme Court for want of authority in the circuit court commissioner who issued it, and where it is evident that such dismissal will result in an application to the Supreme Court for a new writ, this court will regard the case before it as such an application, and will dispose of the meritorious questions involved.—People v. Chamblin, 149 Mich. 653.

§ 44. Hearing on review.

Notice and calendaring of cases, see Appeal, VIII; Calendar.
Calendaring and preference on calendar, see Sup. Ct. Rule 43.
Noticing mandamus cases brought up by certiorari, see Sup. Ct. Rule 12.

¶ 144. In certiorari cases notice of hearing cannot be given until after the return day of the writ.—Miles v. Goffinet, 16 Mich. 280.

¶ 145. An issue of fact cannot be framed in a certiorari proceeding.—McGurrin v. Grand Rapids Township Board, 186 Mich. 475.

§ 45. ——Mode of presenting error.

Assignment and specification in application for writ, see ante § 28.
Setting out evidence in the return, see ante § 36.
Sufficiency of presentation on hearing, see post § 46.
Limitation of review to errors assigned, see post § 48.
Necessity that record show error, see also post § 50.
Limitation of review to matters shown by record, see post § 50.
Necessity and sufficiency of saving objections below, see Saving Questions for Review.

¶ 146. Assignments of error in the Supreme Court are not necessary on common law certiorari.—Stokes v. Jacobs, 10 Mich. 290.

§ 46. ——Sufficiency of assignments or objections.

¶ 147. An allegation as error that a motion to quash a complaint was overruled is enough to raise the sufficiency of the charges as laid.—Gager v. Chippewa Supervisors, 47 Mich. 167.

¶ 148. When an affidavit for certiorari to review the action of a circuit court commissioner in a proceeding to dissolve an attachment is based on an erroneous finding and not a total want of testimony, and the record shows that no claim was made before the commissioner that there was no testimony in favor of respondent to be considered, it does not present any question of law.—Brown v. Blanchard, 39 Mich. 790.

§ 47. ——Briefs and arguments.

Rules for briefs and argument on error or appeal, see Appeal, XI, D, E.
Printing, serving and filing briefs, see Sup. Ct. Rules 40-42.

¶ 149. Decisions which have been published in the Michigan reports must be cited from such reports whenever possible and not from other publications.—People v. Jamieson, 124 Mich. 164.

§ 48. Scope of review in general.

Form of assignments in affidavit, see ante § 28.
Matters considered on motion to dismiss, quash or strike, see ante §§ 39-43.
Practice where unnecessary matter is contained in return, see ante §§ 39-43.
Sufficiency of objections to raise law question, see ante § 46.
Rulings on evidence as presenting questions of law, see post § 53.
Restriction to record showing and matters considered below, see post §§ 50, 51.
Declination of unnecessary or immaterial questions, see post § 52.
Rulings on evidence or on matters of discretion, see post §§ 53, 54.
Review of findings, see post § 55.
Matters reviewable in circuit on certiorari, see post § 66.
On review of drain proceedings, see Drains, II.

¶ 150. Upon certiorari to review an order of the trial court, only objections presented by the record to the court below, and objections assigned when the writ of certiorari was obtained, will be considered.—Lewis v. Board of Education of City of Detroit, 139 Mich. 306.

¶ 151. On certiorari no errors can be considered that are not assigned in the affidavit for the writ.—Grand Rapids, L. & D. R. Co. v. Welden, 69 Mich. 572.

¶ 152. Matter not alleged as error in the affidavit upon which the writ issued will not be noticed.—Grand Rapids, L. & D. R. Co. v. Welden, 69 Mich. 572; Gentle v. Board of School Inspectors of Township of Colfax, 73 Mich. 40.

¶ 153. In certiorari, the Supreme Court considers questions of law only, and such questions as are to be presented must be raised in the affidavit for the writ.—Booker v. Grand Rapids Medical College, 156 Mich. 95.

¶ 154. Where proceedings to lay out a drain are complained of, and a writ of certiorari applied for, the petition for which states that due notice was given, and where, in the affidavit for the writ, the complaining party relies on a general allegation of informalities, it cannot be urged as error that it did not appear from the return to the writ, except inferentially, that proper notices had been posted. No informalities which could be cured by any return or explanation can be relied upon without a special assignment.—Davison v. Otis, 24 Mich. 23.

¶ 155. In certiorari from an order granting mandamus to compel highway commissioners to build a bridge, the jurisdictional objection that the proceeding was not brought by the proper relator was not entertained, where neither made in the court below, nor stated in the petition for certiorari.—Bigelow v. Brooks, 119 Mich. 208.

¶ 156. On certiorari to review the granting of a writ of mandamus relator cannot object to the consideration of a finding because directly contrary to an averment in his answer upon which no issue was taken, where such objection was not raised by any of the assignments of error in the affidavit for the writ.—City of Monroe v. Monroe County Sup'rs, 137 Mich. 638.

¶ 156a. On certiorari to review mandamus by the circuit court the Supreme Court may review the whole judgment where the circuit judge on one of the points decided in favor of the relator "not based upon any conclusion or judgment of my own, but solely for the purpose of having it taken to the appellate court."—Township of West Bloomfield v. Detroit United Ry., 146 Mich. 198.

¶ 157. On certiorari to review a mandamus requiring the recording of a land contract but on condition that a mortgage tax be paid, from which plaintiff took certiorari, the question of the proper basis for computing the tax will not be reviewed, it having been passed on by the circuit in granting the mandamus in favor of relator therein and respondent therein not having brought certiorari on his part to review the question.—Ross v. Stoll, 199 Mich. 561.

§ 49. ——On certiorari to boards and nonjudicial officers.

¶ 158. On certiorari to review the action of the board of supervisors it is only necessary to determine their jurisdiction and the legality of their action.—People ex rel. Scrafford v. Gladwin Supervisors, 41 Mich. 647.

§ 50. ——Matters outside the record or decision.

See also ante ¶¶ 150, 155, 157.
Practice on error as to matters outside the record, see Appeal, XII, B.

¶ 159. Certiorari to an inferior court only removes the cause itself for review, and not a collateral proceeding that does not form a part of the record in the case.—People ex rel. Wiley v. Allegan Circuit Judge, 29 Mich. 487.

¶ 160. Where an affidavit for certiorari complains of rulings of the court, but no return is made except of the record, and the plaintiff in certiorari goes to a hearing upon such return, the Supreme Court will consider nothing except what the record, thus made up, discloses.—Case v. Frey, 24 Mich. 251.

¶ 161. Certiorari to review the action of respondent school inspectors in detaching territory from one district and attaching to another will not present the later action of the inspectors in attaching the remnant of the divided district to a third district, when relator does not complain of such action; and it is doubtful if he could have the writ for that purpose not being a taxpayer in such remnant but being in the portion first transferred.—Doxey v. Martin School Inspectors, 67 Mich. 601.

¶ 162. The right to office of the member of a board of school inspectors, claiming to be lawfully elected and in possession of the office, cannot be tried upon certiorari to re-

view the board's action in altering school district boundaries.—Donough v. Dewey, 82 Mich. 309.

¶ 163. Certiorari to review an order adjudging the petitioners guilty of contempt in refusing to pay the costs of a continuance is not a proper proceeding in which to raise questions relating to the taxation of said costs.—Barney v. Love, 101 Mich. 543.

¶ 164. A judgment of contempt of court rendered against defendant for ignoring an injunction cannot be set aside on certiorari brought for that purpose, where the bill filed and affidavit accompanying it make a prima facie case, upon the strength of which such injunction was granted, and defendant's motion that such injunction be dissolved is given full hearing but overruled, and defendant does not take an appeal from such decision overruling his motion, but ignores the injunction, and, being cited for contempt, is convicted and fined.—Saginaw Lumber & Salt Co. v. Griffore, 145 Mich. 287.

¶ 165. Where the probate court has made a finding as to mental competency of a person for whose estate the appointment of a guardian is sought, the upper court will refuse, on a writ of certiorari, to review such finding, the record of the testimony not being presented.—In re Phillips, 154 Mich. 139.

§ 51. ——Restriction to matters considered below.

Application of rule in circuit courts, see post § 66.

Necessity of objection in trial court to make question, and sufficiency of objection to save it for review, see Saving Questions for Review.

¶ 166. An order of the probate court requiring an administrator to account having been brought into the circuit court by appeal and there reversed, and the proceedings in the circuit court—where no issue of fact was joined—being then removed to the Supreme Court by certiorari, that court refused to consider an objection that this was not a proper case for certiorari, made for the first time in a brief submitted by the defendant in error after the hearing on the merits.—In re Robinson's Estate, 6 Mich. 137.

¶ 167. A justice's judgment will not be reversed on certiorari because of the admission of hearsay testimony (book entries) of the facts sought to be proved, where no objection was made to the reception of such testimony upon the trial.—Martin v. Smith, 108 Mich. 278.

¶ 168. Additional grounds against the constitutionality of a joint resolution, and stronger arguments than were presented below, may be considered on certiorari to review mandamus based on it.—Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

¶ 169. The propriety of the remedy of mandamus is a proper question for consideration on a certiorari where mandamus had been denied on the merits, and the circuit court in deciding the matter had merely assumed it to be the proper remedy. The assumption is equivalent to deciding the question.—Dickinson v. Board of Canvassers of Cheboygan County, 148 Mich. 513.

§ 52. ——Immaterial or unnecessary questions.

Questions made by or in favor of respondent, see ante § 48.

Dismissal because of no meritorious question, see ante §§ 39, 40.

Striking from return or exclusion from consideration as better practice, see ante § 39.

Practice on error as to immaterial questions, see Appeal, XII, A.

¶ 170. Where the return to a writ of certiorari shows that it was never allowed, a judgment dismissing it will be affirmed without consideration whether the plaintiff therein would have been entitled to amend it, or whether he could bring error on the refusal to allow an amendment of it.—Young v. Kelsey, 46 Mich. 414.

¶ 171. The constitutionality of How. St., § 782, which renders women eligible as school inspectors, will not be considered on certiorari to review the unanimous action, altering district boundaries, of the board and three inspectors, only one of whom was a woman.—Donough v. Dewey, 82 Mich. 309.

¶ 172. The constitutionality of How. St., § 684a, which authorizes the election of two school inspectors, under Const., article 11, § 1, providing for the election of one inspector annually, will not be determined on certiorari to review the unanimous action of the board of school inspectors, two members of which are at least de facto officers.—Donough v. Dewey, 82 Mich. 309.

¶ 173. Where an issue was framed on mandamus and a case was presented upon its merits, an objection to the regularity of the proceedings cannot be raised on certiorari to review an order granting the mandamus.—Safford v. Detroit Board of Health, 110 Mich. 81.

¶ 174. On certiorari to review an order in mandamus compelling the assessors to

strike from the roll a personal assessment against an insurance company where the record fails to show any taxable personal property the reviewing court may properly decline to review the decision of the trial judge.—Michigan Mut. Life Ins. Co. v. Hartz, 129 Mich. 104.

¶ 174a. The validity of an ordinance limiting the number of saloons in a city will not be considered on certiorari to review the denial of a writ a mandamus to compel action upon an application for a liquor license, where the return of the writ shows that respondent considered the character of place which applicant had previously conducted as well as the alleged invalidity of the ordinance, in refusing the application.—Frey v. Common Council City of Jackson, 167 Mich. 238.

§ 53. ——Rulings on evidence.

See also ante ¶ 65.

Rulings not questioned below, see ante § 51.

In proceedings for dissolution of attachments, see also post ¶¶ 192-196.

¶ 175. The court will review the rulings of law upon the admission or exclusion of evidence, or other rulings in the proceedings having a bearing upon the result.—Jackson v. People, 9 Mich. 111.

¶ 176. In certiorari the circuit judge's ruling on admission of evidence in attachment dissolution proceedings are not reviewed.—Lord v. Wirt, 96 Mich. 415.

¶ 177. The rulings of the circuit judge in regard to the admission of evidence, made on the trial of an appeal from an order dissolving an attachment, are not reviewable on certiorari.—Rickel v. Strelinger, 102 Mich. 41.

¶ 178. Quaere, whether in certiorari to review mandamus proceedings to compel a highway commissioner to erect a bridge the rulings of the circuit court upon the admission and rejection of evidence can be reviewed on appeal.—Berube v. Wheeler, 128 Mich. 32.

¶ 179. Where letters rogatory are issued from a court of a foreign jurisdiction to a notary in this state to take answers of witnesses to interrogatories accompanying the letters concerning a matter in suit in such jurisdiction the conclusion of the circuit court as to whether certain questions are legal and pertinent and should be answered does not become a question of law reviewable by certiorari.—Van Dyke v. Doughty, 174 Mich. 351.

§ 54. ——Discretionary rulings.

Rulings on evidence as law questions, see ante § 53.

Irreviewableness on error of discretionary rulings, see Appeal, XII, D.

¶ 180. Certiorari permits no review of decisions of fact or matters of discretion unless a legal discretion has not been exercised.—Goss v. Stone, 63 Mich. 319.

¶ 181. The discretion of the circuit court in refusing mandamus to compel payment of an order on the township treasurer on a claim for the price of a road roller, will not be disturbed where it appears that the supervisor received pay from the seller for services in and about the selling, though not in excess of the value of such services and without dishonest intent, and where it is conceded that the township never accepted or used the roller.—First Nat. Bank of Traverse City v. Township Clerk of Union Township, 141 Mich. 404.

§ 55. ——Review of findings and evidence.

See also post ¶¶ 240-242, 244.

Necessity that record show evidence, see also ante § 50.

Conclusiveness of the return, see post § 56.

Presumption as to sufficiency of proofs, see post § 59.

Return of fact as overcoming evidence of contrary tendency, see post ¶ 221.

¶ 182. The Supreme Court on certiorari considers questions of law only; it will not review questions of fact, or weigh the evidence, except to determine whether there is an entire absence of proof on some material fact.—Jackson v. People, 9 Mich. 111; Hyde v. Nelson, 11 Mich. 353; Linn v. Roberts, 15 Mich. 443; Lynch v. People, 16 Mich. 472; Brown v. Blanchard, 39 Mich. 790.

¶ 183. A finding by the trial judge that defendant has not disposed of his property with intent to defraud his creditors is conclusive on certiorari if supported by any evidence.—First Nat. Bank v. Steele, 81 Mich. 93; Lord v. Wirt, 96 Mich. 415.

¶ 184. On certiorari to the circuit court a case is not to be tried de novo; a finding of fact by the trial court is final and cannot be set aside unless it clearly appears to be unsupported by the evidence.—Detroit Citizens' St. Ry. Co. v. Common Council of Detroit, 125 Mich. 673.

¶ 185. A finding of the circuit judge is not reviewable if there is any evidence in the return warranting it.—Iosco County Sav. Bank v. Barnes, 100 Mich. 1.

¶ 186. A finding of fact will not be reviewed if there is evidence to support it.—Teagan Transp. Co. v. Board of Assessors of City of Detroit, 139 Mich. 1.

¶ 187. The office of the writ of certiorari is to try questions of law, and the facts of the case are not reviewable.—Collier v. Township Board of St. Charles, 147 Mich. 688.

¶ 188. On certiorari, questions of law only will be considered.—In re Erdman's Estate, 179 Mich. 567.

¶ 189. Issues of fact will not be reviewed on a common law writ of certiorari.—McGurrin v. Grand Rapids Township Board, 186 Mich. 475.

¶ 190. Upon certiorari to review a judgment, the evidence will not be reviewed unless the undisputed facts conclusively show the findings of fact erroneous.—Wm. Barie Dry Goods Co. v. Casler, 138 Mich. 172.

¶ 191. Where a case is before the Supreme Court on certiorari under the provisions of Comp. L. 1897, § 10497, the court does not review questions of fact but questions of law; and in examining the evidence the court does so, not to determine whether the probabilities preponderate one way or the other, but simply to determine whether the evidence is such that it will justify the finding as a legitimate inference from the facts proved, whether that inference would or would not, have been drawn by the appellant tribunal.—In re Radford, 168 Mich. 474.

¶ 192. This court cannot review on certiorari the conclusions reached upon the facts on competent testimony by a circuit court commissioner or circuit judge in proceedings to dissolve an attachment.—Brown v. Blanchard, 39 Mich. 790; Fenton State Bank v. Whittle. 41 Mich. 365; Sheldon v Stewart, 43 Mich. 574; Powers v. O'Brien 44 Mich. 317; Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 164; Rowe v. Kellogg, 54 Mich. 206.

¶ 193. This court cannot review the decision of a lower tribunal upon the testimony submitted on an application to dissolve an attachment unless there is entire absence of proof on some material point. But it will review its decision upon questions of law, if properly presented, and upon the exclusion of testimony.—Genesee County Sav. Bank v. Michigan Barge Co., 52 Mich. 164.

¶ 194. In certiorari to review proceedings to dissolve an attachment this court will not review questions of fact or pass upon the weight of testimony or credibility of witnesses.—Carver v. Chapell, 70 Mich. 49.

¶ 195. Circuit judge's findings in proceedings to dissolve attachment are conclusive in certiorari, if supported by any evidence.—Lord v. Wirt, 96 Mich. 415; First Nat. Bank v. Steele, 81 Mich. 93.

¶ 196. A finding of fact supported by evidence will not be disturbed on certiorari to review an order dissolving an attachment.—Dimmock v. Cole, 130 Mich. 601.

¶ 197. Upon review of proceedings for the transfer of a cause, the commissioner's finding that the judge was disqualified controls if the evidence conflicts, otherwise it is reviewable as a question of law.—Curtis v. Wilcox, 74 Mich. 69; Fellows v. Canney, 75 Mich. 445; Stimson v. Michigan Shingle Co., 71 Mich. 374.

¶ 198. This court does not examine on certiorari the evidence taken on the hearing of habeas corpus proceedings in a lower tribunal, but is confined to questions of law.—Corrie v. Corrie, 42 Mich. 509.

¶ 199. On certiorari to review habeas corpus proceedings brought to obtain the custody of a minor child, the petitioner and respondent being husband and wife, the finding of the trial court that the welfare of the child will best be subserved by placing it in the care of the mother is a determination of fact conclusive on this court.—Carpenter v. Carpenter, 149 Mich. 138.

¶ 199a. On certiorari to review contempt proceedings the Supreme Court will not review the evidence to determine whether the sentence and fine were excessive for the offense.—In re McHugh, 152 Mich. 505.

¶ 200. Upon certiorari to review the granting of a writ of mandamus the court will not disregard a finding supported by evidence, though it is contrary to an averment in the answer to mandamus on which no issue was taken.—City of Monroe v. Monroe County Sup'rs, 137 Mich. 638.

¶ 201. The finding of the board of supervisors as to the sufficiency of petitions for the submission of the local option question to the electors under Comp. L. 1897, § 5415, How. 2nd Ed., § 5020, is conclusive on review by certiorari.—Heyer v. Board Sup'rs of Shiawassee County, 190 Mich. 184.

§ 56. Construction and effect of return and record.

Proper contents of return, see ante § 36.
Presumptions and implied admissions, see post §§ 58, 59.
Extraneous matters in aid of record, see post § 60.
Conflicts and repugnancies within record or between record and other papers, see post § 61.
In statutory certiorari to review drain, condemnation, highway or like proceedings, see Drains, II; Eminent Domain, VIII; Highways, II, B; etc.

¶ 202. The return to a writ of certiorari is conclusive as to the facts appearing therein.—People v. Leavitt, 41 Mich. 470; Matthews v. Otsego County Sup'rs, 48 Mich. 587; People v. Brown, 54 Mich. 15.

¶ 203. The return to a writ of certiorari must be accepted as true.—People v. Grimm, 182 Mich. 643.

¶ 204. The return of a writ of certiorari is not necessarily conclusive as to statements in the petition therefor that do not go to the merits, but are made merely by way of excuse for delay.—Burnett v. Drain Com'r, 56 Mich. 374.

¶ 205. An allegation of error based upon the alleged refusal of a magistrate to allow proof of certain propositions recited together in an affidavit for certiorari is not supported by a return which shows that they were not presented or ruled upon as one offer, and that the proofs were rejected for different reasons.—Knapp v. Gamsby, 47 Mich. 375.

¶ 206. In certiorari from an order granting mandamus to compel a supervisor to spread a drain tax, the circuit judge's return that the answer raised no such question and that the proceedings of the board of supervisors furnished upon the hearing show that the order included the assessment for the drain in question, was conclusive as against an objection that the board did not order the taxes spread.—Scholtz v. Smith, 119 Mich. 634.

¶ 207. An answer to a petition in mandamus must be taken as true on certiorari to review the decision rendered by the circuit court on hearing of petition and answer.—Kenyon v. Ionia County Sup'rs, 138 Mich. 544.

§ 57. ——As to jurisdiction below.

Admission by silence of return, see also post ¶ 210.

¶ 208. Jurisdictional deficiencies in the record of special proceedings cannot be supplied by statements of fact in the return to certiorari.—People ex rel. Goldsmith v. Nankin Highway Com'rs, 14 Mich. 528; Harbaugh v. Martin, 30 Mich. 234; McGregor v. Gladwin Sup'rs, 37 Mich. 388.

§ 58. ——Admissions by silence of return.

¶ 209. An affidavit for a writ of certiorari must be taken as true where the return does not contradict it.—Wilson v. Township Board of Burr Oak, 87 Mich. 240.

¶ 210. Allegations of jurisdictional facts in an affidavit for a writ of certiorari, as to which no return is required, are not admitted by a failure to make answer thereto.—McGurrin v. Grand Rapids Township Board, 186 Mich. 475.

¶ 211. An allegation of an affidavit for a writ of certiorari that in violation of law a township board granted a license for the sale of liquor within one mile from the Soldiers' Home, held not admitted by the silence of the return to the writ with respect thereto, where the regularity of the proceedings of the board was fully shown.—McGurrin v. Grand Rapids Township Board, 186 Mich. 475.

§ 59. ——Presumptions.

See also post ¶ 230.
Matters admitted by silence of return, see ante § 58.
Presumptions applied on error or appeal, see Appeal, XII, C.

¶ 212. Where the record on certiorari to a judgment in bastardy proceedings does not indicate that there was any dispute as to the identity of the child, the statement of counsel, made in the course of his argument to the jury, that the child was present in the court room, within view of the jury, will be assumed to have been true.—People v. Wing, 115 Mich. 698.

¶ 213. Where several appeals from a determination of a highway commissioner came on to be heard by the township board at the same time and each appellant was represented by the same attorney it must be assumed on certiorari to the circuit court that the action of the board in hearing the appeals separately was assented to by all parties and none was prejudiced thereby.—Bogue v. DeLong, 147 Mich. 63.

¶ 214. On certiorari to review the action of supervisors in removing superintendents of the poor the sufficiency of evidence will be assumed.—Burt v. Iron County Sup'rs, 108 Mich. 523.

¶ 215. Where the decree brought up under proceedings in certiorari recites that the court received the proofs and allegations, and considered the arguments of the respective parties, it will be presumed, in the absence of any return to the contrary, that the proofs (forming no part of the record) were sufficient in both form and substance.—Case v. Frey, 24 Mich, 251.

¶ 216. Where a judgment is brought up for review by certiorari, whatever the evidence in the court below tended to show is to be taken as proved in support of the judgment.—Bullard v. Hascall, 25 Mich. 132.

¶ 217. On a record of proceedings for the dissolution of an attachment which shows that the plaintiffs had made a showing as to the title of the lands attached, and that the proceedings were thereupon dismissed for want of jurisdiction, it will not be presumed that the order for dissolution was made on other evidence not sent up, making out sufficient cause on other grounds for dissolving the attachment.—Patterson v. Goodrich, 31 Mich. 225.

§ 60. ——Resort to affidavit or papers to show facts.

Deficiencies in the return and how supplied, see ante § 38.

¶ 218. The affidavit for a certiorari cannot be used to establish a fact not found in the return.—Hewitt v. Oakland County Probate Judge, 67 Mich. 1.

¶ 219. Where, under a writ of habeas corpus, a circuit court commissioner inquired into the cause of the imprisonment of one held on a justice's execution in replevin, and a writ of certiorari was sued out to review the commissioner's proceedings, it was held that a statement in the affidavit for the writ of the contents of the justice's docket in the replevin suit could not be received as evidence of what such contents were, unless adopted as true by the commissioner in his return.—Tomlin v. Fisher, 27 Mich. 524.

¶ 220. An affidavit in support of an application for a writ of certiorari cannot be used to establish facts concerning which the return to the writ is silent.—McGurrin v. Grand Rapids Township Board, 186 Mich. 475.

§ 61. ——Conflicts or repugnancies in record and papers.

¶ 221. Evidence merely tending to show a fact is overcome by a return that the fact was otherwise.—Bogue v. DeLong, 147 Mich. 63.

¶ 222. On certiorari the court must be governed by the original record notwithstanding an error in the printed record.—Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

¶ 223. On certiorari, where no exceptions are settled, and the printed record is imperfect but the original record contains true copies of the proceedings under the seal of the clerk, the errors assigned in the affidavit for the writ are considered properly assigned for review.—Scott v. Brown, 175 Mich. 447.

§ 62. Judgment and disposal of cause.

On motion to quash or dismiss, see ante § 43.

Remand for correction where no reviewable cause appears, see also ante ¶ 41.

Certiorari to bring back record improperly remanded, see ante § 2.

On certiorari in circuit, see post § 67.

On certiorari to forcible entry, see Forcible Entry, II.

In highway proceedings, see Highways, II, B.

¶ 224. Certiorari is not a flexible remedy, as it only admits of quashing the proceedings reviewed, or of refusing to do so—Whitbeck v. Village of Hudson, 50 Mich. 86.

¶ 225. In certiorari proceedings questions of law are involved, and the judgment of the Supreme Court generally affirms or disaffirms the judgment reviewed.—Leach v. Davy, 199 Mich. 378.

¶ 226. On certiorari to review the action of the circuit court in denying a mandamus for a recount of votes, it does not follow that if the judge was wrong in his conclusion as to the invalidity of the ballots that his decision must be reversed and a writ of certiorari granted, where in fact mandamus was the wrong remedy, the reason being that a case properly decided will not be reversed merely because an erroneous reason was given for the decision.—Dickinson v. Board of Canvassers of Cheyboygan County, 148 Mich. 513.

¶ 227. The damages for a sheriff's omission to serve process are in their nature unliquidated and, in a certiorari cannot be determined as part of the judgment.—Schwab v. Coots, 44 Mich. 463.

¶ 228. Comp. L. 1871, § 1296, permits a jury to award both damages and costs against the person complaining of an encroachment on the public highway, if the encroachment is not proved; but on certiorari this court has no authority to award anything but costs.—Gregory v. Knight, 50 Mich. 61.

¶ 229. Certiorari may sometimes serve as a writ of error; and if the testimony covers the whole matter in dispute, and the case was regularly in the trial court for hearing, a new trial may be ordered on reversal. —People v. White, 53 Mich. 537.

¶ 230. On certiorari to review the action of a township board in removing a school district officer under How. St., § 5170, the return of the clerk of the board is to be taken as true. The fact, therefore, that the testimony returned is insufficient of itself to support the order of removal does not call for a reversal, where the return shows that evidence was introduced sustaining the allegations of the complaint, and that all of the testimony is not returned.—Taylor v. Shimmel, 107 Mich. 676.

¶ 231. Where, on certiorari, the order of maintenance in bastardy proceedings is declared bad for indefiniteness, running until the further order of the court, the case may be remanded, with directions to the court to vacate the order, and enter one in conformity with the direction of the Supreme Court for a definite time.—People v. Wing, 115 Mich. 698.

¶ 232. Upon certiorari to review the granting of a writ of mandamus to compel a township supervisor to spread a certain tax on the roll for a specified year, where the tax is sustained but the time for spreading the assessment on the roll for that year has expired, the court will order it spread on the roll for the following year.—Canal Construction Co. v. Schlickum, 139 Mich. 246.

¶ 233. On certiorari by a corporation to review an order for a writ of mandamus to allow the inspection of corporate books by a director in his official capacity, where it appears that the office of the director has expired pending the appeal, and relief is sought by relator in his official capacity as director and not as stockholder, the case will be remanded by the Supreme Court with leave to apply to the circuit court for an order permitting amendment of the answer to the order to show cause why the writ of mandamus should not issue and for further proceedings.—Leach v. Davy, 199 Mich. 378.

§ 63. ——Construction and effect of judgment.

Reinstatement of order under review, see also ante ¶ 53.

¶ 234. An order of the Supreme Court, dismissing a certiorari to a justice, is a decision by that court that the cause has not been in fact removed from the justice into that court, and that the judgment of the justice is in full force.—Howard v. Rockwell, 1 D. 315.

§ 64. ——Entry of judgment on bond.

¶ 235. Comp. L. 1897, § 933, providing for the entry of judgment on appeal against both appellant and his surety on the bond, must be construed as applying to bonds given in certiorari proceedings.—Knack v. Wayne Circuit Judge, 147 Mich. 485.

§ 65. Certiorari from circuit courts.

When writ direct from Supreme to minor courts will lie, see ante § 24.
To justices of the peace, see Justices of the Peace, VI.
In drain proceedings, see Drains, II.
In forcible entry proceedings, see Forcible Entry, II.
To probate courts, see Probate Courts, III.
Proper remedy to review action of circuit on certiorari, see also ante ¶¶ 24, 25.
Mandamus as remedy to compel dismissal of improper certiorari, see Mandamus, II.
General power of circuit to issue writ, see Jud. Act, Chap. VI, § 1, ¶ 2, Comp. L. 1915, § 12209, ¶ 2.
Rules regulating subjects of jurisdiction, see 1916 C. C. Rule 50, § 1.
Practice in circuit, see 1916 C. C. Rule 50, § 1.

¶ 236. The writ of certiorari lies to bring up for review proceedings of inferior courts and tribunals like the recorder's court of Grand Haven.—Thompson v. Crockery School Dist. No. 6, 25 Mich. 483; Wilson v. Bartholomew, 45 Mich. 41.

¶ 237. The writ lies to bring up proceedings had before a circuit court commissioner for the dissolution of an attachment.—People ex rel. Taylor v. St. Clair Circuit Judge, 32 Mich. 95.

¶ 238. Certiorari lies from a circuit court to review the proceedings of a township board in removing the assessor of a school district.—Merrick v. Arbela Township Board, 41 Mich. 630.

¶ 239. An order dismissing an appeal to the county court from a justice of the peace was such a judgment as might be reviewed by the circuit court on certiorari under the act of 1849.—People ex rel. Brower v. Wayne County Judge, 1 Mich. 359.

¶ 239a. The circuit court has power to issue certiorari to the probate court.—Sellnacht v. Wayne Probate Judge, 190 Mich. 461.

§ 66. ——Matters and proceedings reviewable.
See generally 1916 C. C. Rule 50, § 1.

¶ 240. In certiorari cases the circuit court, or the Supreme Court subsequently on error, considers questions of law only, and will not weigh conflicting evidence but will affirm the judgment unless there is a total lack of evidence on some essential point.—Garvin v. Gorman, 63 Mich. 221; Chicago & C. S. R, Co. v. Peters, 45 Mich. 636; Smoke v. Jones, 35 Mich. 409; Overpack v. Ruggles, 27 Mich. 65; Parsons v. Dickinson, 23 Mich. 56; McGraw v. Schwab, 23 Mich. 13; Welch v. Bagg, 12 Mich. 41; Berry v. Lowe, 10 Mich. 9; Cicotte v. Morse, 8 Mich. 424; Bromley v. People, 7 Mich. 472; Webber v. Hanke, 4 Mich. 198; Higley v. Lant, 3 Mich. 612; Miller v. Chaffee, 1 Mich. 257; Gaines v. Betts, 2 D. 98.

¶ 241. Where a cause was removed from the county court to the circuit court by certiorari, it was held that neither the circuit court, nor the Supreme Court on writ of error, could review the case on conflicting testimony, but for error of law only.—Higley v. Lant, 3 Mich. 612.

¶ 242. The circuit court, like the Supreme Court, cannot on certiorari review upon the facts the proceedings before a circuit court commissioner for the dissolution of an attachment.—Schall v. Bly, 43 Mich. 401.

¶ 243. On certiorari to a circuit court commissioner to bring up for review proceedings for the dissolution of an attachment, objections not taken before the commissioner are not favored.—Patterson v. Goodrich, 31 Mich. 225.

¶ 244. The judgment of a county court is to be reviewed on its merits. The verdict of a jury in that court should not be disturbed for slight causes; but where it is manifestly unsupported by evidence the judgment should be reversed.—Herring v. Hock, 1 Mich. 501; criticized in Berry v. Lowe, 10 Mich. 9.

§ 67. ——Hearing, review, judgment and decision.
Power on error to circuit to require further return in certiorari to justice, see ante ¶ 122.
On certiorari to justice, see Justices of the Peace, VI.
Time for hearing, see 1916 C. C. Rule 50, § 4.

¶ 245. On reversing the judgment of a county court the circuit court might, in its discretion, award a new trial under the act of 1849.—Herring v. Hock, 1 Mich. 501.

¶ 246. A circuit court commissioner's findings ought not to be in all respects reversed on certiorari upon objections that only concern the allowance of costs.—Antiau v. Nadeau, 53 Mich. 460.

CESSION OF TERRITORY to CHAMBERS.

Cross-References.

Cession of territory—
See State of Michigan; United States.
Cestui que trust—
See Trusts, V; Wills, VI.
As necessary or proper party, see Parties; Trusts, IX; and see topics treating of specific remedies like Foreclosure of Mortgages; Quieting Title; Specific Performance.
Conclusiveness of judgment on, see Former Adjudication, V.
Cestui que vie—
See Life Estates.
Chain of title—
Proof of, see Ejectment, IV; Quieting Title, II.
Element in marketability of title, see Vendors and Purchasers, III.
Notice from breaks in chain or by reason of records in chain, see Notice and Record of Title.
Challenges—
See Elections, III, V; Jury, V; Justices of the Peace, IV, F; Grand Jury.
Review of rulings on challenge to juror, see Appeal; Harmless Error; Saving Questions for Review; Indictment, XIV-XVI.
Chambers—
Powers of judges, see Judges, II; and see Courts.
Issuance of writs or grant of relief from chambers, see topics treating of the particular writ or relief. e. g., Assistance, Writ of; Attachment, IX; Habeas Corpus; Injunctions, IV; Mandamus, V.
Review of chamber orders and decisions; see Appeal; Attachment, IX; Certiorari.
Chambers of commerce—
See Exchanges and Boards of Trade.

CHAMPERTY AND MAINTENANCE.

TREATS of contracts and conveyances tending to promote or trafficking in litigation, especially agreements to furnish pecuniary aid in litigation or services to be paid for contingently on success of litigation, and transfers of litigious interests in land held in the adverse possession of another than the grantor. Contingent fee agreements with attorneys under the statutes sanctioning such agreements are treated in Attorneys, II, E.

Analysis.

§ 1. Champertous contracts in general.
§ 2. Buying or dealing in claims.
§ 3. Conveyances or mortgages of land held adversely.

§ 1. Champertous contracts in general.

Buying claims to sue on them, see post § 2.
Validity of contracts with attorneys as to compensation in general, see Attorneys, II, E.
Contingent fee contracts, see Attorneys, § 36.
Abolition of restrictions, see Comp. L. 1915, § 12079.

¶ 1. An agreement whereby an attorney was to prosecute ejectment for his client, receiving, should he succeed, a part of the land or its value, but nothing if he failed, was void for champerty.—Backus v. Byron, 4 Mich. 535.

¶ 2. By the statute of 1867 (see How. St., § 9004), attorneys were enabled to contract with clients as they pleased with regard to compensation.—Well v. Elsam, 40 Mich. 218.

¶ 3. An agreement that an attorney shall prosecute a suit and share in any recovery, but pay the costs if beaten, is now valid since How. St., § 9004, virtually repealed the common law of champerty.—Wildey v. Crane, 63 Mich. 720.

¶ 4. Under 3 Comp. L. 1897, § 11254, an agreement to undertake litigation upon a contingent fee is lawful.—In re Service's Estate, 155 Mich. 179.

¶ 5. The common law doctrine of champerty, as applied to agreements between attorneys and clients, does not prevail in this state.—Foley v. Grand Rapids & I. Ry. Co., 157 Mich. 67.

¶ 6. In an action for personal injuries it appeared that a witness for plaintiff had an arrangement with him whereby he and the attorneys were to have a percentage of the amount recovered. Held, that this contract was only void as between the parties, and did not affect the obligation of the defendant to the plaintiff.—Foley v. Grand Rapids & I. Ry. Co., 157 Mich. 67.

¶ 7. Where an attorney contracts to accept as compensation a percentage of the money to be recovered in a suit, with the provision that the client shall advance the costs, such contract is not rendered void by reason of the fact that the attorney afterwards advances money for the expenses of the litigation, where the original agreement is made in good faith.—Dreiband v. Candler, 166 Mich. 49.

§ 2. Buying or dealing in claims.

Necessity of notice of defense that claim was bought in violation of statute, see Pleading, III, C.
Making defense in motion to quash capias, see Civil Arrest.
Prohibition of purchases for suing on claims, see Comp. L. 1915, § 12072 et seq.
Giving notice of defense, see Comp. L. 1915, § 12075.
Examination to determine whether claim was champertously purchased, see Comp. L. 1915, §§ 12076-12078.

¶ 8. How. St., § 7185, which provides that "no attorney, solicitor, or counselor shall, directly or indirectly, buy, or be in any manner interested in buying, any bond, promissory note, bill of exchange, book debt, or other thing in action, with the intent and for the purpose of bringing any suit thereon," does not apply to an assignment to an attorney of mechanics' liens for the purpose of collection, and to avoid expense and multiplicity of suits.—Smedley v. Dregge, 101 Mich. 200.

¶ 9. The statutes which forbid attorneys at law from dealing in demands for the purpose of prosecuting them for profit, do not prevent an attorney from purchasing one man's chattel and then suing another in replevin for it.—Town v. Tabor, 34 Mich. 262.

¶ 10. A written assignment indorsed on a due bill, reciting that it was for a valuable consideration with authority to the as-

signee to collect it in his own name, is not within the statutes forbidding attorneys to traffic in demands for the purpose of prosecuting them for profit, where the circumstances show that there was no intent to do anything wrong or unlawful.—Randall v. Baird, 66 Mich. 312.

¶ 11. Comp. L. 1897, § 1135, How. Ann. St., 2nd Ed., § 12553, does not prohibit transfers to agents or attorneys for convenience of suit or by way of security where the plaintiff is not shown to have bought the claim solely with the intent to prosecute it for the purpose of profit.—Tidey v. Kent Circuit Judge, 179 Mich. 580.

§ 3. Conveyances or mortgages of land held adversely.

Abrogation of rule as to conveyances of land held adversely, see Comp. L. 1915, § 11693.

¶ 12. At the common law, where there is an adverse possession, a conveyance by a grantor out of possession is inoperative and void, except as a release.—Bruckner's Lessee v. Lawrence, 1 D. 19; Godfroy v. Disbrow, W. 260; Hubbard v. Smith, 2 Mich. 207.

¶ 13. A conveyance by a grantor out of possession is not invalid between the grantor and grantee; and though the latter cannot enforce his rights under it in his own name, he may do so in the name of his grantor; the latter being estopped from questioning the validity of his own deed.—Stockton v. Williams, I D. 546.

¶ 14. Since March 1, 1847, when R. S. 1846 took effect, the common law doctrine invalidating a conveyance of lands held adversely to the grantor has not been in force. —Crane v. Reeder, 21 Mich. 24; Roberts v. Cooper, 20 How. (61 U. S.) 467, 15 L. ed. 969; Michigan Cent. R. Co. v. McNaughton, 45 Mich. 87.

¶ 15. At the common law and prior to How. St., § 5657, one could not give a valid mortgage on lands held adversely to him.—Hubbard v. Smith, 2 Mich. 207.

CHANCE to CHARGES.

Cross-References.

Chance—
- Gaming and lotteries, see Crimes, II; Indictment; Gambling Contracts.
- Validity of contracts wagering in character, see Contracts, IV.

Chancery—
- See Equity.

Chandeliers—
- As fixtures, see Fixtures, Landlord and Tenant, IV, E.

Change—
- Of attorneys, see Attorneys, § 12.
- Of domicile or settlement, see Domicile; Poor Persons.
- Of highway or grade, see Highways, V.
- Of insurance, see Fraternal Associations, IV; Insurance, IX.
- Of names, see Names; Corporations, III, IV.
- Of possession of property as affecting rights or notice, see Chattel Mortgages, I, D; Fraudulent Conveyances, I, F; Notice and Record of Title.
- Of railroad route or stations, see Railroads, II; Street Railways.
- Of theory on appeal, see Appeal, XII.
- Of venue, see Venue, II.
- See also topics treating of the thing to which change applies.

Channel of stream—
- As boundary, see Boundaries.
- Navigation and navigable rights, see Navigable Waters.
- Riparian rights on streams, see Waters.

Character—
- Defamation of, see Libel and Slander.
- Evidence of, see Evidence, VII; Indictment, VIII.
- Impeachment of witnesses, see Witnesses, VI, B.
- Element in criminality, see Crimes; Indictment; Seduction.

Charge of legacies—
- See Wills, VI, G.

Charge to jury—
- See Instructions; Indictment, IX, E; and for instructions in particular actions or on particular issues, see topics treating thereof.

Charges against officers—
- See Officers, V; Municipal Corporations, XV.

Charges and credits—
- See Accounting Suits; and see topics treating of duties wherein accounting is necessary, e. g., Agency, IV. B; Estates of Decedents, X, XII; Partnership, VII, E; Trusts, XI.

Charges for service—
- See Carriers; Electricity; Gas; Telegraphs and Telephones; Waters, VI.
- Regulation by Railroad Commission, see Public Service.

CHARITIES.

TREATS of gifts for public or general charitable or eleemosynary purposes.

Analysis.

§ 1. In general; recognition and validity.
§ 2. Definiteness and certainty.
§ 3. Capacity of taker or trustee.
§ 4. Construction, nature and effect of gift.
§ 5. Right to question or enforce trust.
§ 6. Enforcement of use or trust.
§ 7. Rights, liabilities and property.
§ 8. Rights under invalid trust.

§ 1. In general; recognition and validity.

Construction and effect, see post § 4.
Legality of trusts generally, see Trusts.
Associations and corporations for benevolent and charitable objects, see Associations; Religious Societies; Corporations.
Quo warranto against corporation falsely pretending to be charitable, see Corporations, XXI; Quo Warranto.
[Note. See Comp. L. 1915, §§ 11099-11102, which dispensed with the necessity of definiteness and certainty as to the persons to benefit or as to the objects of the trust, and which vested the trust in the court of chancery, where no trustee is named in the gift, empowering it to appoint a trustee. In New York, where formerly the common law of charities was not recognized, a statute similar to the above was adopted in 1893, which it was held had the effect of restoring the common law. See Allen v. Stevens, 161 N. Y. 122, for an explanation of this statute.]

¶ 1. The law of charitable uses is not in force in Michigan.—Hopkins v. Crossley, 132 Mich. 612.

¶ 2. An incorporated voluntary fire department converted its property into money and placed it in the hands of trustees, the income to be used for the relief of members of the corporation so long as any of them should live and thereafter for the relief of poor and needy members of the fire department of the city and other needy and worthy persons, and when such plan had been carried out the corporation should be dissolved. Held that since the doctrine of charitable uses does not exist in Michigan the trust was void.—Hopkins v. Crossley, 132 Mich. 612.

¶ 3. A devise to a doctor to be used as he sees best for carrying on the work of relieving suffering is void for uncertainty as to the beneficiaries.—Stoepel v. Satterthwaite, 162 Mich. 457.

¶ 4. A gift void because of uncertainty as to the beneficiaries cannot be validated by Pub. Acts 1907, Act No. 122, where such act did not come into effect until after the death of the testator.—Stoepel v. Satterthwaite, 162 Mich. 457.

§ 2. Definiteness and certainty.

Uncertainty of beneficiaries, see ante ¶ 3.
Statute dispensing with definiteness, see Comp. L. 1915, § 11099.

¶ 5. A bequest to the "Universalist Japan Missionary Fund for the support of the Universalist Mission in Japan" is not void as failing to provide a trustee where the fund is identified by extrinsic evidence and it is shown that only one Universalist organization has such a mission.—Cook v. Universalist General Convention, 138 Mich. 157.

§ 3. Capacity of taker or trustee.

Statute obviating necessity of naming competent trustee, see Comp. L. 1915, § 11099.

¶ 6. A bequest or gift of money generally, and not upon permanent uses, to an unincorporated association capable of clear identity, is valid.—In re Ticknor's Estate, 13 Mich. 44; Allen v. Duffie, 43 Mich. 1.

¶ 7. An unincorporated society or a voluntary association is, at common law, capable of taking as a beneficiary in a trust.—White v. Rice, 112 Mich. 403.

¶ 8. A voluntary association has the right to take a simple legacy not charged with a permanent use.—Lounsbury v. Square Lake Burial Ass'n, 170 Mich. 645.

¶ 9. A bequest of money in trust to trustees of a voluntary cemetery association, to be expended upon the latter's property, the

association being then on the eve of incorporation, accomplished before the trust's going into effect, is valid.—Lounsbury v. Square Lake Burial Ass'n, 170 Mich. 645.

§ 4. Construction, nature and effect of gift.

Statutory rule of liberal construction, see Comp. L. 1915, § 11100.

¶ 10. A church fund devoted to religious purposes constitutes a charitable trust.—Bruce v. Central M. E. Church, 147 Mich. 230.

¶ 11. Inasmuch as one in contributing to a church fund is performing a work of charity it follows that the fund contributed to is a charitable fund.—Bruce v. Central M. E. Church, 147 Mich. 230.

¶ 12. A fund created by persons mutually contributing for the relief of the contributors is a private rather than a public charity.—Hopkins v. Crossley, 138 Mich. 561.

¶ 13. The doctrine of cy pres has no application to a bequest to the "Universalist Japan Missionary Fund for the support of the Universalist Mission in Japan"; there is no doubt of the testatrix's intention; it is clearly expressed and subject to no other inference but that the bequest should be devoted under the direction of the Universalist Church to the support of the Japan Mission as known to her and as it had been carried on and to which she had before contributed.—Cook v. Universalist General Convention, 138 Mich. 157.

§ 5. Right to question or enforce trust.

Mode of enforcement, see post § 6.
Functions of prosecuting attorney, see Comp. L. 1915, § 11100.

¶ 14. The acquiescence for thirty-three years by the heirs of a testator in a decree admitting a will to probate, held to estop them from questioning the validity of a testamentary charitable trust.—Sprague v. Trustees of Protestant Episcopal Church, 186 Mich. 554.

§ 6. Enforcement of use or trust.

Who may enforce, see ante § 5.
Statutory powers of court of chancery, see Comp. L. 1915, § 11100.

¶ 15. The attorney general cannot, in the state's behalf, bring a suit in equity adverse to all private parties and interests to enforce a gift by will to charitable uses, unless the gift be definitely to a public charity such as equity recognizes.—Attorney General v. Soule, 28 Mich. 153.

§ 7. Rights, liabilities and property.

Under invalid trust, see post § 8.
Escheat of property of trust, see Escheats.
Liability of hospital for negligence, see Asylums and Hospitals, § 3.
Adverse possession of land dedicated to religious uses, see Adverse Possession, ¶ 104.
Vesting in trustee, if named, or in court of chancery, if none named, see Comp. L. 1915, § 11099.

¶ 16. Corporations administering a charitable trust, like all other corporations, are subject to the general laws of the land, and cannot claim exemption from responsibility for the torts of their agents, unless that claim is based on a contract with the person injured.—Bruce v. Central M. E. Church, 147 Mich. 230.

§ 8. Rights under invalid trust.

Statutory validation of trusts made under Pub. Acts 1907, No. 122, see Comp. L. 1915, § 11101.

¶ 17. Trustees who qualify and take possession of property under an invalid testamentary charitable trust, hold under a resulting trust in favor of the testator's heirs.—Sprague v. Trustees of Protestant Episcopal Church, 186 Mich. 554.

CHARTER to CHASTITY.

Cross-References.

Charter—
- Of corporation, see Corporations, IV; and see also Banking, IX; Associations; Railroads, IX; etc.
- Of municipality, see Municipal Corporations, II.
- Constitutionality of laws granting or affecting, see Constitutional Law; Statutes.

Charter party—
- See Shipping, II.

Chastisement—
- As tort or crime, see Assault and Battery.
- By parent, see Parent and Child.
- Of pupil in school, see Schools, VI.

Chastity—
- Element in rape or seduction, see Rape; Seduction.
- Assault of carnal nature as tort, see Assault and Battery.
- Defamation of chastity, see Libel and Slander.
- Defense to breach of promise action, see Breach of Promise.
- Impeachment of witness, see Witnesses, VI, B.

CHATTEL MORTGAGES.

TREATS of written hypothecation of chattels to secure payment of a debt or performance of an obligation by vesting the mortgagor's title with or without present possession in the mortgagee, defeasible on condition that the debt be paid or the obligation be performed, and excludes Pledges, which see; conditional sales or repurchase agreements (see Sales, VI, C, XII) and vendors' liens (see Sales, VIII, B); liens incident to bailments, or existing by statute (see Liens); and assignments for security (see Assignments, § 23; Pledges).

Analysis.

I. Nature, Requisites and Validity.

A. In General.

§ 1. Nature and definition.
§ 2. Mortgage distinguished from other contracts.
§ 3. ——Mortgage or sale of goods.
§ 4. ——Misnamed or disguised sales.
§ 5. Evidence to show nature of transaction.
§ 6. ——Weight and sufficiency.
§ 7. Questions of fact and instructions as to nature.
§ 8. Construction, validity and effect in general.
§ 9. ——Partial invalidity.
§ 10. Waiver and estoppel.

B. Subject Matter and Debt or Liability Secured.

§ 11. What may be mortgaged.
§ 12. Future property.
§ 13. What may be secured; future debts.
§ 14. ——Joint and several debts.
§ 15. Description of property.
§ 16. ——Merchandise and trade property.
§ 17. ——Animals.
§ 18. Additions and accessions.
§ 19. Description of debts or liabilities and parties.
§ 20. Term and time of payment.
§ 21. Agreements to extend to other debts or property.
§ 22. Evidence, jury questions and instructions.

C. Requisities of the Mortgage, Affidavits and Filing.

§ 23. In general.
§ 24. Signatures, execution and date.
§ 25. Affidavits.
§ 26. Filing and copies.
§ 27. ——As to whom required.
§ 28. ——Character of the property; choses in action.
§ 29. ——Real estate transfers covering personalty also.
§ 30. ——Place and time for filing.
§ 31. ——Property in two places.
§ 32. Purpose and effect of filing.
§ 33. ——Sufficiency of record; neglect of clerk.

D. Effect Against Third Persons; Notice; Change of Possession.

§ 34. In general.
§ 35. Unrecorded mortgages.
§ 36. ——Materiality of intention or good faith.

§ 37. Knowledge or actual notice.
§ 38. ——Taking subject to mortgage or incumbrances.
§ 39. Constructive notice from filing.
§ 40. Possession as notice.
§ 41. ——Sufficiency of change.
§ 42. ——Making mortgagor agent in possession.
§ 43. Property affected; after acquired goods.
§ 44. Persons protected or affected.
§ 45. ——Creditors.
§ 46. ——Subsequent mortgagees.
§ 47. ——Subsequent purchasers.
§ 48. ——Effect of subsequent filing or change.
§ 49. ——Later mortgage filed first.
§ 50. Independent and paramount claims of title.
§ 51. ——Rights under prior sale.
§ 52. Estoppel and waiver.
§ 53. ——Recognizing or assuming mortgage debt.
§ 54. ——By representations as to credit or ownership.
§ 55. Fraudulent mortgages.
§ 56. ——Consideration for mortgage.
§ 57. ——Indebtedness pre-existing in part.
§ 58. ——Excessiveness or mistake in mortgage.
§ 59. Evidence as to fraud or notice.
§ 60. Jury questions and instructions.

II. Rights Under the Mortgage; Title, Possession and Transfer of the Property.

A. RIGHT GIVEN BY THE MORTGAGE; TITLE AND POSSESSION.

§ 61. In general; effect on title.
§ 62. Conditions and collateral agreements.
§ 63. Provisions as to insurance or protection of property.
§ 64. Right of possession in general.
§ 65. ——By mortgagor.
§ 66. ——Under authority to manage or sell.
§ 67. ——By mortgagee.
§ 68. ——Accrual of mortgagee's right.
§ 69. ——Insecurity clause and attempted transfer.
§ 70. Conversion or impairment of right by party in possession.
§ 71. Evidence and proof of title or right.
§ 72. Instructions and jury questions as to title or right.

B. TRANSFERS AND ALIENATIONS OF THE PROPERTY.

§ 73. In general.
§ 74. Consent of mortgagee.
§ 75. Rights to price or proceeds of sale.
§ 76. Rights of takers under mortgagee.
§ 77. Execution or involuntary transfer.
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III. Lien and Priorities.

§ 79. In general; other levy or lien.
§ 80. Purchase money mortgages.
§ 81. Priorities by notice or filing.
§ 82. Between unfiled mortgages.
§ 83. Priority by agreement or terms of the mortgage.

§ 84. ——Rights of subsequent creditors.
§ 85. Waiver and estoppel of priority.
§ 86. Foreign mortgages and liens.

IV. Assignment or Transfer of the Mortgage.

§ 87. Assignability and rights of assignee.
§ 88. Equities.
§ 89. ——Under mortgage to secure negotiable paper.
§ 90. Creditor as assignee.
§ 91. Assignment of mortgage without debt.

V. Renewals and Extensions.

§ 92. Renewal and effect of nonrenewal.
§ 93. ——Effect of taking possession.
§ 94. Place for renewal.
§ 95. Sufficiency of affidavit.
§ 96. Record of renewal.
§ 97. Effect of renewal on priority.
§ 98. Premature renewal.
§ 99. Renewal of unfiled original.

VI. Payment, Redemption and Discharge.

§ 100. Payment or satisfaction of debt.
§ 101. ——By labor or services.
§ 102. ——By substituting or renewing notes for debts.
§ 103. ——Foreclosure and application of proceeds.
§ 104. ——Mortgage to secure indorsement or other secondary obligation.
§ 105. Application of payments.
§ 106. Evidence of payment or satisfaction.
§ 107. Merger and extinction.
§ 108. Tender.
§ 109. Release.
§ 110. ——Suing on debt or for value of property.
§ 111. ——Evidence of release.
§ 112. Right to redeem.
§ 113. ——By execution creditor or subsequent lienor.
§ 114. Time for redemption.
§ 115. Amount required to redeem.
§ 116. Bill to redeem or enjoin foreclosure.
§ 117. Subrogation and assignment on redemption.
§ 118. Restoration of property on discharge.
§ 119. ——Rights of other creditors.
§ 120. Accounting for sale price or surplus.

VII. Default and Foreclosure by Sale or Otherwise.

§ 121. Default and right to foreclose.
§ 122. ——Waiver of forfeiture and release or avoidance of mortgage.
§ 123. Party entitled; assignee or comortgagee.
§ 124. Time for foreclosure; laches and limitations.
§ 125. Mode and requisites of foreclosure in general.
§ 126. Sale under power.
§ 127. ——Collateral agreements affecting power.
§ 128. ——Before maturity of debt; insecurity clause; instalments.
§ 129. ——Notice of sale.

§ 130. ——Method, place and terms of sale.
§ 131. ——Mortgagee as purchaser.
§ 132. Extent of sale; excessiveness.
§ 133. ——Instalments not yet due.
§ 134. Application of proceeds.
§ 135. Purchaser's title.
§ 136. ——Effect of irregularity or avoidance of proceedings.
§ 137. Fraud, defects and irregularities in sale.
§ 138. ——Remedy of mortgagor.
§ 139. ——Rights and remedies of creditors and third persons.
§ 140. Estoppel to question sale.

VIII. Remedies and Procedure Other Than Foreclosure.

§ 141. In general; action on the debt.
§ 142. Suit on mortgaged choses in action.
§ 143. Torts by third persons.
§ 144. ——Before condition broken.
§ 145. Rights of comortgagee or comortgagor.
§ 146. Rights of trust mortgagee.

I. NATURE, REQUISITES AND VALIDITY.

A. IN GENERAL.

§ 1. Nature and definition.

Particular contracts distinguished, see post §§ 2-7.

What may be mortgaged and what may be secured, see post § 11 et seq.

Lien of the mortgage and priorities with other liens or claims, see post III.

Mortgage as a lien and not a transfer of title, see post § 61.

Transfer of building as mortgage of it, see also post ¶ 16.

[Note. In so far as the mortgage and the debt secured are but contracts, their nature is that of Contracts or Negotiable Instruments, which see.]

As to the nature of liens in general, see Liens.

¶ 1. A debtor assigned to his creditor certain shares of railroad stock, and at the same time gave a note for the debt, reciting therein that if the said debt and interest is not paid at maturity the railroad stock "hereby assigned to secure the payment aforesaid is to be deemed and taken as forfeit for the above payment." This constituted in legal effect a chattel mortgage of the stock, under which the holder of the note was entitled to possession of the stock certificates.—Davis v. Rider, 5 Mich. 423.

¶ 2. An instrument in the form of a chattel mortgage, containing the usual power of sale, and providing that the mortgagee may take possession whenever he thinks himself insecure, will confer rights on the mortgagee and operate as a valid mortgage.—Wingler v. Sibley, 35 Mich. 281.

¶ 3. A contractor entered into a contract of indemnity with his surety, whereby, in consideration of the suretyship, he assigned to him all his interest in the original contract, with full power to control it and receive all the pay thereon, the surety "becoming responsible for all materials furnished," title to which should pass to him immediately on sale to his principal. Held, that this contract of indemnity only amounted to a mortgage on the materials.—Hurd v. Brown, 37 Mich. 484.

¶ 4. A mortgage made on a building, wherein no description is given of the realty on which the building stands and made with the intention of security on the building, held, to be of a chattel and not of realty.—Nagel v. Schneider, 83 Mich. 407.

§ 2. Mortgage distinguished from other contracts.

Evidence of real character of contract, see post §§ 5, 6.

Character of the contract as a jury question, and instructions as to nature of transaction, see post § 7.

Mortgages amounting to common law assignments, see Assignments for Creditors, § 12.

Liens in general, see Liens.

Security by transfer of actual possession, see Pledges.

Liens created by lease, see Landlord and Tenant, IV, H.

¶ 5. If the instrument is a conveyance upon condition given as security for a pre-existing debt, and contains no trust in its body whereby the property is withdrawn from the right of the mortgagor or others

to redeem, or whereby the title of the property is placed beyond the reach of execution as to its surplus, the instrument is a chattel mortgage; but if it conveys the absolute title to a trustee for the benefit of creditors and thus places the property and surplus beyond the reach of creditors, it is a common law assignment.—Warner v. Littlefield, 89 Mich. 329.

¶ 6. A writing given by a debtor to his surety for the debt, providing that on failure of the debtor to pay the debt within thirty days the surety may take immediate possession of the goods, etc., in possession of the debtor in the store and premises occupied by him, and sell so much as will pay the debt and a reasonable compensation for his services, and redeliver the balance to the debtor, is not a mortgage, for it does not purport to change, in any way, the title to the property. It is a mere naked power, giving no right in the property itself until reduced to possession.—Holmes v. Hall, 8 Mich. 66.

¶ 7. A stipulation in a lease "that all goods, wares and merchandise, household furniture, fixtures, or other property, which are or shall be placed in or on said premises by the lessee, shall be liable, and this lease shall hereby constitute a lien or mortgage on said property, to secure the rent due or to grow due on this lease," with authority to the lessor, on default of payment of rent, or upon breach of any of the covenants of the lease, to enter the premises and take and sell the property as in cases of chattel mortgages, etc., and to retain the amount of any rent due or to grow due on the lease, together with the costs of sale, etc., is not a mortgage, and conveys no present interest in the property.—Dalton v. Laudahn, 27 Mich. 529.

¶ 8. A stipulation, secured by chattel mortgage on a newspaper establishment, not to use the columns of the paper or permit them to be used to publish matter detrimental to the mortgagee, his reputation or business, the stipulation being unlimited in point of time, and designed to accompany the property into the hands of whomsoever may become purchasers, is held to be too indefinite to constitute the basis of a mortgage lien enforceable by power of sale; effect can be given to it only on a construction which would render it intolerable, and presumably not within the contemplation of the parties.—Fowler v. Hoffman, 31 Mich. 215.

¶ 9. An agreement whereby A. is to work land for the benefit of B., who is to own and have the crops raised and apply the proceeds upon the indebtedness due to him from A., is not a chattel mortgage, and cannot be shown to be such by parol evidence, and it need not be filed to preserve the rights of the parties under it.—Haynes v. Ledyard, 33 Mich. 319; Haynes v. Ledyard, 44 Mich. 621.

¶ 10. An agreement to repay a loan made to enable the borrower to purchase a stock of goods, out of the first moneys realized from their sale, before paying to the vendor the balace of the purchase price, is not equivalent to an agreement to give a chattel mortgage on the goods.—Finn v. Donahoe, 83 Mich. 165.

¶ 11. An instrument is a chattel mortgage and not a trust or preferential assignment, wherein several places therein it is so designated, which conveys a stock of lumber to a trustee as "security" to be sold in case of default and proceeds applied to the payment of designated creditors, the mortgagor to retain possession until default in promised payments and demand by the trustee, though it contains no defeasance clause.—Belding-Hall Mfg. Co. v. Smith, 125 Mich. 54.

¶ 12. A chattel mortgage is a mere security to the mortgage and not a transfer of title, and under How. St., § 8749o, authorizing a proceeding for a receiver and the marshaling of assets in favor of a labor claimant, in case of a common law or other assignment for benefit of creditors, a chattel mortgage does not per se constitute an assignment within the statute.—Wineman v. Fisher Elec. Mfg. Co., 118 Mich. 636.

§ 3. ——Mortgage or sale of goods.

Sales so-called by parties or disguised by fiction, see post § 4.

Sales transferring possession reserving title, see Sales, XII.

¶ 13. An instrument must be considered a mortgage if, taken alone or in connection with surrounding facts, it appears to have been given as a security; the mere absence of terms of defeasance cannot determine whether it is a mortgage or not.—Cooper v. Brock, 41 Mich. 488; Weed v. Mirick, 62 Mich. 414.

¶ 14. A bill of sale taken with the understanding that on the payment of certain notes the goods shall be delivered back, may be found to be a mortgage.—Buhl Iron Works v. Teuton, 67 Mich. 623.

¶ 15. A bill of sale, which is in effect a chattel mortgage must, like a chattel mortgage, follow the statute by being filed, in case the donor is a nonresident, in the township or city where the property is at the time the instrument is executed.—First National Bank v. Weed, 89 Mich. 357.

¶ 16. An agreement for the sale of a building standing on leased land, by which the

purchaser agrees to pay the purchase price in specified instalments, and to forfeit all claim to the building in case of a failure to make such payments, and upon demand deliver up possession to the vendor, and forfeit all payments made thereon, held to operate as a chattel mortgage.—Read v. Horner, 90 Mich. 152.

¶ 17. A bill of sale given merely for the accommodation of the vendor, and assigned by his direction to secure a loan to himself, will be treated as a chattel mortgage from the vendor to the assignee, and it is no exception to the rule that title does not pass under a mortgage.—Pinch v. Willard, 108 Mich. 204.

¶ 18. A contract for the sale of a stock of goods, reserving title in the vendor until payment of the purchase price, and providing that goods purchased to replace those destroyed, "as well as all others used in the business," shall be subject to the lien of the agreement, operates, as to property subsequently acquired, as a mortgage, and, unless filed as required by statute, is to that extent void as to creditors of the vendee.—Hudson v. McKale, 107 Mich. 22.

¶ 19. Plaintiff's mortgagor, who was indebted to defendant in the sum of $947, was desirous of establishing a creamery, dairy, and commission business, and entered into a contract with defendant, by which, in consideration of his agreement to make advances to the amount of $1,000, including the existing indebtedness, he assigned to defendant a contract for the purchase of the land on which he was erecting a building to be used in connection with the creamery business, and agreed to insure the building and its contents in defendant's favor. The contract provided that the mortgagor should attend to the business for the benefit of defendant, and according to his instructions, but in his own name, and turn over to defendant the net proceeds thereof as often as requested, until the advances and interest thereon should be paid. It was further agreed that the land contract and buildings and improvements, and all apparatus, chattels and merchandise used in connection with the business, were and should remain defendant's property until the mortgagor's agreements were fulfilled, and that on such fulfillment defendant should relinquish all his rights, title, and interest in said property to the mortgagor. The mortgagor continued to carry on the business, and for part of the time with a partner. He made purchases in his own name, added largely to the plant, bought and stocked a farm, and operated it in connection with the business, gave his individual notes, indorsed by others than defendant, and made payments on the land contract, of all of which facts defendant had notice. Plaintiffs' mortgage was given 18 months after the execution of the contract, which was not filed in the proper office, and plaintiffs had no notice or knowledge of its existence. Plaintiffs replevied the mortgaged property from the defendant, who claimed ownership by virtue of the contract. Held, that the contract was a security, merely, and that a verdict should have been directed in favor of plaintiffs.—Damm v. Mason, 98 Mich. 237.

¶ 20. An instrument, in the form of a bill of sale of a stock of goods, providing that in consideration of the sale and delivery of the property the second party agrees to allow the first party as a credit on his indebtedness to the second party a sum equal to that realized from a sale of such property by such second party, less necessary expenses, and stating the indebtedness to be in the form of a certain note which the first party agrees to pay and further providing that any excess of collateral upon the note shall be applicable upon any other note held by such second party, construed as a chattel mortgage, especially where the parties placed such construction upon the instrument.—American Steel & Wire Co. v. Dedrick, 196 Mich. 731.

¶ 21. Filing in the town clerk's office among the chattel mortgages a bill of sale absolute on its face does not estop the vendee from claiming the transfer to be absolute in suit for conversion against judgment creditor of vendor; but the jury may consider such filing in determining whether the sale was absolute or was intended as a security.—Wessels v. Beeman, 87 Mich. 481.

¶ 22. A contract between defendant and a retail piano dealer evidenced an agreement whereby defendant was to consign for sale certain pianos to the dealer, the dealer was to pay all expenses of sale, to report all sales promptly, and to settle for cash sales at the time of settlement of the sale. For pianos sold on instalments, he was to take a lien contract in his own name, and indorse the same to defendant to be retained by him until the amount due for the instrument receipt was given by him to defendant, with interest. The compensation of the dealer was to be the difference in the amount for which the instrument was sold and the cost as represented by the consignment receipt given by him to defendant. Among other provisions, the dealer agreed to carry insurance and to surrender all unsold instruments on thirty days' notice. Held, in a controversy between the trustee in bankruptcy of the dealer and defendant, that the agreement evidenced a consignment for sale and not a chattel mortgage void for the reason that it was not recorded.—Wasey v. Whitcomb, 167 Mich. 58.

¶ 23. An instrument of sale of personal property retaining title in the seller is not changed in its character by the fact that when the buyer became insolvent the seller placed

the instrument on file with the township clerk.—American Harrow Co. v. Deyo, 134 Mich. 639.

§ 4. ——Misnamed or disguised sales.

¶ 24. How. St., § 6193, which avoids unrecorded chattel mortgages as against the mortgagor's creditors and subsequent good-faith purchasers or mortgagees, unless accompanied by an immediate delivery, and followed by an actual and continued change of possession of the mortgaged property, does not permit a transaction which is in substance a mortgage to have the effect of a sale, however disguised, to the prejudice of parties dealing with the debtor, in the absence of the statutory notice to such parties. —Damm v. Mason, 98 Mich. 237.

¶ 25. An instrument purporting to be a bill of sale, but stating that it was given as security for money advanced, reciting a consideration of only $1,200, but purporting to convey articles in process of manufacture and worth $3,000, was construed as only a mortgage.—Cooper v. Brock, 41 Mich. 488.

¶ 26. A debtor executed a bill of sale of his stock of goods under an agreement providing that the vendee should furnish not to exceed $1,200 for the purpose of discharging the indebtedness of the vendor, and that the bill of sale should be security for the moneys so to be advanced; that the vendee should resell the stock upon payment by the vendor of $1,600, in monthly instalments; that in the meantime the stock and all additions thereto should remain the property of the vendee; that no indebtedness should be incurred without his knowledge; that the goods should be insured in his favor; and that, in case of his death before the entire $1,600 should have been paid, his representatives should execute a bill of sale to the vendor upon repayment of the amount advanced, with interest. The vendor continued the business for several months, when the vendee took possession. Held, that the absolute title did not pass to the vendee.—Duffie v. Clark, 106 Mich. 262.

¶ 27. A bill of sale may be shown to be a mortgage notwithstanding a statement in it that it is "understood to convey an absolute title."—Wetmore v. Moloney, 127 Mich. 372.

§ 5. Evidence to show nature of transaction.

See also ante ¶ 9.
See also ante ¶ 27.
Sufficiency of evidence, see post § 6.
Admissibility of parol to vary or contradict the terms of the mortgage, see Evidence, V, A.

¶ 28. A bill of sale of personal property, though absolute on its face, may at law be shown by parol evidence to have been given as a mortgage.—Fuller v. Parish, 3 Mich. 211; Buhl Iron Works v. Teuton, 67 Mich. 623.

¶ 29. A bill of sale absolute on its face may in an action at law be shown by parol to have been given as a mortgage.—Pinch v. Willard, 108 Mich. 204.

¶ 30. A defeasance may be proved by parol evidence.—Wasey v. Whitcomb, 167 Mich. 58.

¶ 31. The fact of the vendee's filing a bill of sale is some evidence upon the question whether the instrument was intended as an absolute sale where such filing was needless or as a security where it was necessary as against others.—Black v. Simon, 116 Mich. 382.

¶ 32. Where it is sought to show that an instrument apparently a consignment contract or bill of sale is in reality a chattel mortgage, the circumstances under which the instrument was made as well as the practical construction given to it by the parties in their dealings thereunder may be considered. —Wasey v. Whitcomb, 167 Mich. 58.

§ 6. ——Weight and sufficiency.

¶ 33. Evidence that an instrument in the form of a consignment for sale is in fact a chattel mortgage should be clear and convincing.—Wasey v. Whitcomb, 167 Mich. 58.

¶ 34. It does not require the same amount and strictness of proof to declare a mere unsealed bill of sale a chattel mortgage or security as it does to determine a deed to be a mortgage.—Seligman v. Estate of Ten Eyck, 74 Mich. 525.

¶ 35. That a bill of sale is not a mortgage is not conclusively shown by the fact that upon its execution the vendee surrenders certain notes due him from the vendor.— Buhl Iron Works v. Teuton, 67 Mich. 623.

§ 7. Questions of fact and instructions as to nature.

¶ 36. The question whether a bill of sale was meant merely as a security is for the jury under proper instructions.—McMillan v. Larned, 41 Mich. 521.

¶ 37. It is error to submit the question whether a bill of sale was meant as a chattel mortgage if there is no evidence tending to show it.—Edwards v. Edwards, 54 Mich. 347.

¶ 38. An instruction to the jury that it is competent to show that a bill of sale, although conveying an absolute title on its face, may have been given by way of security, and that it is competent to show this by parol testimony, is sufficient in the absence of a request for the further instruction that the burden of proof is on the party making such claim to overcome the contrary presumption arising from the face of the paper.—Seligman v. Estate of Ten Eyck, 74 Mich. 525.

§ 8. Construction, validity and effect in general.

Construction of instrument to determine whether in effect a mortgage, see ante §§ 2-4.
Construction of descriptions of property or debt, see post §§ 15-19.
Of descriptions of the debt, or of the terms and time of payment, see post §§ 19-21.
Variance as to date of indebtedness between note and mortgage, see post ¶ 92.
Validity and effect as against persons other than the parties, see post I, D.
Subject matter and debt as to which it may be valid and effectual, see post I, B.
Form and filing of the instrument, see post I, C.
Purpose and effect of filing, see post § 32.
Invalidity of unrecorded mortgages against third persons without notice, see post § 35.
Total invalidity as against subsequent creditors if not filed, see post § 45.
Invalidity for fraud on creditors and third persons, see post § 55 et seq.
Rights of the parties under the mortgage, including special stipulations and the right to possession, see post II, A.
Rights arising out of transfers of the mortgaged property, see post II, B.
Agreements collateral to the mortgage, or conditions on its effect, see also post § 62.
Construction and effect of powers of sale, see post § 126 et seq.
Collateral agreement limiting power of sale, see post § 127.
Duress, fraud or mistake affecting validity of the mortgage as between the parties to it do not ordinarily present any question peculiar to chattel mortgages as distinguished from other contracts; and accordingly the topics Duress, Fraud, Mistake, should be consulted for such matters.
General law as to validity of contracts with respect to their object or consideration, see Contracts, IV.
General rules for construction of contracts, see Contracts, VI.
Power of married woman to execute mortgage, see Husband and Wife, IV, D.

¶ 39. A mortgage is not necessarily made directly to the beneficiary; the security is always made in trust to secure obligations, and the trust and beneficial interest need not be in the same hands; a mortgage to a third person is as valid as if made to a creditor.—Adams v, Niemann, 46 Mich. 135.

¶ 40. Although a mortgage may modify the loan contract, an irreconcilable contradiction by the mortgage of the terms of the note cannot be allowed to affect the contract as shown in the note, as the indebtedness is represented by the note which constitutes the primary contract.—Ferris v. Johnson, 136 Mich. 227.

¶ 41. Where a mortgagor of chattels inserted in the body of his mortgage on file an agreement, which he signed, "that this mortgage shall cover and be a lien upon all the property above specified, the same for the year 1868 as it did for the year 1867." the mortgage and stipulation were construed together as creating a mortgage.—Grimes v. Rose, 24 Mich. 416.

§ 9. ——Partial invalidity.

Validity of mortgage covering joint and several debts, see also post ¶ 59.
Restriction of security to amount described as debt, see post § 19.
Filing in only one place where property is in two places, see post § 31.
General doctrine as to effect of partial invalidity of contracts, and the construction of contracts to determine whether they are severable so that one part may stand, the other falling, see Contracts, IV, D, VI, A; Sales, II.

¶ 42. A chattel mortgage executed by a husband alone upon property a part of which belongs to that class of exempt property a mortgage of which is declared by How. St., § 7686, to be void unless also executed by the wife, is void only to the extent of the exempt property.—Watson v. Mead, 98 Mich. 330.

¶ 43. The lien held by one who has taken a mortgage for a copartnership is not affected by the fact that the mortgage was made to include the individual debt of a partner, or was fraudulent in law as against a subsequent mortgagee.—Caulfield v. Curry, 63 Mich. 594.

§ 10. Waiver and estoppel.

Effect of filing as mortgage upon right to claim instrument as bill of sale, see ante § 3.
Estoppel of mortgagor or privy to contest mortgage for failure to file, see ante § 27.
Waiver and estoppel affecting third persons, see post §§ 52-54.
Waiver and estoppel of priority, see post § 85.
Estoppel to claim as real estate mortgage one treated as chattel mortgage, see Estoppel, III.

¶ 44. Plaintiff is estopped in replevin from disputing the validity of a chattel mortgage in the defendant's hands and denying that it stands as security for a note signed by himself and the mortgagee as joint makers where the time of payment was extended by the defendant upon the promise of the plaintiff and the other maker to assign and the subsequent assignment of the mortgage.—Scofield v. Farmer, 125 Mich. 470.

¶ 44a. The presence of the mortgagor at a foreclosure of a fraudulent mortgage is no assent to the sale and no voluntary payment of the purchase money which he alleges to be usury.—Canning v. Harlan, 50 Mich. 320.

B. SUBJECT MATTER AND DEBT OR LIABILITY SECURED.

§ 11. What may be mortgaged.

Sufficiency of description as filed to cover accounts payable, see post ¶ 166.

The distinctions between personal and real property are treated in Property; Real Property; Fixtures. Whenever the question turns on whether the subject matter constitutes personal chattel property, those topics should be consulted.

Assignments for security, and assignability of choses in action, see Assignments, I, §§ 1-11, III, § 23.

Mortgaging of partnership property, and right of one partner to bind the firm, see Partnership, III, IV.

Selection of exemptions by act of mortgaging part, see Exemptions, III.

Loans on salaries, household goods, etc., in certain cities, see Comp. L. 1915, § 6025.

¶ 45. Whether there can be a mortgage of a mortgage of chattels, quaere.—Place v. Grant, 9 Mich. 42.

§ 12. Future property.

Sufficiency of description to include, see also ante ¶ 18.

Inclusion of future goods as making conditional sale a mortgage in effect, see also ante § 3.

Securing future debts, see post § 13.

Accessions and additions to mortgaged property, see post § 18.

Failure to file mortgage as affecting right to future goods, see post § 27.

Filing as protecting after-acquired goods, see post § 43.

Effect of want of filing on future acquisitions, see post ¶ 113.

Sufficiency of affidavit of renewal of mortgage of after-acquired goods, see post § 95.

In so far as mortgagability of future property depends on the transferability of a nonexistent subject matter, see also Assignments, I; Contracts, I, IV; Property.

¶ 46. A mortgage on a stock of goods may be made to cover goods afterwards put in to keep up the stock.—Cadwell v. Pray, 41 Mich. 307.

¶ 47. A chattel mortgage may lawfully cover after-acquired property.—Louden v. Vinton, 108 Mich. 313; Huellmantel v. Vinton, 116 Mich. 621.

¶ 48. A mortgage on a dealer's stock may be made to cover after-acquired goods; but they must be brought within its descriptive words; and a mortgage drawn to cover goods to be "added to" the stock, or gotten "for use" in the business, will not include goods bargained for but never received at the place of business, or which, on being received, are devoted to some other purpose.—Curtis v. Wilcox, 49 Mich. 425.

¶ 49. Future as well as existing book accounts may be mortgaged; and a mortgage of all future book accounts covers an unpaid account subsequently accruing to the mortgagor, whether or not it is entered upon his books.—Dunn v. Michigan Club, 115 Mich. 409.

¶ 50. Where a mortgage on a stock of goods authorizes the mortgagor to retail in the ordinary course, and requires him to keep up his stock to a specified amount as security to the mortgagee, and keep it insured for his benefit, and is worded to cover all the stock he shall have from time to time in trade, it will authorize the mortgagee to seize and sell such goods as were added to the stock after giving the mortgage, unless rights of third persons have intervened.—Leland v. Collver, 34 Mich. 418.

¶ 51. Where, after the execution by M. to C. of a mortgage upon a stock of goods and all additions thereto, a third person delivers to M. certain goods under written contracts that title thereto is to remain in the vendor until full payment, held, in replevin by C. against M.'s receiver, that M.'s interest in the latter goods—including, as an incident, the right of possession—was covered by the mortgage.—Chafey v. Mathews, 104 Mich. 103.

¶ 52. Where a mortgage on a stock of goods contemplates that the stock on hand and all its proceeds shall be bound, though it does not in terms provide for a lien upon future acquisitions, a strong equity is raised in favor of the mortgagee as against the future additions; and though that equity would not prevail against a levy made while it was no more than a general equity, yet where, by valid and formal agreement or otherwise, it had become actually attached to the goods before levy, it would prevail.—People v. Bristol, 35 Mich. 28.

§ 13. What may be secured; future debts.

Mortgage to secure agreement to restrict matter published in newspaper, see ante ¶ 8.
Mortgaging future property, see ante § 12.
Sufficiency of description of debts to be secured, see post § 19.
Necessity of filing the contract secured, see post § 26.
Rights of assignee of mortgage covering future debts, see post § 88.
Increasing amount of loan after levy by third person on mortgagor's equity, see post ¶ 348.

¶ 53. A mortgage may be given to secure the performance of any other act or contract by the mortgagor, or by a third person, besides the payment of money.—Byram v. Gordon, 11 Mich. 531.

¶ 54. A chattel mortgage given to secure an existing indebtedness, and the payment of the price of a bill of goods which the mortgagor has ordered, is valid.—Rosenthal v. Bishop, 98 Mich. 527.

¶ 55. A chattel mortgage given to secure the mortgagee as indorser of the mortgagor's notes is a valid chattel mortgage, and prima facie constitutes security for renewals of the note until the whole amount has been paid. —Meech v. Citizens' Ins. Co., 147 Mich. 343.

¶ 56. A mortgage given in good faith to secure future advances agreed to be made by the mortgagee, as well as present indebtedness, is valid.—Hyde v. Shank, 77 Mich. 517.

§ 14. ——Joint and several debts.

Validity of partnership mortgages, covering firm and several debts, as against third persons, see also post § 56.
Right of foreclosure by joint mortgagees, see post ¶ 460.
Comortgagee's right of action for torts by third persons, see post § 145.

¶ 57. A mortgage to several persons jointly may be made to cover separate debts.—Adams v. Niemann, 46 Mich. 135; Walker v. White, 60 Mich. 427; Lyon v. Ballentine, 63 Mich. 97.

¶ 58. A mortgage upon property of a partnership executed by one member in the firm name to a trustee to secure certain creditors of the firm, setting forth the particular claims secured, is not invalid as to such creditors because made to secure also an individual claim against the partner.—Walker v. White, 60 Mich. 427.

¶ 59. A mortgage given by copartners to secure firm debt is not void because also including private debt of one partner.—Caulfield v. Curry, 63 Mich. 594.

§ 15. Description of property.

Necessity of describing and sufficiency of description of after-acquired goods, see ante § 12.
Descriptions of merchandise and trade property, see post § 16.
Of mortgaged animals, see post § 17.
Increase or additions to property described, see post § 18.
Sufficiency of description as jury question, see post § 22.
Sufficiency of description in mortgage as filed to charge subsequent purchaser or mortgagee with notice, see post § 39.

¶ 60. Written descriptions of property are to be interpreted in the light of the facts known to and in the minds of the parties at the time.—Willey v. Snyder, 34 Mich. 60.

¶ 61. The intention of the parties to a mortgage may aid in ascertaining the exact description of the property it is to cover and in applying it thereto.—Cass v. Gunnison, 58 Mich. 108.

¶ 62. The intention of the parties to a mortgage cannot apply the mortgage to property not known to the parties when the mortgage was made.—Cass v. Gunnison, 58 Mich. 108.

¶ 63. General terms in a clause describing property incumbered thereby are limited to the class of property specified.—Kuschell v. Campau, 49 Mich. 34.

¶ 64. A mortgage of "twenty acres of wheat now sown and growing on the ground, and still to be sown, on the twenty acres, this present season of 1886, on the farm," etc., is not void for uncertainty, but covers, as against a subsequent purchaser or incumbrancer, the first twenty acres sown that season, or as much thereof as was sown when the mortgage was executed.—Wade v. Strachan, 71 Mich. 459.

¶ 65. A mortgage of an undivided half interest in a growing crop of peppermint, a perennial, made by one in possession of the land on which the crop is growing, under an oral contract good for only one year, cannot, as against a lien for distilling the mint and for advances made to mortgagor by the owner of the land, be held valid as to the crop grown by the mortgagor the following year, although the owner knew of the mortgage, and permitted the mortgagor to continue in possession the second year.—Brown v. Bolt, 116 Mich. 52.

¶ 66. Where mortgaged goods are described in the mortgage as "all household and personal effects," and said general description is followed by a specific and minute descrip-

tion of the goods, the latter description limits the former to the property particularly described.—Kearney v. Clutton, 101 Mich. 106.

¶ 67. Where the description in a mortgage, after enumerating certain articles, goes on with the words, "carpets, bedding, bedroom furniture and other personal property in and about said house and premises; except herefrom such personal property as is exempt from execution by the laws of the state of Michigan, to wit, stoves in use, family pictures, library and school books, clothing provisions, fuel and sewing machine; also, excepting household goods, furniture and utensils therein, of the value of $250"—the mortgagors having more than two hundred and fifty dollars' worth of household goods, furniture and utensils aside from the articles enumerated and those specified as exempt,—it was held that the intention was to mortgage the specific articles unconditionally, and that the general description following the specific enumeration was to give so much further security as the property covered by it would give after deducting from it what was exempt from execution and two hundred and fifty dollars' worth of household goods, furniture and utensils besides.—Giddey v. Uhl, 27 Mich. 94.

§ 16. ——Merchandise and trade property.

¶ 68. A wooden figure of an elephant used as a sign to boot and shoe store is covered by mortgages on "furniture" of the store, and on "signs and furniture."—Curtis v. Martz, 14 Mich. 506.

¶ 69. The property covered by a chattel mortgage was described as "all the stock in trade, goods, wares, and merchandise, furniture, and fixtures, of every name and nature, situated in the building now occupied by said first party in the village of T., and all goods and wares and merchandise and personal property that may hereafter be acquired by us, and placed in said store building, excepting from the terms and conditions of this mortgage such property as is by law exempt from levy and sale upon execution, hereby reserving the right to make selection of said exempt property." Held, that the description was sufficient to furnish the means of identity.—Louden v. Vinton, 108 Mich. 313.

¶ 70. A mortgage given by a merchant of "goods in [his] store" will not be held, under these words, to include a safe kept in his store, not for sale, but for his own private use.—Curtis v. Phillips, 5 Mich. 112.

¶ 71. A mortgage on a stated quantity of certain specified kinds of lumber, lying in a specified place, is not void for uncertainty on the ground that the quantity of such lumber at that place is greater than the mortgage calls for, so long as it is all of the same value, and is treated as one mass.—De Graff v. Byles, 63 Mich. 25.

¶ 72. Whether a mortgage upon a quantity of lumber is not void for uncertainty if given before the mortgagors have received the lumber and acquired title to it, and before the portion designated in the mortgagee has been set apart and identified by the selection, from the mass, of other lumber claimed by a creditor, quære.—Cass v. Gunnison, 58 Mich. 108.

¶ 73. An electric light and power company mortgaged certain real estate, together with all buildings, constructions and improvements upon said premises or elsewhere situated, belonging to said company, and all dynamos, engines, boilers, pumps, wells, machinery, tools, instruments, apparatus, and lines of poles, and its business of producing, renting, selling, distributing, and using electricity. Held, that the term "apparatus" includes carbon lamps, stored in the mortgagor's buildings, and not in use.—Ramsdell v. Citizens' Electric Light & Power Co., 103 Mich. 89.

¶ 74. A mortgage on "all the lumber now on hand at said mill, and in transit, belonging to said first parties, being the lumber purchased from said second parties," cannot be made to cover lumber shipped after it was executed, and not identified until shipped.—Cass v. Gunnison, 68 Mich. 147.

¶ 75. A mortgage upon a stated quantity of mixed logs in the drive is void for uncertainty as against third parties who have acquired rights, if it does not furnish the data for separating the mortgaged logs from the mass.—Richardson v. Alpena Lumber Co., 40 Mich. 203.

¶ 76. A mortgage upon a steam saw-mill on certain described land, and upon "five horses, one shingle shed, one yoke of oxen (white or nearly white), one lumber wagon, one pair of trucks, two sets of harness, twelve sets of bob sleighs, and all tools, chains and implements of every kind used in and about said mill," is not void on its face for indefiniteness.—Austin v. French, 36 Mich. 199.

¶ 77. A vendor selling a business under a contract in the nature of a chattel mortgage, held not entitled to take possession of the vendee's bills receivable on the latter's default.—Lehnen v. Ryan, 185 Mich. 246.

§ 17. ——Animals.

Increase of animals as part of mortgaged property, see post § 18.

¶ 78. Where several oxen are described in a mortgage as "red, white and blue," the full description need not apply to each.—Fordyce v. Neal, 40 Mich. 705.

¶ 79. The following description in a mortgage is sufficient: "all the cattle, consisting of two yokes, aged six and seven years, color, red, white and blue, * * * and all other property now in our possession in or about said village," etc.—Fordyce v. Neal, 40 Mich. 705.

¶ 80. A description of property in a mortgage as "one Durm bull, known as the Grinnalls bull—said bull is four years old, weight about 2,400 pounds," is not open to the objection that it is so vague and indefinite as to prevent the mortgage, when duly filed, becoming constructive notice to a subsequent purchaser of the bull from the mortgagor.—Willey v. Snyder, 34 Mich. 60.

¶ 81. As against others than the parties to the mortgage, "one sorrel horse" is not a sufficient description under the Canadian statute, which requires that a mortgage of chattels "shall contain such efficient and full description thereof that the same may be thereby readily and easily known and distinguished."—Montgomery v. Wight, 8 Mich. 143.

¶ 82. The name of an animal, if it has one, furnishes a description of it, for the purposes of a chattel mortgage. Semble.—Montgomery v. Wight, 8 Mich. 143.

§ 18. Additions and accessions.

Rights in commingled goods, see also Accession and Confusion, ¶ 19.
Filing as covering additions, see post § 43.
Fees included in amount required to redeem, see post § 115.
Estoppel of purchasers under mortgage to question its application to accessions, see post ¶ 227.
General law as to accessions or additions to property, and rights of parties on confusion of goods, see Accession and Confusion.

¶ 83. New printing material purchased after the printing establishment has been mortgaged, to supply the wear, decay and destruction of the old, and which has become so commingled with the old as not to be readily distinguished, would be included in the mortgage, and become a part of the mortgaged property by accession; but if so kept separate as to be readily distinguishable, it would not be so included.—Fowler v. Hoffman, 31 Mich. 215.

¶ 84. The doctrine applicable to a confusion of goods applies where a mortgagor, having added new purchases to the mortgaged stock, refuses on demand to identify and separate the new goods from the old, when the mortgagee is rightfully taking possession; and this is so though there be no such confusion of goods as absolutely to destroy their separate identity, if only they cannot be separated without the mortgagor's aid.—People v. Bristol, 35 Mich. 28.

¶ 85. A purchase money mortgage on a pregnant mare covers the colt unless it is weaned before the maturity of the mortgage.—Kellogg v. Lovely, 46 Mich. 131.

¶ 86. Where one buys a mare on credit and gives a chattel mortgage on her for the entire purchase price, and she is afterwards found to be with foal which is not weaned before the credit expires, he is not entitled to keep the colt if he makes default in payment and the mare is taken on the mortgage.—Kellogg v. Lovely, 46 Mich. 131.

¶ 87. A description of the property covered by a chattel mortgage as "all of the * * * cattle, calves, * * * now on hand, or that may grow or be raised on our farm during the season," is sufficiently broad to include calves which, at the time of the execution of the mortgage, were carried by cows owned by the mortgagors.—Cleveland v. Koch, 108 Mich. 514.

¶ 88. A chattel mortgage on specific property securing the payment of a certain sum in annual payments during six years and providing that it should cover all other personal property which the mortgagor might own or acquire during such years, is invalid as to subsequent good faith purchasers or attaching creditors, as to property which had no relation to that in possession of the mortgagor at the time of giving the mortgage, but was afterwards acquired outside of the business in which he was then engaged.—Ferguson v. Wilson, 122 Mich. 97.

§ 19. Description of debts or liabilities and parties.

Effect of conflict or discrepancy between note and mortgage, see ante ¶ 40.
Notice as limited to filed description of claim, see post § 39.
Mistake or excessiveness as fraud on third persons, see post § 58.
Description of condition on which indemnity mortgage shall operate, see also post § 62.
Description and statement of amount due in renewal affidavit, see post § 95.
What mortgage on salaries, household goods, etc., in certain cities must state, see Comp. L. 1915, § 6026.

¶ 89. A mortgage cannot be held invalid as not truthfully describing the indebtedness

secured, where, though the real transaction is not set forth in detail, the amount of the indebtedness intended to be secured is correctly stated, and no fraud appears.—Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779.

¶ 90. An objection that a bill of sale is too indefinite and uncertain to have effect as security, in that it fails to state the amount secured thereby, cannot be raised by one who has acquired no valid lien on the property.—First Nat. Bank v. Marshall & Ilsley Bank, 108 Mich. 114.

¶ 91. Where a bill of sale intended as security is given for a specified consideration, and nothing appears upon its face to indicate that it is intended to secure any other or greater sum, the vendor's creditor need treat it as valid only to the amount specified. —Mueller v. Provo, 80 Mich. 475.

¶ 92. A mortgage is not invalidated by the fact that the notes intended to be secured become due at different dates and not at the time fixed by the mortgage.—Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779.

¶ 93. The recital in a chattel mortgage of a desire on the part of the party of the first part, the mortgagor, to secure to "said first party" the payment of the sum named therein does not invalidate the security as to the mortgagor's creditors, where the mortgage acknowledges a consideration received from the party of the second part, and the grant is made to said party.—Louden v. Vinton, 108 Mich. 313.

¶ 94. A mortgage to cover future advances is valid; and the amount named in a mortgage as consideration does not limit the sum for which the mortgage may stand as security, if from the whole instrument the intent to secure future indebtedness is apparent. Where the plain terms of the instrument evidence such intent they will control, as against the mortgagor's contention that it was the understanding of the parties that the mortgage was security only for the consideration named.—Citizens' Savings Bank v. Kock, 117 Mich. 225.

§ 20. Term and time of payment.

Variance in date of payment between note and mortgage, see ante ¶ 92.
Extension of time of payment as new contract, see post § 97.
Time for redemption, see post §§ 112-114.
Foreclosure upon mortgage stating no time for payment, see post § 124.
Express agreement as to time of foreclosure, see post § 127.

¶ 95. A chattel mortgage that fixes no time when the debt secured becomes due and payable is due at once.—Lyon v. Ballentine, 63 Mich. 97; Bearss v. Preston, 66 Mich. 11; McGraw v. Bishop, 85 Mich. 72.

¶ 96. Where no time of performance of the act or contract secured by the mortgage is specified the omission does not vitiate the contract, but the law steps in and requires performance within a reasonable time.—Byram v. Gordon, 11 Mich. 531.

¶ 97. The presumption that a chattel mortgage debt becomes due immediately where no due date is specified is overcome by implications of a term of credit contained in provisions for interest on the principal "until paid, at the time hereinbefore set forth" where it also contemplates the furnishing of more goods on credit, the continuance of a business, the payment for future purchases at the time when the bills should become due, the insurance and replenishment of the stock and the right of the mortgagor to possession and to sell from it in the course of trade.—Crowley v. Langdon, 127 Mich. 51.

§ 21. Agreements to extend to other debts or property.

Application of collateral agreements, see also post § 62.
Extinguishment of debt by merger, see post § 107.
Release of portion of property from mortgage, see post § 109.

¶ 98. A parol agreement that a mortgage shall cover the indebtedness for goods acquired afterwards will not also cover the debts of a partnership subsequently entered into; a written extension would be necessary.—Parkes v. Parker, 57 Mich. 57.

§ 22. Evidence, jury questions and instructions.

Mortgage note as essential proof of right under mortgage as against third person, see post § 71.
As to subsisting debt secured and as to amount in support of mortgagee's right to possession, see post §§ 71. 72.
General law of evidence and instructions, see Evidence; Instructions.
Admissibility of parol evidence, see Evidence, V, A.

¶ 99. Where a chattel mortgage is given in a stated sum to secure the mortgagee as surety against liability on certain notes given by her for the mortgagor's debts, the notes are competent evidence to fix the amount of the indebtedness.—Louden v. Vinton, 108 Mich. 313.

¶ 100. The question whether the parties to a chattel mortgage knew what it was to cover is one for the jury.—Cass v. Gunnison, 58 Mich. 108.

¶ 101. Submission to a jury of the question of the sufficiency of the description in a chattel mortgage as a question of fact is error.—Austin v. French, 36 Mich. 199.

¶ 102. It is for the jury to determine whether there was confusion of goods in a stock of general merchandise, or whether all the goods in a store were covered by a chattel mortgage.—Cadwell v. Pray, 41 Mich. 307.

C. REQUISITES OF THE MORTGAGE, AFFIDAVITS AND FILING.

§ 23. In general.

Instruments amounting to chattel mortgages, see also ante § 1.
Necessary parties to the mortgage, trust mortgages, see ante § 8.
Filing as constructive notice, or in lieu of it actual notice or change of possession, to third persons, see post §§ 35-42.
The contract requisites as to parties, offer and acceptance, legality, and consideration, when governed by principles common to all contracts, will be treated in Contracts, II-V.
Necessity of change of possession, filing or notice as against third persons, see post I, D.
The general requisites of contracts of whatsoever kind are treated in Contracts, which see.

¶ 103. That a chattel mortgage of a stock of goods to secure the mortgagor's present and future obligations to a bank runs to the bank's cashier individually instead of to the bank, cannot be raised as an objection by the mortgagor's receiver when sued in replevin, where it appears that the purpose of the mortgage was fully understood, not only by the mortgagor but by his creditors, that all of the business was done through the cashier, and that no one has been injured by the mortgage not running directly to the bank.—Chafey v. Mathews, 104 Mich. 103.

§ 24. Signatures, execution and date.

The general law governing the signing, attestation, delivery, and acceptance of instruments inter partes is treated in the topic Execution of Instruments.
What constitutes sufficient delivery and acceptance, see Execution of Instruments, III.
Evidence to prove acceptance or delivery of the instrument, see post ¶ 246, and see generally Execution of Instruments, III.
Execution of mortgage of corporate property, see Corporations, XIII, D, XV.
Necessity of signature of wife to cut off exemptions, see Exemptions, IV.

¶ 104. A chattel mortgage need not be under seal.—Sweetzer v. Mead, 5 Mich. 107.

¶ 105. Since a seal on a chattel mortgage is a nullity because unnecessary, it will not vitiate the mortgage.—Sweetzer v. Mead, 5 Mich. 107.

¶ 106. Where a duly filed chattel mortgage was signed by both husband and wife, it was immaterial as to the question of priority what financial relations existed between the mortgagors, or whether she had or had not any interest in the property mortgaged; since her signature was either formal and of no consequence or was substantial as that of a comortgagor.—Eddy v. McCall, 71 Mich. 497.

¶ 107. A chattel mortgage is not invalid because dated back.—Johnson v. Stellwagen, 67 Mich. 10.

§ 25. Affidavits.

Defect in affidavit as filed, see post § 26.
Renewal affidavit, see post § 95.
General law of affidavits, see Affidavits.
Necessity of affidavit filed with conditional sale, see Sales, XII.
Necessity of filing affidavit of good faith, see Comp. L. 1915, § 11988; see also Pub. Acts 1915, No. 163.

¶ 108. An affidavit attached to a chattel mortgage, where sworn to, is valid although not signed by affiant.—Rameau v. Valley, 168 Mich. 569.

§ 26. Filing and copies.

As to whom filing is requisite, see post §§ 27, 44 et seq.
As to what character of property filing is requisite, see post § 28.
Instruments or mortgages affecting realty as well as personalty, see post § 29.
Place and time for filing, see post §§ 30, 31.
Character of instrument, mortgage required to be filed or other contract not requiring filing, see ante §§ 2-4.
Actual notice or change of possession as equivalent to charge third persons, see post §§ 37, 38, 40-42.
Filing as constructive notice to third parties, see post § 39.
Persons affected with notice, see post §§ 44-49.
Necessity of renewal, see post § 92.

¶ 109. Act No. 258, Pub. Acts 1905, governing the making and recording of chattel mortgages, must be strictly complied with to render the same valid.—People ex rel. Esper v. Burns, 161 Mich. 169.

¶ 110. Where a mortgage was given to secure the performance of a written agreement, the latter was held to be no part of the mortgage, and therefore not required

to be filed with it in order to render the record notice to third persons,—Byram v. Gordon, 11 Mich. 531.

¶ 111. Act No. 258, Pub. Acts 1905, provides that a chattel mortgage shall be void unless recorded, and before it shall be recorded an affidavit must be made by the mortgagor that the consideration for the instrument is actual and adequate, and that the mortgage is given in good faith. A mortgagor made such affidavit and recorded the mortgage, but the notary failed to fill in the jurat. Held, the mortgage was void as against a previous creditor.—People ex rel. Esper v. Burns, 161 Mich. 169.

§ 27. ——As to whom required.

¶ 112. A mortgagor of chattels cannot contest the mortgage for the failure to file it, nor can his trustee.—Lyle v. Palmer, 42 Mich. 314.

¶ 113. A mortgage of a stock of goods made August 31, 1875, which covered expressly not only all goods then in store, but all other goods to be thereafter put there, and which was not filed till November 4, 1875, is held valid as between the parties to bind goods purchased by the mortgagor, and added to the stock in the store on October 4, 1875.—American Cigar Co. v. Foster, 36 Mich. 368.

§ 28. ——Character of the property; choses in action.

Future acquisitions, see also ante ¶ 113.
Filing where property is realty in character, see Notice and Record of Title, II, E.

¶ 114. How. St., § 6193, providing for the filing of chattel mortgages, does not apply to a mortgage of accounts.—Farrell Foundry & Machine Co. v. Preston Nat. Bank, 93 Mich. 582.

¶ 115. An assignment of open accounts as security for a debt need not be filed as a chattel mortgage and is not void as against other creditors for want of such filing; How. St., § 6193, providing that every mortgage or conveyance intended to operate as a mortgage of goods and chattels which is not accompanied by an immediate delivery and followed by an actual change of possession shall be void as against creditors and subsequent purchasers unless recorded, applies only to mortgages of goods and chattels that are capable of delivery.—Preston National Bank v. Smith Middlings Purifier Co., 84 Mich. 364.

¶ 116. An assignment of open accounts as security need not be recorded or filed, but is valid without filing if made bona fide, and without intent to defraud.—McDonald v. Preston Nat. Bank, 111 Mich. 649.

¶ 117. R. S. 1846, chap. 81, tit. 19, § 10, How. St., § 6193, avoiding chattel mortgages not filed, is inoperative as to mortgages upon enrolled vessels.—Robinson v. Rice, 3 Mich. 235.

¶ 118. Mortgages upon enrolled and licensed vessels need not be filed in township or city clerk's office to be valid, and no presumption of fraud arises from failure to file them there.—Haug v. Third Nat. Bank, 77 Mich. 474.

¶ 119. A mortgage on a United States vessel recorded in the office of the collector of part of the city of Detroit, where she was duly licensed as required by the federal statute is valid despite the fact that the mortgage was not registered in the city clerk's office of Detroit and that she had abandoned for two years the coasting trade for which she had been licensed during which time she had been employed as a local ferry.—Fleming v. Fire Ass'n of Philadelphia, 147 Mich. 404.

§ 29. ——Real estate transfers covering personalty also.

Effect of filing or record with real estate mortgages, see post ¶ 130.

¶ 120. A., the vendee in land contracts from B. and C. giving no possessory rights until fully paid up, defaulted on both contracts and entered into another contract with B. by which B. was to make advances to A., B. taking an assignment of the C. contract to secure his own first contract and his advances. Afterwards B. paid what was due on the C. contract and took a deed from C., which was in effect a mortgage, held as security against A. Subsequently D., who was getting out lumber from the two tracts, received A.'s order to hold the lumber for B. and agreed to do so. Held, that B.'s claim to the lumber need not have been filed as a chattel mortgage, and that it was superior to the claim of a chattel mortgagee from A.—Gamble v. Ross, 88 Mich. 315.

§ 30. ——Place and time for filing.

See also ante ¶ 15.
Filing absolute bill of sale among mortgages, see also ante ¶ 21.
Effect of actual notice of mortgage not properly filed, see post § 37.
Effect of tardy filing as against intervening rights, see post §§ 48, 49.
Effect upon creditors' rights of mistake in filing, see also post § 48, ¶ 209.
Later mortgage filed before earlier one, see post § 49.
Withholding from files as fraud on creditors, etc., see post § 55.
Time of filing as bearing on good faith, see post § 59, ¶ 245.

Effect of foreign filing, see also post ¶¶ 360-362.
Lien of foreign mortgages, see post § 86.
Time for renewal, see post § 98.
Place for renewing, see post § 94.
Proper domicile of the party, and change of domicile, see Domicile.
Place of filing chattel mortgage, see Comp. L. 1915, § 11988; see also Pub. Acts 1915, No. 163.

¶ 121. Under How. St., § 6193, which requires chattel mortgages executed by nonresidents of this state to be filed in the office of the clerk of the township "where the property is," such filing must be in the township where the property is situated at the time of the execution and delivery of the mortgage, and not in some other township or city to which the property may be removed after such execution and delivery.—First National Bank v. Weed, 89 Mich. 357.

¶ 122. A chattel mortgage must be filed in the town where the mortgagor resides.—Reynolds v. Case, 60 Mich. 76.

¶ 123. The record of a mortgage made and duly filed in another state or country is of no avail when the property is brought into this state.—Montgomery v. Wight, 8 Mich. 143; Boydson v. Goodrich, 49 Mich. 65.

¶ 124. A mortgage not filed according to the laws of Michigan when the property is brought into the state is inferior to a levy of attachment.—Corbett v. Littlefield, 84 Mich. 30.

¶ 125. Where the members of a firm have their actual and permanent residence in one place, but transact their business at another, where they board for part of the year, but with no intention of changing their domicile, a mortgage given by them should be filed at their permanent place of residence.—Briggs v. Leitelt, 41 Mich. 79.

¶ 126. A mortgage made by partners is not filed where the mortgagors or either of them "resides" if filed in a town where they do business, but where one does not live and the other expects to live but has not yet brought his family to live.—Cass v. Gunnison, 68 Mich, 147.

¶ 127. A partnership having a definite local abiding place may be said to reside there for the purpose of determining the proper place under the statute for filing a chattel mortgage given by the firm in the firm name, and which is strictly a partnership incumbrance.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

¶ 128. Where a partnership mortgage made in the firm name, signed by the resident partner alone (the other partner residing in another state), and covering only firm property, was filed in the office of the clerk of the township where the resident partner resided, and where the seat or abiding place of the former was located, it was held valid and operative, under Comp. L. 1871, § 4706, How. St., § 6193, as to property described in it and situated in another township and county.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

¶ 129. A mortgage, where possession is not given, is void as against the mortgagor's creditors, if not put on file in the proper office, even though recorded elsewhere by mistake.—Wallen v. Rossman, 45 Mich. 333.

¶ 130. A chattel mortgage included in a mortgage of land and recorded therewith in the office of the register of deeds, but not filed with the city clerk, is void as against the claim of the mortgagor's execution creditors who did not know of its existence when they gave credit to the mortgagor.—Ramsdell v. Citizens' Electric Light & Power Co., 103 Mich. 89.

§ 31. ——Property in two places.

¶ 131. A mortgage which had been properly filed as to a portion of the property covered by it would not be rendered inoperative as to such property by the fact that it was not properly filed as to other distinct chattels described in it and situated elsewhere. A conveyance or incumbrance may be bad as to a part of the property which is the subject of it and good as to the residue.—Hubbardston Lumber Co. v. Covert, 35 Mich. 254.

§ 32. Purpose and effect of filing.

¶ 132. The purpose of Comp. L. 1871, §§ 4706-4708, How. St., § 6193, in requiring chattel mortgages to be filed, is not merely to give notice to creditors and purchasers, but chiefly to show the transaction to have been actual and genuine, and to prevent secrecy and imposition, and to remove the presumption otherwise arising against good faith.—People v. Bristol, 35 Mich. 28.

¶ 133. The statute providing for the filing and renewal of chattel mortgages was intended to do away with the necessity of delivery, and to enable the mortgagor to retain possession until default.—First National Bank v. Summers, 75 Mich, 107.

§ 33. ——Sufficiency of record; neglect of clerk.

Filing in wrong book or place, see ante ¶¶ 129, 130.
Notice imputed by the filing, see post § 39.
Sufficiency of record of renewal, see post § 96.

¶ 134. A mortgage cannot be taken from the files in the town clerk's office; it is a part of the public records; a certified copy of it will serve to show the filing, and to use in taking possession of the goods covered by it.—Warner v. Comstock, 55 Mich. 615.

¶ 135. A chattel mortgage properly filed is a public record, and belongs to the office; and the clerk has no right to deliver it to the mortgagee to be taken away.—Woodruff v. Phillips, 10 Mich, 500.

¶ 136. One having a mortgage on file in the city clerk's office took it away for a few days, and without his knowledge the clerk made an entry in the file book that the mortgage had been delivered to the mortgagee. It was held that this entry was unofficial, and did not enable one who had bought the mortgaged property to hold it as against the mortgage, which had been returned to the files before his purchase had been made.—Woodruff v. Phillips, 10 Mich. 500.

¶ 137. A mortgage, properly filed and, afterwards, unlawfully delivered by the clerk to the mortgagee, needs no second indorsement of filing by the clerk on its return to make it notice thereafter under the statute. —Woodruff v. Phillips, 10 Mich. 500.

¶ 138. Although the indorsement of filing upon a chattel mortgage is made by a deputy clerk for whose appointment the city charter does not provide, yet where such mortgage is actually deposited among the files in the city clerk's office, and an entry of the filing made in the record book, such entry and filing are sufficient and constitute notice of the mortgagee's rights.—Keating v. Retan, 80 Mich. 324.

¶ 139. Where a mortgage is at once duly filed with the town clerk, who receives and properly indorses it, without receiving or demanding his statutory fees, the fact that the town clerk, being himself the mortgagor, neglects to enter the same as required upon the alphabetical index, or to place the instrument in the files of mortgages, cannot invalidate the mortgage; the remission of the fees, or giving credit therefor, concerns no one but the officer, and the mortgagee, having done all that the statute requires of him, cannot be prejudiced by the failure of the officer to do his duty.—People v. Bristol, 35 Mich. 28.

D. EFFECT AGAINST THIRD PERSONS; NOTICE; CHANGE OF POSSESSION.

§ 34. In general.

Priority of mortgage lien over other liens, see post III.
Character of instrument, whether mortgage requiring filing or other contract not requiring it, see ante §§ 2-4.
Filing as indicia of construction placed upon instrument, see ante § 3.
Certainty in description of mortgaged goods, see ante §§ 15-17.
Invalidity of unfiled mortgages as against third persons having no notice, see post §§ 35, 36.
Filing, actual notice, or change of possession as equivalents for purpose of affecting third persons, see post §§ 37-42.
Lien and priorities in general, see post III.
Lien, priority and effect of mortgage relatively to other lienor or claimant, see post III.

¶ 140. A mortgage not filed or one followed by continued possession is void as against subsequent rights.—In re Hicks, 20 Mich. 280.

§ 35. Unrecorded mortgages.

Immateriality of good faith, see post § 36.
Change of possession and sufficiency of change to dispense with recording, see post §§ 40-42.
Validity of unfiled mortgage as against creditor of adverse claimant, see post § 50.
Withholding from files as fraud, see post § 55.
Priority between unrecorded mortgages, see post § 82.
Renewal of unrecorded mortgage, see post § 99.

¶ 141. An unrecorded chattel mortgage given before the inception of the claim of a creditor is invalid as against such creditor, where there has been no change of possession as between mortgagor and mortgagee. —O'Neil v. Brooks, 180 Mich. 540.

¶ 142. Under Comp. L. 1897, § 9523, an unrecorded bill of sale intended as a mortgage not accompanied by any change of possession is void as to persons extending credit to the seller in good faith without knowledge of its existence.—Sachs v. Norn, 139 Mich. 357.

¶ 143. A mortgage not filed is void as against the creditors of the mortgagor by the express terms of the statute, when the mortgagor is left in possession as before giving it. Whether it is not also void as against one to whom the mortgagor has assigned for the benefit of his creditors is left undecided by this case.—Putnam v. Reynolds, 44 Mich. 113.

¶ 144. Cooper v. Brock, 41 Mich. 488, holding that an unfiled mortgage of chattels is absolutely void as against creditors or subsequent purchasers or mortgagees, unless there

is an immediate delivery and an actual and continued change of possession of the property, seems to be overruled by later decisions. —Watson v. Mead, 98 Mich. 330.

¶ 145. Since the statutes make no provision for filing a nonresident's chattel mortgage, the necessity of possession by the mortgagee is not dispensed with in such a case. —Montgomery v. Wight, 8 Mich. 143.

¶ 145a. U. S. Rev. Stat., § 4192, in reference to recording mortgages upon enrolled and licensed vessels, supersedes the state statute in regard to filing chattel mortgages, and no presumption of fraud that would arise under the state law because of failure to file them can prevail against their validity.—Haug v. Third Nat. Bank, 77 Mich. 474.

§ 36. ——Materiality of intention or good faith.

¶ 146. If a bill of sale of a shingle-mill is taken as security for its owner's debts, but the mill is left in his possession, a copy of the bill must be filed at once or the property cannot be protected by it against other creditors of the owner, whose good faith alone will not protect the unrecorded transfer (How. St., § 6193).—Talcott v. Crippen, 52 Mich. 633.

¶ 147. The intentions or suppositions of the parties to an instrument which is in effect a conveyance, to be defeated on the payment of certain indebtedness, as to who should be regarded as holding the title, cannot avail as against subsequent mortgagees in good faith, in the absence of the continued change of possession or notice required by How. St., § 6193.—Damm v. Mason, 98 Mich. 237.

¶ 148. Under How. St., § 6193, the question of good faith and absence of intent to defraud creditors is immaterial; the mortgage is void as against creditors or subsequent purchasers or mortgagees unless the filing or change of possession takes place. How. St., § 6190, making such failure only presumatively fraudulent, applies to absolute sales and assignments and not to chattel mortgages or to assignments of personalty by way of security.—Cooper v. Brock, 41 Mich 488; Buhl Iron Works v. Teuton, 67 Mich. 623.

§ 37. Knowledge or actual notice.

Persons affected, see post § 44 et seq.
Evidence of notice, see post § 59.
Evidence, jury questions and instructions, see post §§ 59, 60.
Notice of mortgage by attorney as binding client, see also Attorneys, § 25.
Doctrine of notice involved in the negotiable instrument evidencing the mortgage debt, see Negotiable Instruments, XIII.

(1 Mich. Dig. 57)

General doctrine of notice to principal or client through agent or attorney, see Agency, II, E; Attorneys, II, C; Corporations, XVII, E.

¶ 149. By virtue of the statute (How. St., § 6193) filing is not essential to the validity of a chattel mortgage as against a vendee having actual notice.—Read v. Horner, 90 Mich. 152.

¶ 150. Dictum, that as to subsequent purchasers and mortgagees, notice of a chattel mortgage is equivalent to filing.—People ex rel. Esper v. Burns, 161 Mich. 169.

¶ 151. In an action involving notice of a chattel mortgage alleged to have been recorded in a township other than that of the mortgagor's residence, an instruction that actual notice of the mortgage is just as efficacious as notice as is the filing, is proper. —Loeser v. Jorgenson, 137 Mich. 220.

¶ 152. Notice to a creditor of the existence of a chattel mortgage is not sufficient to make it valid, when under the law it is invalid, either from failure to file it properly or failure to change possession.—People ex rel. Esper v. Burns, 161 Mich. 169.

¶ 153. Being notified of a prior mortgage at the time of taking a conveyance of or lien upon the property, the subsequent purchaser is put upon inquiry as to the extent of the prior mortgage, and takes subject to its amount.—Doyle v. Stevens, 4 Mich. 87.

¶ 154. The notice to a subsequent purchaser or mortgagee of a prior unrecorded lien upon chattels must be so clear and distinct as to render it bad faith in the second mortgagee to insist upon his mortgage in preference to the former because recorded first.—Doyle v. Stevens, 4 Mich. 87.

¶ 155. Notice of the existence of an unpaid prior mortgage of personal property destroys the preference which a second mortgagee might otherwise be entitled to claim in consequence of the omission of the first mortgagee to refile his mortgage within a period prescribed for that purpose by statute. —Wetherell v. Spencer, 3 Mich. 123.

¶ 156. A member of a creditor firm was called from his house at 10 p. m. to a lawyer's office, and was there informed that his firm's debtors were in trouble and desired to give a mortgage, as they had promised to protect the firm. Thereupon a mortgage was executed, reciting that the goods were free from incumbrances except those named therein. Held, that a failure to make further inquiry would not charge the mortgagees

with notice of a mortgage executed earlier on the same day.—Millar v. Olney, 69 Mich. 560.

¶ 156a. An attorney's knowledge of the existence of a chattel mortgage filed by mistake in the wrong office is notice to his client who has an account against the mortgagor which is put into judgment by such attorney after such filing.—Littauer v. Houck, 92 Mich. 162.

§ 38. ——Taking subject to mortgage or incumbrances.

Estoppel by recognizing or assumption of debt, see post § 53.

¶ 157. Where a mortgage contains a clause showing that it is made subject to a prior one, filing is unnecessary to maintain such priority, which can never be secured for the second mortgage as against the first except by agreement of the parties.—Flory v. Comstock, 61 Mich, 522.

¶ 158. The creditors of one who buys mortgaged goods, assuming the mortgage, cannot complain that the mortgage is invalid for want of filing.—Dwight v. Scranton & Watson Lumber Co., 69 Mich. 127.

¶ 159. A purchaser of property which was subject to a chattel mortgage, could not avoid such mortgage because it was not filed at the place of residence of the mortgagor, where he had notice of the mortgagee's claim.—Soule v. Harrington, 135 Mich. 155.

¶ 160. Where a second mortgage is taken subject to a prior one duly filed, given to secure a debt of a firm of which the second mortgagee was a member, the nonrenewal of the prior mortgage cannot give priority to the second, executed by the other partner.—Flory v. Comstock, 61 Mich. 522.

¶ 161. Where a mortgaged chattel is advertised for sale and sold subject to the mortgage, purchasers have sufficient notice of the mortgage to estop them from contesting it on the ground that it was not duly placed on file.—Kellogg v. Secord, 42 Mich. 318.

¶ 162. Advertising and selling a chattel subject to a mortgage thereon is, to purchasers, such notice of the mortgage as dispenses with filing.—Kellogg v. Secord, 42 Mich. 318.

§ 39. Constructive notice from filing.

Filing to constitute notice, see ante §§ 26-31.

As to what property filing gives notice, see ante § 28.

Sufficiency of the record or filing, see ante § 33.

Change of possession as equivalent to filing, see post §§ 40-42.

Actual knowledge or notice as equivalent of filing, see ante §§ 37, 38.

Effect of filing in wrong place or record, see also ante ¶¶ 129, 130.

Filing in part only of places where property is situated, see ante ¶ 131.

Effect of officer's neglect to file or index properly, see ante ¶ 139.

Knowledge of mortgage filed in wrong place, see ante ¶ 156a.

Persons affected with notice, see post §§ 44-49.

Priority by filing, see post § 81.

¶ 163. A subsequent mortgagee of chattels is presumed to have notice of a prior mortgage on file.—Caulfield v. Curry, 63 Mich. 594.

¶ 164. A mortgage was given in evidence which purported to be given to secure a certain promissory note. A note of the description was not produced, but one of a different date was offered as the one designed to be secured. It was held that the filing of the mortgage was not notice of any claim other than the one described in it.—Hinchman v. Town, 10 Mich. 508.

¶ 165. The subsequent purchaser or mortgagee is sufficiently charged if the description is such as upon proper inquiry suggested by the description can apply only to the mortgaged chattel; he is required to see that the property which he takes is correctly described and cannot rely on the fact that the name given in the mortgage is not the one by which he takes it.—Willey v. Snyder, 34 Mich. 60.

¶¶ 166, 167. Where a chattel mortgage had been executed by the principal defendant, and duly filed, to secure existing and future indebtedness, and covering future-acquired property, and also all notes and accounts due or to become due the mortgagor, which the mortgagees were authorized to collect, it was held that such mortgage was notice to plaintiffs, and to all other persons, of the rights of the mortgagees in the property covered by said mortgage; and that under it they were entitled to receive from the garnishee defendant the sum of $600 due the mortgagor, on book account, arising largely from the purchase of posts, wood and ties which were owned by the mortgagor at the time he executed the mortgage, it appearing that the mortgagees intended to retain their lien on said property to secure the payment of the indebtedness secured to them by said mortgage.—Fuller v. Rhodes, 78 Mich. 36.

§ 40. Possession as notice.

Rights of possession between mortgagor and mortgagee, see post II, A.

Sufficiency of possession of after-acquired goods, see also ante ¶ 52.
Sufficiency of change and effect of making mortgagor agent of mortgagee, see post §§ 41, 42.
Retention of possession of land by vendor as notice of vendee's rights in timber cut from land, see ante ¶ 120.
Persons affected with notice, see post §§ 44-49.
Right of mortgagee to possession, see post § 67,
Taking possession as equivalent of renewal of mortgage, see post § 92.
Necessity of change of possession, see Comp. L. 1915, § 11985.

¶ 168. A second mortgagee of personal property in possession of a prior mortgagee takes with notice of all the rights of such prior mortgagee.—Grimes v. Rose, 24 Mich. 416.

¶ 169. The rights of a vendor who has taken possession of all the property with the consent of the vendee, under a bill of sale intended as security for the payment of the unpaid purchase money, and who is in possession when the vendee executes a chattel mortgage to secure a pre-existing indebtedness, are superior to those of the mortgagee or his assignee, although the bill of sale is not filed at the time of the execution and filing of the mortgage.—Finn v. Donahue, 83 Mich. 165.

¶ 170. A claim that the possession of chattels is that of the managing partner of a partnership, and at the same time that such person has possession as the mortgagee in an unrecorded mortgage, is inconsistent when the rights of subsequent mortgagees are concerned.—Vining v. Millar, 121 Mich. 235.

§ 41. ——Sufficiency of change.

Making mortgagor agent or bailee of mortgagee, see post § 42.
Time for change and effect of tardy change, see post § 48.
Question of fact, see post § 60.
Necessity of possession of vessels at sea or abroad, see Comp. L. 1915, § 11987.

¶ 171. The change of possession required by How. St., § 6193, where the mortgage is not filed, must be an open, visible and substantial change, and such as to give notice to the public that there has been an actual change of interest or ownership, and, in case of bulky property, such as lumber, must be such as is practicable.—Smith v. Greenop, 60 Mich. 61.

¶ 172. Where the lessee of mortgaged chattels is allowed to remain in actual possession thereof, an assignment of the lease by the mortgagor to the mortgagee's assignee does not constitute such a change of possession as dispenses with filing and renewal.—First Nat. Bank v. Summers, 75 Mich. 107.

¶ 173. Where only symbolical delivery of mortgaged chattels can be made, and they are left where the right of possession is uncertain, doubts must be decided in favor of creditors and against the mortgagee, since he could have protected himself fully by filing the mortgage.—Anderson v. Brenneman, 44 Mich. 198.

¶ 174. If a mortgagee of chattels takes possession in the mortgagor's behalf before foreclosure to screen the property from execution, it is fraud; and if, having a mortgage claim, he sets up some other against creditors levying on a mortgaged interest, or if not in possession in good faith under his mortgage claim, fraud may be inferred. If the change of possession from the owner is not actual, his security would be absolutely void as against an execution levy, and if he is a purchaser the purchase would be presumptively fraudulent.—Haynes v. Leppig, 40 Mich. 602.

¶ 175. Where articles are of that bulky nature that a symbolical delivery only can be made, and they are permitted to remain in a place where the possession may be equivocal, or what could not be said to be an actual possession, all doubts must be solved in favor of the purchaser or creditor, and against a mortgagee who has failed to file or renew his mortgage.—First Nat. Bank v. Summers, 75 Mich. 107.

¶ 176. The appointment of the clerk of the mortgagor as agent of the mortgagee, for the purpose of taking care of and selling the goods, where there is no announcement of change in business, no change of books, and no other apparent change in ownership or possession, is not a change of possession within the meaning of R. S. 1846, p. 327, § 10, How. St., § 6193.—Doyle v. Stevens, 4 Mich. 87.

¶ 177. Where a debtor delivered two teams of horses with harnesses to a creditor to use at a stipulated rate per month until the indebtedness was liquidated and such property was subsequently seized under an execution by a second creditor and sold to defendant, after which it was replevied by plaintiff under an unrecorded chattel mortgage given before inception of the claim of the execution creditor, held that the delivery of the property to the first creditor under the contract of bailment did not constitute such a change of possession as to obviate the necessity of recording the chattel mortgage.—O'Neil v. Brooks, 180 Mich. 540.

¶ 178. Where a stock of goods, which had been attached by creditors of the mortgagor, is replevied by the mortgagee within one year of the date of the filing of the chattel mortgage and while such mortgage is in full force, and possession is taken by the mortgagee, the recording acts do not thereafter apply, if the property is not again put in the possession of the mortgagor.—Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779.

§ 42. ——Making mortgagor agent in possession.

Making mortgagor's clerk agent, see ante ¶ 176.
Reservation of power of sale as fraud, see post § 55.
Right to possession under the mortgage, see post §§ 65, 66.

¶ 179. Mortgages permitting the mortgagor to sell or dispose of the goods in the ordinary course of trade are valid.—People v. Bristol, 35 Mich. 28; Wingler v. Sibley, 35 Mich. 231.

¶ 180. A mortgage of a stock of goods which leaves the mortgagor in possession, and by inference allows him to make sales in the usual course of business, is good between the parties and not necessarily void as to creditors.—Gay v. Bidwell, 7 Mich. 519; Oliver v. Eaton, 7 Mich. 108.

¶ 181. A mortgage on a stock of goods is not made void by a proviso that the mortgagor "shall be allowed to continue the sale of goods from said store as though this instrument was not made."—Wingler v. Sibley, 35 Mich. 231.

§ 43. Property affected; after-acquired goods.

Right to mortgage future property, see ante § 12.
Character of property dispensing with need to file, see ante § 28.
Mortgage of perennial crop, applicability to subsequent crop grown by mortgagor, see ante ¶ 65.
Goods which did not pass to buyer (mortgagor) because of fraud or other reason, see post § 51.
Priority between mortgage with after-acquired clause and purchase mortgage for the after-acquired goods, see post § 80.
Lien of purchase money mortgages, see post § 90.
Estoppel to question sale of after-acquired goods, see post § 140.

¶ 182. A duly filed chattel mortgage covering certain specified property and all other property which the mortgagor may thereafter add to and use in a particular business is valid even as to third persons, e. g., subsequent creditors attaching the after-acquired property.—Eddy v. McCall, 71 Mich. 497.

¶ 183. Where the purchaser of merchandise mortgages it to a third person in order to pay the vendor and so obtain title and the mortgage is given, payment made and goods delivered on the same day, the mortgage will not be regarded as given on after-acquired property; and if duly filed the mortgagee can bring trover against a purchaser.—Greenaway v. Fuller, 47 Mich. 557.

¶ 184. A mortgage upon after-acquired goods will hold against a seller who took them back in satisfaction of a debt for the price with notice of the mortgage; he can have no better title than the buyer.—Robson v. Michigan Cent. R. Co., 37 Mich. 70.

¶ 185. The lien of a chattel mortgage covering all additions to and substitutes for the property described in the mortgage will not attach to goods ordered by the mortgagor before giving the mortgage, and which never actually came into his possession as owner.—Kingman & Co. v. William C. Denison and McCormick Harvesting Mach. Co., 84 Mich. 608.

¶ 186. A vendee, though a bona fide one, is liable in trover if he refuses to deliver up the goods to one who holds a mortgage, of which the vendee has notice, that includes them as after-acquired property.—American Cigar Co. v. Foster, 36 Mich. 368.

§ 44. Persons protected or affected.

See also ante ¶ 140.
Sufficiency of description to protect mortgagee, see ante I, B.
Partial validity of mortgage, see ante § 9.
Effect generally of unfiled mortgages or of actual notice or of change of possession, see ante §§ 35-38, 40-42.
Rights of seller of goods to reclaim them as against intervening mortgage, see ante § 43, post § 51.
Effect of tardy filing, see post §§ 48, 49.
Subsequent creditors in good faith, see post § 45.
Subsequent mortgagees in good faith, see post § 46.
Subsequent purchasers, see post § 47.
Effect of delay in filing, see post §§ 48, 49.
Rights under levy or attachment, see also post § 77.

¶ 187. Under How St., § 6193, providing that every mortgage, or conveyance intended to operate as a mortgage, of goods and chattels, which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession, shall be absolutely void as against creditors of the mortgagor, unless the mortgage, or a true copy be duly recorded, a chattel mort-

gage on a dock, the possession of which is retained by the mortgagor, is invalid as against an execution levied on the property before recording of the mortgage thereon.—Tuck v. Olds, 29 Fed. 738.

¶ 188. Withholding a chattel mortgage from files operates as a fraud on persons who become interested as stockholders in property which they have no reason to suppose incumbered.—International Wrecking & Transp. Co. v. McMorran, 73 Mich. 467.

¶ 189. An indemnity contract, executed by a contractor to his surety, purporting to be a bill of sale but in effect a mortgage, since it was not filed, does not protect the materials sold to the contractor before the execution of such contract from seizure on execution.—Hurd v. Brown, 37 Mich. 484.

§ 45. ——Creditors.

See also post ¶ 339.

Who are subsequent creditors in good faith where there is delay in filing, see post § 48.

Creditors of third persons not in privity with mortgagor, see post ¶ 215.

Filing or equivalents to impute notice, see ante §§ 35-42.

Effect of notice of invalid mortgage, see ante § 37.

Effect against creditor of agreement that mortgagee shall have possession under mortgage, see also post ¶ 282.

Invalidity as against creditors, see also ante ¶ 143.

As to whom renewal is essential, see post § 92.

Rights in property after satisfaction and discharge, see post § 119.

Dismissal of foreclosure bill for invalidity of mortgage, see post ¶ 459.

Who deemed creditors, see Comp. L. 1915, § 11986.

¶ 190. The term "creditors," as used in How. St., § 6193, avoiding unfiled chattel mortgages as against creditors of the mortgagor, includes those who have entered into contracts with parties as indorsers, guarantors or sureties. So held where a bank accepted an indorser without notice or knowledge of the existence of an unfiled chattel mortgage on his property, but which was filed before the contingent liability of the indorser was fixed by the protesting of the note.—Cutler v. Steele, 85 Mich. 627.

¶ 191. The words "creditors of the mortgagor" in Comp. L. 1897, § 9523, as amended by Pub. Acts 1907, No. 332, How. St., 2nd Ed., § 11407, providing that every chattel mortgage not "accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against creditors of the mortgagor, and as against subsequent purchasers or mortgagees in good faith," unless a copy thereof be filed as directed by the statute, mean subsequent creditors in good faith and without notice of the mortgage.—In re Huxoll, 193 Fed. 851; Detroit Trust Co. v. Pontiac Savings Bank, 196 Fed. 29, affirmed in 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509.

¶ 192. One to whom, in the interval between the delivery and the filing of a chattel mortgage, a note is assigned by executors as part of her share of her father's estate, is a "subsequent creditor in good faith" as to whom the mortgage is void under How. St., § 6193, Comp. L. 1897, § 9523.—Cutler v. Huston, 158 U. S. 423, L. ed. 1040, 15 Sup. Ct. Rep. 868.

¶ 193. A mortgage is invalid as against creditors if not put on file when the goods remain in the mortgagor's possession; this applies to those who become creditors during the interval while the mortgage is not on file, and not merely to those who have obtained judgment or levied attachment before filing.—Fearey v. Cummings, 41 Mich. 376; Wallen v. Rossman, 45 Mich. 333.

¶ 194. As against creditors of the mortgagor who have given or extended credit without notice of an existing unfiled chattel mortgage, such mortgage is void.—Root & Co. v. Harl, 62 Mich. 420; Field v. Fisher, 65 Mich. 606; Cutler v. Steele, 85 Mich. 627; Kennedy v. Dawson, 96 Mich. 79.

¶ 195. Any creditor may avoid an unrecorded chattel mortgage who, during its absence from the record, has done anything on the basis of its non-existence—such as giving new or extending old credits, and renewing notes or other obligations.—Root & Co. v. Harl, 62 Mich. 420.

¶ 196. A chattel mortgage given in good faith by a mother to her son to whom she was then indebted is not to be postponed to an attachment subsequently levied in favor of other creditors for pre-existing debts.—Dalton v. Stiles, 74 Mich. 726.

§ 46. ——Subsequent mortgagees.

Necessity for renewal, see post § 92.

¶ 197. A second mortgagee who has notice of the existence of the prior mortgage at the time of taking his own is not a subsequent mortgagee in good faith, within the meaning of the statute.—Wetherell v. Spencer, 3 Mich. 123; Doyle v. Stevens, 4 Mich. 87.

¶ 198. The words "mortgagee in good faith" in How. St., § 6193, relating to the filing of chattel mortgages, mean the same

thing as "mortgagee for a valuable consideration without notice."—People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679.

§ 47. ——Subsequent purchasers.

Rights under sale subject to mortgage lien, see post § 76.

Subsequent purchasers entitled to protection by renewal, see post § 92.

¶ 199. Comp. L. 1871, § 4706, How. St., § 6193, in making an unfiled chattel mortgage void "against subsequent purchasers or mortgagees in good faith," is for the benefit of those only who have acquired rights of which they might otherwise be defrauded, and is meant to protect them against instruments of which they had no notice when they obtained their rights; one who has not paid is not protected, and one who has paid is entitled to protection as a bona fide purchaser only to the extent of payments made before notice.—Kohl v. Lynn, 34 Mich. 360.

§ 48. ——Effect of subsequent filing or change.

Withholding from files as fraud, see post § 55.

Priorities of credits extended during withholding, see post ¶ 340.

Effect of tardy renewal, see post § 92.

¶ 200. A mortgage not seasonably filed is absolutely void—where there is no change of possession—as against third parties whose rights have intervened between its making and filing.—Crippen v. Jacobson, 56 Mich. 386; Field v. Fisher, 65 Mich. 606.

¶ 201. A chattel mortgage given in good faith is void for want of immediate possession of the goods only where rights have arisen in consequence, or injury resulted, in the interval before possession is given.—Waite v. Mathews, 50 Mich. 392.

¶ 202. Where a mortgage was not filed until some time after delivery the only creditors who could assail it as void were those who had acquired rights during the interval.—Johnson v. Stellwagen, 67 Mich. 10.

¶ 203. The statutory invalidity of an unfiled chattel mortgage extends to all creditors who became such after the giving and before the filing of the mortgage.—In re Huxoll, 103 Fed. 851; Detroit Trust Co. v. Pontiac Sav. Bank, 196 Fed. 29, affirmed in 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509.

¶ 204. Under Comp. L. 1897, § 9523 (How. St., 2nd Ed., § 11407), providing that every chattel mortgage "which shall not be accompanied by an immediate delivery, and followed by an actual and continued change of possession of the things mortgaged, shall be absolutely void as against the creditors of the mortgagor," the statutory invalidity of an unfiled chattel mortgage extends to all creditors who become such after the giving and before the filing of the chattel mortgage.—Detroit Trust Co. v. Pontiac Sav. Bank, 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509; affirming 196 Fed. 29.

¶ 205. The failure to file a chattel mortgage makes it invalid as to those who become creditor during the interval while the mortgage is not on file as well as to those who have obtained judgment or levied attachment before filing.—People ex rel. Esper v. Burns, 161 Mich. 169.

¶ 206. A chattel mortgage given by a corporation Sept. 2, 1904, was not filed until April 21, 1905. Held, that no creditor could object to its validity from this failure to record unless he extended credit to the corporation between said dates.—Marine Sav. Bank v. Norton, 160 Mich. 614.

¶ 207. A chattel mortgagee who delays filing his mortgage at once so that he cannot be said to have exercised, or intended to exercise, due diligence, is not in a position to raise the question of the rights of a diligent mortgagee as against those of a diligent creditor of the mortgagor.—Cutler v. Steele, 85 Mich. 627.

¶ 208. A mortgage made in good faith to secure a valid debt, given before the execution of an assignment for the benefit of creditors, but not filed until afterwards, is not void as against the assignee for want of filing, unless he represents creditors who became such while it remained unrecorded (How. St., § 6193).—Brown v. Brabb, 67 Mich. 17.

¶ 209. A chattel mortgage filed by mistake in the wrong office is nevertheless good as against creditors whose claims accrued prior to its execution, though not as against those who became such during the time between the execution of the mortgage and its filing, without knowledge of its existence.—First Nat. Bank v. Guntermann, 94 Mich. 125.

¶ 210. Where, after a creditor has agreed with a debtor to accept a renewal note for a portion of the debt, the debtor executes a chattel mortgage upon his property, which the mortgagee fails to file, and the creditor accepts the renewal note in reliance upon the non-existence of such mortgage, the date of the renewal note must be taken as the date of the transaction, so far as the relative rights of the mortgagee and the creditor are concerned.—Cutler v. Steele, 85 Mich. 627.

§ 49. ——Later mortgage filed first.

¶ 211. A mortgage given merely as a security for a pre-existing debt cannot, though filed at once, be allowed priority over a previous mortgage not filed so soon.—People's Sav. Bank v. Bates, 120 U. S. 556, 30 L. ed. 754, 7 Sup. Ct. Rep. 679.

¶ 212. One who becomes a creditor without notice of an unfiled mortgage on his debtor's chattels whereof possession is unchanged gets a lien superior to such mortgage by taking and duly filing—even after the other mortgage has been filed—a mortgage to secure his debt.—Dempsey v. Pforzheimer, 86 Mich. 652.

¶ 213. A mortgage not filed until after rents had accrued under a lease containing a clause reserving a lien on the chattels for rent is inferior to the lessor's rights, whether the lease had the effect of a mortgage or only that of a power.—Crockett v. Bearce, 104 Mich. 257.

§ 50. Independent and paramount claims of title.

Rights of assignee of mortgage against adverse claims, see post § 87.

Tacking claim under mortgage to levy in hostility, see post ¶ 204.

Evidence, jury questions and instructions as to right or title under the mortgage, see post §§ 71, 72.

¶ 214. A garnishee to whom the principal defendant had turned over his stock of goods in payment of moneys advanced, was not required to account therefor; and the fact that he held a chattel mortgage on the property which was never filed, did not place him in a different position, as possession was not taken under the mortgage.—Crusoe Bros. Co. v. Kudner, 136 Mich. 583.

¶ 215. A mortgage on a stock of goods need not be filed to establish its priority over levies subsequently made, if the mortgage was given to secure the negotiable notes of a purchaser who was not the execution defendant nor a creditor of his, and did not claim in hostility to the owner of the mortgage.—Henry v. Ferguson, 55 Mich. 399.

¶ 216. The rights of a pledgee in possession are superior to the lien of a mortgage given pending such possession.—Finn v. Donahoe, 83 Mich. 165.

§ 51. ——Rights under prior sale.

See also ante § 43.

Evidence to prove fraud in mortgage, see also post ¶ 248.

Mortgagee as bona fide purchaser against vendor induced to sell by mortgagor's fraud, see Sales, XI.

¶ 217. A vendor of goods is not estopped from reclaiming them out of a stock on the ground that they were procured by fraud, by reason of his having had notice, at the time of sale, of a mortgage on the stock given by the vendee to secure a pre-existing debt and covering accessions to the stock.—Vincent v. Hansen, 113 Mich. 173.

¶ 218. In an action of replevin where a lessee was to sell certain machines to his lessor, who credited on the purchase price certain past due rent, but title did not pass because of the lessor's failure to make a cash payment, held, that the lessee's mortgagee could claim possession of the machines though the lessee had not repaid the rent so credited.—Hughes v. Daniells, 87 Mich. 190.

¶ 219. In an action of trover by a chattel mortgagee against a seller who replevied the property from the mortgagor, a directed verdict for the plaintiff is justified by evidence of valuable consideration for the mortgage, of want of notice of the mortgagor's fraud in obtaining the goods, of notice of the mortgage to the defendant before action of replevin taken by him, and that no credit was extended by the defendant while the mortgage was unrecorded, the plaintiff being a bona fide mortgagee and the defendant having invested the mortgagor with indicia of ownership.—Heenan v. Forest City Paint & Varnish Co., 138 Mich. 548.

¶ 220. Where a manufacturing corporation gave notes to a bicycle corporation in relation to a bicycle contract, and it appeared that a certain number of bicycle frames were set apart as part of the consideration for which the notes were given, but passed into the possession of a trustee under a mortgage for the benefit of creditors given by the bicycle corporation, and where part of a fund on hand consisted of the amount realized from the conversion of such frames, the title of the manufacturing corporation to the frames was not divested, and it was entitled to an accounting for such frames.—World Mfg. Co. v. Hamilton-Kenwood Cycle Co., 123 Mich. 620.

¶ 221. The rights of a vendor in possession are superior to the lien of a mortgage given pending such possession to secure a pre-existing indebtedness, even though the bill of sale of the goods was procured from the purchaser by the vendor's fraud, if the latter was in possession of the property by consent of the purchaser under the agreement.—Finn v. Donahoe, 83 Mich. 165.

¶ 222. Where a vendor, with knowledge of the existence of a chattel mortgage covering the vendee's entire stock of goods, and all accessions thereto, consents that goods sold to the vendee both before and after such knowledge shall be considered as commission

goods so as not to subject them to the mortgage and afterwards insists on settling with the vendee and accepts his notes for the purchase price, upon which he brings suit and attaches the vendee's stock of goods, he takes the same subject to the lien of said mortgage.—Merrill v. Denton, 73 Mich. 628.

¶ 223. Where the vendor of a stock of goods agreed with the vendee's father that if he would advance a certain sum as part payment for the goods he should be repaid by the vendee out of the first sales thereof, vendee giving her father a mortgage on the goods as security for such advance, the vendor was held to be estopped from claiming any lien for the unpaid purchase money as against the mortgagee's assignee.—Finn v. Donahoe, 87 Mich. 292, reversing on rehearing 83 Mich. 165.

§ 52. Estoppel and waiver.

See also ante ¶ 161.

Waiver and estoppel between parties to dispute mortgage, see ante § 10.

Right to question delayed filing, see also ante § 48.

Waiver of lien or priority, see post § 85.

Taking mortgage as waiver of status of creditor, see also post ¶ 359.

Waiver of status of superior creditor by taking assignment of mortgage, see also post ¶ 375.

Effect of delay in foreclosing, see post § 124.

Who may attack sale of mortgaged goods, see post § 140.

Attachment subject to mortgage as recognition that it is not fraudulent, see also Attachment, ¶ 155.

¶ 224. A wife who knows that her husband is about to include some of her own property in a chattel mortgage given in part to secure payment for her own board is estopped from claiming the property as against the mortgagee if she neglects to assert her right to it at the time. But evidence that she knew it long afterwards, and when the mortgagee had taken the property, is immaterial.—Davis v. Zimmerman, 40 Mich. 24.

¶ 225. Complainant bank took a mortgage of a corporation on its personal property to secure a loan on Sept. 2, 1904. The mortgage was not recorded until April 21, 1905. Held, a creditor could not assert the invalidity of the mortgage from the failure to file it when it appeared that after he knew it was filed he received payments on his account and repeatedly had notes renewed to him.—Marine Sav. Bank v. Norton, 160 Mich. 614.

§ 53. ——Recognising or assuming mortgage debt.

See also ante ¶ 225.

Taking subject as dispensing with need for filing as to such taker, see ante § 38.

Express assumption of mortgage as fixing priority, see post § 88.

¶ 226. One who purchases property expressly subject to a chattel mortgage which he assumes cannot assert any invalidity in the inception of such mortgage.—Dwight v. Scranton & Watson Lumber Co., 69 Mich. 127.

¶ 227. Purchasers of goods that have been mortgaged under an arrangement that the mortgage shall cover additions are estopped from disputing any such arrangement if they have bought subject to it.—Leland v. Collver, 34 Mich. 418.

¶ 228. One is estopped from questioning the validity of a mortgage upon chattels which he has bought subject to the lien of such mortgage, he expressly assuming it and agreeing to pay it as part of the purchase price.—Dwight v. Scranton & Watson Lumber Co., 69 Mich. 127.

§ 54. ——By representations as to credit or ownership.

¶ 229. A bank is not estopped from asserting a chattel mortgage lien on the property of one of its debtors by the fact that, in reply to a letter from another bank inquiring as to the character and financial standing of the debtor, but containing no intimation that a loan was contemplated, it merely commended the debtor's business reputation and personal habits, and gave the amount of his assets above liabilities, without disclosing the existence of such mortgage or the indebtedness represented thereby.—First Nat. Bank v. Marshall & I. Bank, 108 Mich. 114.

¶ 230. Statements made by a mortgagor of chattels for the purpose of obtaining credit for a corporation of which he was a member, to the effect that he had sold the mortgaged property to such corporation, are not conclusive upon the mortgagee, unless he knew of them at the time, and kept silent; nor is he estopped from claiming under his mortgage merely because the property was permitted to remain in the apparent control of the corporation.—First Nat. Bank v. Marshall & I. Bank, 108 Mich. 114.

¶ 231. False representations made by a creditor holding an unrecorded chattel mortgage as to the financial standing of his debtor, in answer to a letter of inquiry from a merchant from whom the debtor is seeking to purchase goods on credit, to induce the extending of such credit, will estop the creditor from interposing a mortgage subsequently executed to him to prevent the collection of the debt contracted in reliance

upon such representations; and the same rule applies to the concealment by the creditor of the debt, and of the place of residence of the debtor (his place of business not being his real place of residence), if made for the purpose of inducing such credit.—Curtis v. Wilcox, 91 Mich. 229.

§ 55. Fraudulent mortgages.

See also ante ¶ 188.
Effect of dating back, see ante ¶ 107.
Simulated change of possession as fraud against creditor hindered thereby, see ante ¶ 174.
Effect of good faith on mortgage not filed, see ante § 36.
Evidence of genuineness and good faith as object of filing, see ante ¶ 132.
Provisions for disposal of stock by mortgagor for mortgagee, see also ante § 42.
Change of possession by making mortgagor agent in possession, see ante § 42.
Reality of debt secured, amount of same, and mistake or misstatement in mortgage, see post §§ 56-58.
Evidence of fraud, see post § 59.
Questions for jury, see post § 60.
Mortgage by mother to son for pre-existing debt, see ante ¶ 196.
Right of action under chattel mortgage against holders under a second mortgage, fraudulently given, see post ¶ 544.
Fraud between the parties affecting the mortgage or the debt, see ante § 8, and see generally Fraud.
Fraudulency of transfers in general as to creditors and purchasers, see Fraudulent Conveyances.
Applicability of Bulk Sales Law to chattel mortgages, see Fraudulent Conveyances, I.
Garnishment of fraudulent mortgagee, and defenses available to such garnishee, see Garnishment.
Chattel mortgage as assignment for creditors, see Assignments for Creditors, § 12.
Suits to annul mortgage in aid of assignment, see Assignments for Creditors, § 39.
Presumption of fraud unless followed by change of possession, see Comp. L. 1915, § 11985.

¶ 232. It is an act of bad faith for a mortgagee to withhold from the files a mortgage given him by a debtor in order to shield the latter from demands that have been contracted in ignorance of its existence.—Shipman v. Seymour, 40 Mich. 275.

¶ 233. The withholding of a chattel mortgage from the files is a fraud upon parties extending credit to the mortgagor during the time it is withheld, and in ignorance of it, and such a mortgage is void as to creditors.—Baker v. Parkhurst, 119 Mich. 542.

¶ 234. Reservation in a chattel mortgage of a merchandise stock of a power of sale in the usual course of trade does not invalidate it as against creditors.—Louden v. Vinton, 108 Mich. 313.

¶ 235. A chattel mortgage void for fraud, is void as to all parties claiming under it without regard to bona fides or estoppel; such a mortgage is void in the hands of a trustee for creditors although he did not himself participate in the negotiations.—Crowley v. Langdon, 127 Mich. 51.

¶ 236. A mortgage given to indemnify the mortgagee for becoming surety on the bond of the mortgagor as administrator of the estate of a decedent, and which authorizes the mortgagee to sell to satisfy claims proved against such estate "according to the orders of the probate court," is not rendered invalid as against creditors by the fact that such administrator, the mortgagor, was himself a creditor of the estate, if the mortgaged property has in fact been sold by the mortgagee and the proceeds paid over upon the claims proved against the estate, excluding that in favor of the administrator.—Sutherland v. Danaher, 35 Mich. 422.

§ 56. ——Consideration for mortgage.

What constitutes valid debt secured by mortgage, see ante §§ 13, 14.
Description of debt or liability, see ante § 19.
Pre-existing debt as debt secured, see post § 57.
General doctrine that want of consideration is badge of fraud on creditors, see Fraudulent Conveyances, I, C.

¶ 237. An indemnity mortgage is valid if honestly and fairly given; and if merely an indemnity to the extent of securing the mortgagor's debts more directly, and made with the express concurrence of the creditors who hold them, it is not void as against creditors.—Adams v. Niemann, 46 Mich. 135.

¶ 238. Where the mortgagee of chattels did not file his mortgage, and allowed the mortgagor to continue to appear to the world as owner of the property, and suffered it to remain precisely as though he had no incumbrance upon it, so that third parties to whom the mortgagor was indebted contracted with the mortgagor in good faith for possession of the property as security during an extension of time granted him—they to indemnify themselves thereafter out of the property if the debt was not paid, and to return the surplus—it cannot be held that the whole consideration of such a contract was the pre-existing debt alone, and that therefore the rights of the third parties are subservient to the mortgage. Whether considered as a sale or security, such a consid-

eration, involving stipulations of great value and extending beyond the mere prior debt, was enough to impart to the transaction the good faith of subsequent purchasers and mortgagees made essential by R. S. 1846, ch. 81, to give it precedence of the mortgage. —Sheldon v. Warner, 26 Mich. 403.

¶ 239. A mortgage by a copartnership, including the individual debt of one partner as well as a firm debt is not fraudulent in law as to a subsequent mortgagee.—Caulfield v. Curry, 63 Mich. 504.

§ 57. ——Indebtedness pre-existing in part.

¶ 240. A mortgage is not void against a defrauded vendor bringing replevin because given for a sum in excess of the amount advanced at the time of its execution, the excess sum being intended to secure pre-existing indebtedness.—Zucker v. Karpeles, 88 Mich. 413.

¶ 241. A chattel mortgage given to secure a precedent indebtedness is valid as against one from whom the mortgaged goods had been fraudulently purchased by the mortgagor, where the mortgagee had no knowledge of the fraud, and where a part of the indebtedness was incurred after such fraudulent purchase, but upon the agreement of the debtor to give such security whenever it should be demanded.—Hees v. Carr, 115 Mich. 654.

¶ 242. Where, to secure previous debts and new advances, the vendee of goods bought on credit mortgages them to a third person without notice that the sale was procured by fraud, such mortgagee is protected as a bona fide purchaser to the full extent of his mortgage.—Zucker v. Karpeles, 88 Mich. 413.

§ 58. ——Excessiveness or mistake in mortgage.

Assertion of lien after discharge as fraud on other creditors, see post § 119.

¶ 243. A mortgage given by mistake for more or less than the actual indebtedness intended to be secured is not thereby invalidated where no fraud or deception was intended by either party.—Lyon v. Ballentine, 63 Mich. 97.

¶ 244. A chattel mortgage false in fact should not be placed on the public files to the injury of third persons.—Willison v. Deenberg, 41 Mich. 156.

§ 59. Evidence as to fraud or notice.

Giving mortgage as evidence bearing on fraud as ground for attachment, see Attachment, §§ 122-124.

Affidavit as evidence, see Comp. L. 1915, § 11903.

¶ 245. When the good faith of a mortgage is in question, the time when it was filed and the use afterwards made of it may be shown. —Shipman v. Seymour, 40 Mich. 275.

¶ 246. Plaintiffs, in an action of replevin, claimed property under a chattel mortgage, and defendants claimed to hold it under attachments against the mortgagors. The evidence tended to show that there was no manual delivery of the mortgage to plaintiffs, who lived in another state, but that the mortgagors were indebted to the plaintiffs in more than its amount. Held competent for the plaintiffs to put in evidence a letter from the mortgagors, written some time before the levy of attachments, informing them of the execution of the mortgage. The letter would tend in some degree to prove that the true intent of the mortgage was to secure an actual indebtedness, and not to make a mere cover of the transaction.—Sweetser v. Mead, 5 Mich. 107.

¶ 247. Where the question is whether the mortgage under which plaintiff claims was fraudulent as to creditors, another mortgage executed at the same time and as a part of the debtor's general plan securing creditor who was a relative of the mortgagor, and who was seeking to secure plaintiff as well as himself, is admissible as bearing upon the fraudulent intent.—Krolik v. Graham, 64 Mich. 226.

¶ 248. In an action for the recovery of goods fraudulently purchased from plaintiff by defendant's assignor, where it appeared that the assignor had conducted a special sale at half price of a pretended large consignment of goods from another dealer to whom a chattel mortgage was given on the day before the assignment, it was admissible to show as bearing on the validity and good faith of the chattel mortgage that only a small quantity was received from such other dealer and that the assignor had said that he did not know how much he owed the other dealer, the mortgagee.—Koch v. Lyon, 82 Mich. 513.

¶ 249. Procuring a letter from a mortgagor by which he acknowledged receipt of an "annexed bill of goods," the bill being antedated and receipt of the same being denied by him on the stand and the amount being included in the mortgage executed after the date of the bill, is a badge of fraud, where the mortgagor as seller was in position to prove the invoice and order for the goods by other means than the letter, if in fact they had been ordered, and where the letter was presented at night already prepared for signature and the mortgagor called out of bed to sign it.—Rosenthal v. Bishop, 98 Mich. 527.

¶ 250. On the question whether a mortgage made by one partner was obtained by

fraud of the mortgagee on the other partner, it being admitted that an arrangement had been made to reduce the amount owing by a certain date, and that it had been partly reduced before that date, and that the mortgage was procured with care to prevent the defrauded partner from knowing what was afoot, it was proper to show that had the time been allowed to elapse the full reduction would have been made as agreed, he having been the managing partner who negotiated the agreement for further credit on condition that such reduction be made.—Walsh v. Taitt, 142 Mich. 127.

¶ 251. There being an issue as to whether a chattel mortgage was procured by fraud from one partner without knowledge of the other, and that the fraud comprised the inclusion in the mortgage of a debt to another not in fact owed, and that an agency existing for such other was caused to be broken and taken up by the mortgagee, it was proper as bearing thereon to receive letters bearing on the account with such other and explaining the transaction.—Walsh v. Taitt, 142 Mich. 127.

¶ 252. On the question of fraud in procuring a chattel mortgage from one's partner, it is proper to show that it was so drawn as to include a sum for a pretended debt to another creditor than the mortgagee, and that such debt had no existence in fact, that the mortgagee had knowledge of such fact and designed to cause a termination of a contract of agency of the firm for such other creditor and to drive the firm out of business; where defendant partner had no knowledge of the making of the mortgage and the other partner had received a sum for executing it.—Walsh v. Taitt, 142 Mich. 127.

¶ 253. A fraud upon unsecured creditors is not shown by evidence of a mortgage given to certain creditors of a corporation covering practically the entire property of the corporation debtor where the credit thus secured was extended in the belief that the corporation was solvent, there is no evidence of want of good faith, and the indebtedness secured is about equivalent to the property mortgaged.—Franklin Needle Co. v. Amazon Hosiery Co., 128 Mich. 198.

¶ 254. The fact that stockholders, to whom a chattel mortgage of corporation property was given to secure a debt due them, the day before the mortgage was given, paid the balance due on their stock subscription by crediting the amount on their claims, does not as a matter of law establish that there was fraud in the execution of the mortgage.—Crossette v. Jordan, 132 Mich. 78.

¶ 255. To show notice of the plaintiff's rights in a suit by a mortgagee to recover for logs sold by a mill owner, to whom they had been delivered for the purpose of manufacture by the mortgagor, who had mortgaged them prior to such sale, plaintiff may show the relations existing between the mill owner and his vendee, and to that end that the vendee held a mortgage on the mill property, defendant being a purchaser from such vendee.—Stanton v. Estey Mfg. Co., 90 Mich. 12.

¶ 256. A finding of notice of a chattel mortgage on lumber turned over to the claimant in payment of a debt cannot be sustained on evidence showing without contradiction that his first knowledge of the mortgage (an invalidly filed one) was first acquired after title had passed to him, and that he had no notice before then, and where moreover little if any of the property was covered by the mortgage.—Cass v. Gunnison, 68 Mich. 147.

¶ 257. Where a stock of goods owned by F. was by him placed in, and was used as a part of, a business carried on by his daughter, she making large additions thereto, and where the goods were with F.'s knowledge used as a basis of credit by her, and the manager in charge wrote stating that she was owner, it was sufficient to show want of notice to her mortgagees as against testimony by a clerk of a conversation evincive of notice had in the presence of such manager.—Rogers v. Robinson, 104 Mich. 329.

§ 60. Jury questions and instructions.

See also ante ¶ 151.

As to good faith of one taking after failure to renew, see also post ¶ 384.

¶ 258. The erasure in a mortgage of a printed clause to the effect that the mortgaged goods were "free and clear from all encumbrance, liens," etc., was proper to go to the jury upon the question whether the mortgagee had actual notice of a prior mortgage subsequently filed.—Williams v. Bresnahan, 66 Mich. 634.

¶ 259. In replevin where the question of fraudulent conspiracy between the purchaser of goods and mortgagees was involved, an instruction which in substance told the jury that the evidence on the question of keeping a first chattel mortgage off the records must be such as to satisfy the judgment of the jury that there was fraud, was too favorable to the defendants instead of being subject to objection by them.—Durrell v. Richardson, 119 Mich. 502.

¶ 260. In replevin of goods claimed to have been fraudulently purchased, against the purchaser and mortgagees who were his relatives, the facts of the withholding of a first mortgage from record, the close relationship of the parties, and that the mortgagees knew that the stock was purchased on

credit and that the giving of the mortgage would give them priority over those who had recently sold the goods, and especially in view of contradictory testimony in another proceeding as to the manner of payment of the money, held that the court was justified in submitting to the jury the question whether there was any bona fide loan, or any loan at all.—Durrell v. Richardson, 119 Mich. 592.

¶ 261. Where heavy merchandise, like pig iron or lumber, is mortgaged and the mortgage is not placed on file, and there is no actual delivery and apparent change of possession, there must be a sufficiently clear and unequivocal designation of the property to serve as notice of the mortgage to creditors or subsequent purchasers; and it is for the jury to decide under proper instructions what is sufficient notice thereof.—Anderson v. Brenneman, 44 Mich. 198; Smith v. Greenop, 60 Mich. 61.

¶ 262. It was error to refuse to instruct the jury in trover for the possession of property under a chattel mortgage, where plaintiff's theory that defendant is fraudulently laying claim thereto is supported by evidence, that unless the alleged sale by the mortgagor to the defendant of such chattels was accompanied by an immediate delivery, and was followed by the actual and continued change of possession, such sale was presumptively fraudulent and void as against plaintiff, and is conclusive evidence of fraud, unless it be made to appear on the part of the defendant that the sale was made in good faith, and without any intention to defraud such mortgagor's creditors.—Wright v. Starks, 77 Mich. 221.

II. RIGHTS UNDER THE MORTGAGE; TITLE, POSSESSION AND TRANSFER OF THE PROPERTY.

A. RIGHTS GIVEN BY THE MORTGAGE; TITLE AND POSSESSION.

§ 61. In general; effect on title.

Property included in the description, see ante §§ 12, 15-17.

Mortgagee claiming under other superior title, see also ante § 50.

Mortgages taking possession under right other than the mortgage, see also post § 291.

Right to sell the goods, see post II, B.

Rights and equities of assignee of the mortgage, see post IV.

Right to insure property, see post § 63.

Right to redeem, see post § 112 et seq.

Right to buy in on own foreclosure, see post § 131.

Rights in proceeds of foreclosure sale, see post § 134.

Right to accounting of proceeds or price of property, see post § 120.

Default and right to foreclose or sell, see post VII.

Right to sue on choses in action covered by mortgage, see post § 142.

Execution of mortgage as disposal of property constituting ground for attachment, see Attachment, § 9, ¶ 21.

Attachability of chattel mortgage interests, either of mortgagor or mortgagee, see Attachment, § 15.

Rights of trustee in bankruptcy of mortgagor, see Bankruptcy, § 3.

Chattel mortgagee as bona fide purchaser of chattels, see Sales, XI.

¶ 263. It is now settled that an unforeclosed chattel mortgage is a mere security for the debt, not a transfer of title.—Lucking v. Wesson, 25 Mich. 443; Kohl v. Lynn, 34 Mich. 360; People v. Bristol, 35 Mich. 28; Gardner v. Matteson, 38 Mich. 200; Grove v. Wise, 39 Mich. 161; Haynes v. Leppig, 40 Mich. 602; Brink v. Freoff, 40 Mich. 610; Cadwell v. Pray, 41 Mich. 307; Wilson v. Montague, 57 Mich. 638.

¶ 264. The earlier doctrine was that a chattel mortgage passes to the mortgagee the legal title on condition, upon breach whereof the title becomes absolute at law.—Tunnahill v. Tuttle, 3 Mich. 104; Thurber v. Jewett, 3 Mich. 295; and see Flanders v. Chamberlain, 24 Mich. 305; Lucking v. Wesson, 25 Mich. 443.

¶ 265. Title does not become absolute in mortgagee until foreclosure or some equivalent act.—Kohl v. Lynn, 34 Mich. 360; Brink v. Freoff, 40 Mich. 610; Grove v. Wise, 39 Mich. 161; Cary v. Hewitt, 26 Mich. 228.

¶ 266. The relations of the parties to a chattel mortgage is that of debtor and creditor with the latter secured by lien, and the title of the mortgagee does not become absolute until after foreclosure and sale.—Hannah & Hogg v. Richter Brewing Co., 149 Mich. 220.

¶ 267. The common law doctrine that a chattel mortgage is an instrument of sale conveying the title to the property does not prevail in this state.—Hannah & Hogg v. Richter Brewing Co., 149 Mich. 220.

¶ 268. A chattel mortgagee is not the absolute owner of the property; he is bound to apply and account for it, and has no greater interest than the amount of his security.—International Wrecking & Transp. Co. v. McMorran, 73 Mich. 467.

¶ 269. Whether the mortgagor or mortgagee has possession, the property right of the former is only the residue after payment of the mortgage.—Daggett, Bassett & Hills Co. v. McClintock, 56 Mich. 51.

§ 62. Conditions and collateral agreements.

Insurance conditions, see post § 63.

Effect of collateral understanding as to ownership where mortgage is not filed, see ante ¶ 147.

Subsequent agreement authorizing immediate possession for mortgagee, see also post ¶ 322.

Default and right to foreclose, see post § 121.

Power of sale as limited by collateral agreement, see post § 127.

Effect of agreement between the parties as to possession on mortgagee's right of action against third persons for interference with the goods, see post § 143.

¶ 270. An agreement that security given for a present loan shall also be held by the lender as security for any balance due him on previous transactions is not equivalent to an agreement that, if a balance is found to be due the borrower on such transactions, the same shall be applied in reduction of the present loan.—Pinch v. Willard, 108 Mich. 204.

¶ 271. A trust chattel mortgage contained a condition that it should not be binding unless the beneficiaries should extend the time of payment for 40 days upon the obligations which the mortgage was designed to secure. Another clause authorized the trustee, should he consider the indebtedness insecure, to take possession of the property, and to sell the same as he might deem best for all persons interested. Held, that the assent of the beneficiaries to the act of the trustee in taking possession of the property before the expiration of the 40 days was not inconsistent with their previous acceptance of the condition on which the mortgage was given; the two clauses were both to be given effect.—Beckman v. Noble, 115 Mich. 523.

¶ 272. The term "appear," as used in the condition to a chattel mortgage executed by a respondent in a criminal case to secure the mortgagees for becoming sureties for his appearance at a certain term of court to answer an information on file against him, and conditioned that, if the mortgagor shall "appear" at the next jury term of said court, then the mortgage shall be void, must be construed with reference to the obligation which the sureties have undertaken, and the mortgagor's appearance at the term named when a continuance was taken will not avoid the mortgage, so far as notice to subsequent purchasers is concerned.—Crawford v. Vinton, 102 Mich. 83.

¶ 273. In trover against the mortgagee of chattels neither the mortgagor nor any one in his shoes can complain of a ruling that unless sale was made with the mortgagee's consent there was no waiver of the condition that certain sales would cause a forfeiture.—Leland v. Collver, 34 Mich. 418.

§ 63. Provisions as to insurance or protection of property.

Failure to insure as ground for taking possession, see post ¶ 290.

Breach of insurance and protection covenant as ground to foreclose, see post § 121.

¶ 274. A mortgagee of chattels may insure them himself if the mortgagor does not keep his covenant to do so, and he may add any reasonable premium to the amount due him.—Leland v. Collver, 34 Mich. 418.

¶ 275. In case of a stipulation for insurance of the mortgaged property for the mortgagee's benefit in a sum equal to the full amount due on the mortgage, "due" was construed to mean "owing," and held to contemplate insurance to the extent of the amount left unpaid.—Fowler v. Hoffman, 31 Mich. 215.

¶ 276. A stipulation for insurance of the mortgaged property for the mortgagee's benefit, mortgagor being in possession, is not discharged by the mortgagee's procuring the insurance after the mortgagor's default.—Fowler v. Hoffman, 31 Mich. 215.

§ 64. Right of possession in general.

Primary right of mortgagor, and right of mortgagee on default or because of insecurity, see post §§ 65-69.

Retention of possession as object of statute requiring filing, see ante ¶ 133.

Right of subsequent purchaser from mortgagor, see post § 73.

Liability for negligence in caring for property, see post § 70.

Remedies of mortgagee for injuries to the property or possession thereof by third persons, see post §§ 143, 144.

Right to custody of chattels when attached, see Attachment, § 60.

Right under mortgage to sue as against levy made against property in possession of mortgagee, see also Conversion, II.

Seizure under chattel mortgage as exonerating carrier from duty to deliver goods, see Carriers, ¶ 101.

¶ 277. Any parol undertaking between the mortgagors and mortgagees of property regarding its possession is ended when the property is converted by a third person.—Harvey v. McAdams, 32 Mich. 472.

§ 65. ——By Mortgagor.

Filing as substitute for possession by mortgagee, see ante § 32.

Reservation of right as fraud on creditors, see ante § 55.

Right of mortgagee to take possession, see post §§ 67-69.
Right to restoration of possession upon tender of payment, see post § 118.

¶ 278. The mortgagor's right to retain possession is measured by the mortgage.—Daggett, Bassett & Hills Co. v. McClintock, 56 Mich. 51.

¶ 279. The mortgagor of chattels has the right of possession until demand is made for them, and must keep them safely until then.—Cadwell v. Pray, 41 Mich. 307.

¶ 280. The mortgagor, while remaining in possession, holds, not as the mortgagee's agent, but as the owner of incumbered property.—People v. Bristol, 35 Mich. 28.

¶ 281. A provision in a chattel mortgage allowing the mortgagor to retain possession until the debt is due is for his benefit, and may be waived by him at any time.—Hyde v. Shank, 77 Mich. 517.

¶ 282. The waiver by a mortgagor of his right to the possession of the property until the maturity of the mortgage debt, and his consent that the mortgagee may take immediate possession, cannot affect the rights of an attaching creditor, who, if he regards the mortgage as valid, should levy subject to the rights of the mortgagee; and if he claims it void as to creditors and succeeds in showing such fact, the agreement as to possession will not affect that question.—Hyde v. Shank, 77 Mich. 517.

§ 66. ——Under authority to manage or sell.
Notice from possession by mortgagor as agent for mortgagee, see ante § 42.
Right of mortgagor to sue on an account covered by the mortgage, see post § 142.

¶ 283. The right sometimes reserved to the mortgagor of chattels to retain possession and dispose of them in the course of trade is a conditional bailment, which will be terminated by any change or enlargement of the reserved privilege without the mortgagee's consent, or by any diversion of the proceeds of sale from the designated object. The right is not assignable or independent.—Daggett, Bassett & Hills Co. v. McClintock, 56 Mich. 51.

¶ 284. Authority from the mortgagee to the mortgagor to go on and make sales of the mortgaged goods in the usual course of business would be ended by the levy of an attachment on them.—King v. Hubbell, 42 Mich. 597.

¶ 285. A sale of mortgaged goods to pay an existing debt is not in the ordinary course of business, and would violate the rights of the mortgagee, even in case sales in the usual course were contemplated as permissible.—Laing v. Perrott, 48 Mich. 298.

§ 67. ——By mortgagee.
Rights of assignee of mortgage, see post IV.
Possession of mortgagee as notice to third persons, see ante § 40.
Taking possession as waiver of lien, see post § 85.
First and second mortgagees in possession as tenants in common, see post ¶ 358.
Effect of tender upon mortgagee's right to retain possession, see post § 108.
Duty to restore possession on redemption or discharge, see post § 118.
Seizure by mortgagee after extinguishment of debt by merger, see also post ¶ 415.
Foreclosure upon default, see post § 121.
Purchasers on defective foreclosure as mortgagees in possession, see post § 135.
Necessity of redemption to divest possession acquired by irregular sale, see also post § 139, ¶ 523.
Mortgagee's right of action before condition broken for interference with possession, see post § 144.

¶ 286. The right of a mortgagee of chattels to take them into his own possession is part of his security, and a contract right; and nothing afterwards done by or against the mortgagor can affect it.—Smith v. Menominee Circuit Judge, 53 Mich. 560.

¶ 287. The mortgagee is entitled to immediate possession, to hold until condition performed, unless the parties otherwise stipulate.—Tannahill v. Tuttle, 3 Mich. 104; Daggett, Bassett & Hills Co. v. McClintock, 56 Mich. 51.

¶ 288. Possession by mortgagees of chattels is favored by statute.—Haynes v. Leppig, 40 Mich. 602; Daggett, Bassett & Hills Co. v. McClintock, 56 Mich. 51.

¶ 289. Under a mortgage giving the mortgagee a right to take possession there is a corresponding duty in the mortgagor to deliver it, and this necessarily involves the duty of identifying it.—People v. Bristol, 35 Mich. 28.

¶ 290. A chattel mortgagee cannot take possession for failure of the mortgagor to assign an insurance policy due to the wrongful taking of the policy by an agent of the mortgagee.—Crowley v. Langdon, 127 Mich. 51.

¶ 291. Where the owner of demised premises also held a chattel mortgage on the tenant's property, both the lease and chattel mortgage providing for the taking of pos-

session in case of default, the tenant has no right of action for an unlawful seizure of the mortgaged property where, upon both the rent and debt being in arrears, the landlord, being lawfully upon the premises, took possession of the mortgaged property, and bolted the door of the premises, for the purpose of taking an inventory.—Laetz v. Tierny, 153 Mich. 279.

¶ 292. Under a mortgage covering all the lumber and other chattels in a lumber yard, and authorizing the mortgagee, on default, to enter upon the premises and take possession, and to sell the goods, the mortgagee has a right to take possession of the yard and to sell the lumber where it stands, but not to exclude the mortgagor from the yard or office, or to hold the yard after the sale.—Bearss v. Preston, 66 Mich. 11.

§ 68. ——Accrual of mortgagee's right.

¶ 293. A mortgagee's right of possession becomes absolute upon default, and remains so until all of the debt is realized from the property; and if possession is prematurely taken it may be retained, subject to the mortgagor's right of redemption on payment of so much as is not realized, or possibly of reclamation until default.—Daggett, Bassett & Hills Co. v. McClintock, 56 Mich. 51.

¶ 294. Seizure under an execution cannot aid a premature seizure under a mortgage if the execution is not against the mortgagor but against a stranger.—Botsford v. Murphy, 47 Mich. 536.

§ 69. ——Insecurity clause and attempted transfer.

Construction of insecurity clause, see also ante § 62.
Title by independent purchase after waiver of insecurity clause, see post ¶ 328.
Return of goods on tender of payment by mortgagor, see post § 118.
Right of foreclosure under insecurity clause, see post § 121.
Power of sale under insecurity clause before maturity of debt, see post § 128.
Right of action to gain possession under insecurity clause, see post § 144.

¶ 295. Where a mortgage provides that the mortgagees may take possession of the mortgaged property whenever they consider their claim in jeopardy, they are entitled to possession even though the conditions of the mortgage have not been broken.—McGraw v. Bishop, 85 Mich. 72.

¶ 296. Under a clause allowing the mortgagee to take possession when he deems himself insecure it is not necessary that he be in fact insecure; it is enough if he had reason to believe and in good faith did believe himself to be insecure.—Woods v. Gaar, Scott & Co., 93 Mich. 143.

¶ 297. The right of a chattel mortgagee to take possession under an insecurity clause in the instrument is not a mere option to be exercised arbitrarily without reference to changed conditions or to the mortgagor's conduct.—Woods v. Gaar, Scott & Co., 93 Mich. 143.

¶ 298. A mortgagee may reserve the right to take possession of the goods if sold, but the right is optional, and the mortgagor is not in fault for not delivering them if they are not demanded.—Cadwell v. Pray, 41 Mich. 307.

¶ 299. Where a chattel mortgage gave the mortgagee a right of possession in case of any actual or attempted sale, assignment, disposal or removal of the whole or any part of the property, a sale of a portion in payment of an existing debt is such a violation of the condition as authorizes the mortgagee to seize the goods.—Laing v. Perrott, 48 Mich. 298.

¶ 300. Under a clause empowering the mortgagee to take possession whenever he should deem himself insecure, he would have good cause for doing so if he had reason to think and did think that he had been overreached in regard to the value of the property.—Botsford v. Murphy, 47 Mich. 536.

¶ 301. Where a stock of mortgaged goods has been seized under a writ of attachment so that the mortgagor is prevented from carrying on his business in the customary manner, mortgagees may consider their claim in jeopardy, and proceed under the terms of the mortgage to take possession.—McGraw v. Bishop, 85 Mich. 72.

¶ 302. A clause in a mortgage providing that if the mortgagor should sell, assign or dispose of the property, or attempt to do so, or to remove the same from the township, without the written assent of the mortgagee, the latter might enter upon the premises of the mortgagor, or any other place where the property might be, and take possession of, and sell and dispose of, the same, is neither an express nor an implied covenant for possession by the mortgagor, so as to subject the property to levy and sale on execution against him.—Eggleston v. Mundy, 4 Mich. 295.

¶ 303. Where a chattel mortgage contains a clause authorizing the mortgagees to take possession whenever they deem themselves insecure, an attachment in opposition to the mortgage, and the officer's refusal to admit the mortgagees to joint posession, justify

them in demanding possession, whether the debt is due or not.—Rosenfield v. Case, 87 Mich. 295.

¶ 304. A chattel mortgage provided that the mortgagee might take possession in case the property was sold. Held, that a demand of payment before the debt was due was not a demand for the goods, especially if made by the assignor of the debt from the vendor of the goods, since both had parted with their interests.—Cadwell v. Pray, 41 Mich. 307.

¶ 305. In replevin to enforce a chattel mortgage an instruction that the mortgagee was justified in taking possession under the general security clause of the mortgage is properly refused where the question of good faith is raised by testimony that the security was adequate.—Crowley v. Langdon, 127 Mich. 51.

§ 70. Conversion or impairment of right by party in possession.

See also ante ¶ 285.

Right of action for proceeds of sale by mortgagor, see post § 75.

Appropriation of goods to own use as satisfaction pro tanto, see post ¶ 404.

Retention of possession after tender by mortgagor, see post § 108.

Holding after discharge of mortgage, see post VI.

Of goods remaining in mortgagee's possession after satisfaction of debt, see post § 118.

Irregularities at foreclosure sale, see post § 138.

Mode of sale amounting to conversion, see post §§ 130, 137-139.

Conversion by excessive sale, see post §§ 132, 133.

Conversion by third persons, see post §§ 143, 144.

Evidence to show conversion of mortgaged goods by party in possession, see also Conversion, II.

Measure of damages for injury to mortgaged goods, see Damages, III, B.

¶ 306. If the mortgagee takes possession prematurely he does not thereby become liable for the price as for conversion of the whole, nor will he be answerable for the value of the whole property until he has disposed of it. And even in case of conversion he will be responsible for the balance only after his own debt is paid.—Daggett, Bassett & Hills Co. v. McClintock, 56 Mich. 51.

¶ 307. It is a conversion for a mortgagee, after taking possession of a portion of the mortgaged property on breach of condition, to retain possession of it and assign the mortgage to a third person; if he so converts the property its value may be applied on the debt.—Brong v. Brown, 42 Mich. 119.

¶ 308. Where a mortgagor is entitled to the possession of the goods until condition broken subject to the mortgagee's right to take possession under an insecurity clause, he can maintain trover if the mortgagee arbitrarily enforces said clause.—Woods v. Gaar, Scott & Co., 93 Mich. 143.

¶ 309. As between a mortgagee of chattels and a second mortgagee, whose mortgage was executed after possession of the property had been surrendered to the former, a sale of the property upon the first mortgage does not constitute such a conversion as to make the first mortgagee liable in trover.—Grimes v. Rose, 24 Mich. 416.

¶ 310. Trover will not lie against a mortgagee in possession of the mortgaged property under claim of absolute ownership without tender of the amount due him.—Card v. Fowler, 120 Mich. 646.

¶ 311. There is no conversion where a mortgagee, under a danger clause in mortgage, takes possession of the goods which are less in value than the amount of the mortgage.—Botsford v. Murphy, 47 Mich. 536.

¶ 312. If, when the mortgagee of a crop of celery has taken possession under his mortgage and placed men in charge, the mortgagor sends the men away after the trenches are opened to give the celery air, and then neglects to take proper care of the crop, he cannot recover against the mortgagee for resultant damage.—Van Werden v. Winslow, 117 Mich. 564.

¶ 313. Property which is taken out from the operation of a chattel mortgage by the mortgagor's fraudulent contrivance is wrongfully converted.—In re Hicks, 20 Mich. 280.

¶ 314. As against sureties on a replevin bond who took a mortgage on the chattels to indemnify them, which mortgaged chattels were left with the mortgagor, and the mortgage never became available to the mortgagees the mortgagor has no equity growing out of the giving of the mortgage to protect him against a suit for suffering a collusive judgment in the replevin action.—Wright v. Hake, 38 Mich. 525.

§ 71. Evidence and proof of title or right.

See also post ¶ 412.

¶ 315. Where chattels have been mortgaged to secure the payment of promissory notes, the notes must be put in evidence in defense to an action of replevin for the chattels in order to establish the mortgagee's right of possession as against that of a person otherwise entitled to it. But as against a person wrongfully trying to obtain pos-

session of them, the prior possession of the mortgagee would be enough.—Hendrie v. Canadian Bank of Commerce, 49 Mich. 401.

¶ 316. In trover by a mortgagee against an officer and a judgment creditor of the mortgagor to recover the value of the mortgaged goods taken from the mortgagor's possession, evidence is admissible showing an arrangement between the mortgagor and mortgagee whereby the latter was entitled to the immediate possession of the goods, and had the right to hold the same until the mortgage was due and paid.—Ganong v. Green, 64 Mich. 488; Ganong v. Green, 71 Mich. 1.

¶ 317. In an action of trover by a chattel mortgagee against one who has replevied the property, it is competent to introduce the draft which furnished the consideration for the chattel mortgage.—Heenan v. Forest City Paint & Varnish Co., 138 Mich. 548.

¶ 318. A mortgagee of chattels must prove the amount and condition of his claim if a controversy as to his rights under the mortgage arises with any one interested in questioning it.—Haynes v. Leppig, 40 Mich. 602.

¶ 319. In an action by mortgagees against a marshal for interference with their possession while disposing of the goods, it is proper to show that they were realizing the best prices that could be obtained and failed to get enough to pay the mortgages, and that the deficiency exceeded the value of the goods taken by the marshal.—Densmore v. Mathews, 58 Mich. 616.

¶ 320. Where a married woman brings trover for chattels taken upon a mortgage against a grantee thereof, and there is conflicting testimony as to whether the grantee held them under an agreement with the husband or one with the wife, and, if with the wife, whether it was absolute or conditional, the case is for the jury.—Stansell v. Leavitt, 48 Mich. 225.

¶ 321. A firm of lumbermen let a logging contract and agreed to furnish the logger with teams, the title to which the firm was to retain until the teams were paid for. The logger mortgaged the teams and never completed his contract; and the survivor of the firm having taken possession of the teams, the mortgagee replevied them from him. Held, that evidence bearing on the state of the account between the contracting parties at the time the mortgage was given was properly admitted, as it tended to show that nothing was then owing for the teams.—Hood v. Olin, 68 Mich. 165.

(1 Mich. Dig. 58)

§ 72. Instructions and jury questions as to title or right.

¶ 322. Where a mortgagee replevies attached chattels under a mortgage authorizing him to take possession after thirty days' default, evidence of an arrangement made prior to the levy of the attachment, between the mortgagor and mortgagee, by which the latter was to have immediate possession, should not be ignored by charging that plaintiff cannot recover unless some of the debt secured became due thirty days before the suit.—Hyde v. Shank, 77 Mich. 517.

¶ 323. Where a chattel mortgage expressly provides that the mortgagor is to keep a stock of goods replenished to an amount equal to 175% of the debt, it is improper to allow the jury to find that such was not the agreement of the parties, but that the right to take possession depended upon the mortgagee's belief as to the adequacy of the security.—Crowley v. Langdon, 127 Mich. 51.

B. TRANSFERS AND ALIENATIONS OF THE PROPERTY.

§ 73. In general.

Assignment of the mortgage and debt, see post IV.

What constitutes a transfer or sale within condition for seizure of possession, see also ante § 69.

Attempted transfer by mortgagor as ground for seizure by mortgagee, see ante § 69.

Sale by first mortgagee as conversion towards second mortgagee, see ante ¶ 309.

Estoppel of mortgagee to question sale by mortgagor, see also ante § 54.

Right of claimants under mortgagor to redeem, see post § 112.

Replevin by subsequent purchaser from mortgagor during chancery proceedings to foreclose, see post ¶ 521.

Seizure and disposal by mortgagee as ground for attachment, see Attachment, § 9, ¶ 20.

Attachment of or levy on mortgaged chattels, and rights as against the levy, see Attachment; Executions.

Extent of protection of subsequent purchaser, see ante § 47, and see also Sales, XI.

Criminal disposal of mortgaged chattels, see Crimes, II; Indictment.

¶ 324. The mortgagor has the right to make a general sale of whatever interest he owns.—Cadwell v. Pray, 41 Mich. 307.

¶ 325. A right of action on the part of the mortgagors for fraud in connection with the making of the chattel mortgage in question, did not pass to the purchaser from them.—Soule v. Harrington, 135 Mich. 155.

¶ 326. A chattel mortgagee cannot be deprived of possession by subsequent purchasers without tender or payment.—Paulus v. Nunn, 48 Mich. 190.

¶ 327. Purchasers subject to the equities of a chattel mortgagee in possession cannot divest such possession without redemption even if foreclosure has not been regular.—De Graff v. Byles, 63 Mich. 25.

¶ 328. The seller of a horse, who took a chattel mortgage thereon from the purchaser, does not have a legal title as against a purchaser from the mortgagor merely by force of a provision in the mortgage to the effect that the mortgagor shall retain possession and in case of default in payments the mortgagee shall have the right to take the property wherever it may be found without process of law, where the mortgagee after default did not exercise or seek to exercise rights based on such provision, but bought in at execution sale after the sale by the mortgagor had been made.—Allison v. Teeters, 176 Mich. 216.

¶ 329. Every purchaser of mortgaged goods becomes in equity a trustee of any fund provided for in the mortgage to the same extent to which it makes the mortgagor himself such a trustee.—Leland v. Collver, 34 Mich. 418.

¶ 330. A chattel mortgage was executed upon a quantity of logs to secure the payment of accommodation notes given by the mortgagees to enable the mortgagors to cut the logs and manufacture them into lumber, under an agreement on the part of the mortgagors to pay the notes out of the proceeds arising from the sale by them of said lumber. Held, that purchasers of the lumber could hold it as against the mortgagees, or the holders of the notes, who claimed to be subrogated to the rights of the mortgagees.—First Nat. Bank v. Weed, 89 Mich. 357.

¶ 331. One who purchases property expressly subject to a chattel mortgage which he assumes cannot assert any invalidity in the inception of such mortgage.—Dwight v. Scranton & Watson Co., 69 Mich. 127.

¶ 332. A purchaser of mortgaged property has the right before sale to test the existence of the lien by a bill to restrain foreclosure, so that in case of an adverse decision he can have a chance to pay the amount due and save the property.—Daugherty v. Byles, 41 Mich. 61.

§ 74. Consent of mortgagee.

See also post ¶ 419.

Waiver of clause for forfeiture by sale, see also ante ¶ 273.

Reserved right to possession and sale, see ante § 66.

As passing unincumbered title, see also ante ¶ 330.

Authority to pledge, see post § 78.

Neglect of mortgagee to assert lien as bar to right of foreclosure, see post § 124.

¶ 333. Where a chattel mortgage authorizes the mortgagee to take possession of the mortgaged property in case of its sale by the mortgagor without the written assent of the mortgagee, and such assent is afterwards given on condition that the money realized shall be applied to the payment of the mortgage debt, on a breach of such condition, a right inures to the mortgagee to take possession of the property.—Watson v. Mead, 98 Mich. 330.

¶ 334. Where a mortgagee claims the possession of a part of the mortgaged property because of an alleged attempt of the mortgagor to dispose of it contrary to the condition of the mortgage, and in a suit brought by the mortgagor for its recovery it appears that the mortgagee assented to the sale by the mortgagor of the balance of the property, it is error for the court to instruct the jury, generally, that such consent was a waiver of said condition, without calling attention to the claim of the mortgagee as to the alleged attempt of the mortgagor to dispose of the particular property in suit.—Riley v. Conner, 79 Mich. 497.

§ 75. Rights to price or proceeds of sale.

Right upon breach of condition to apply proceeds of sale to mortgage debt, see ante ¶ 333.

Extinction of reserved power of sale by improper sale or misapplication of proceeds or hostile levy, see ante § 66.

Accounting for sale price, see post § 120.

¶ 335. A mortgagee whose mortgage provides that any sales of the property shall be in the name of the mortgagee, and that the lien shall follow the property, may recover the purchase price of the chattels, under the common counts in assumpsit, of one who buys them from the mortgagor.—Flood v. Butzbach, 114 Mich. 613.

¶ 336. The common counts in assumpsit lie in favor of a mortgagee for the purchase price of the mortgaged chattels against one who buys them from the mortgagor, where the mortgage provides that any sale shall be in the mortgagee's name and that the lien shall follow the goods.—Flood v. Butzbach, 114 Mich. 613.

¶ 337. Where a mortgage of all the stock in trade "now or hereafter" to be owned by the mortgagor authorizes the mortgagees in case of default to take possession of the stock and to collect and receive moneys on the accounts, the mortgagees, if they have not

waived their right of lien, are entitled to hold, as against a garnishing creditor who had full notice of the mortgage, money due the mortgagor from the garnishee on account of stock acquired and sold after the execution of the mortgage.—Fuller v. Rhodes, 78 Mich. 36.

§ 76. Rights of takers under mortgagee.

See also ante ¶ 329.

Demand for possession on mortgagor after sale, see also ante ¶ 304.

¶ 338. A sale and delivery of mortgaged chattels by the mortgagee when in lawful possession by virtue of a voluntary surrender by the mortgagors, would transfer all his rights as mortgagee, and this would entitle his vendee to take and retain possession as against the mortgagors, at least until the mortgage debt was paid or tendered.—Sirrine v. Briggs, 31 Mich. 443.

¶ 339. A bank took a bill of sale of certain property as security but there was no change of possession and it was not recorded and hence, under Comp. L. 1897. § 9523, was void as against creditors. The bank sold the goods included in the bill of sale. Held, that the last purchaser took no better title than the bank had as against creditors of the first owner.—Sachs v. Norn, 139 Mich. 357.

§ 77. Execution or involuntary transfer.

Effect of levy or sale to terminate rights of possession between parties to mortgage, see ante §§ 65, 66.

Levy as ground for seizure under insecurity clause, see ante § 69.

Evidence and instructions as to title or right under mortgage, see also ante §§ 71, 72.

Priority of levy over foreign mortgage, see post § 86.

Rights of assignee, see also post ¶ 374.

Validity of execution upon goods covered by unrenewed mortgage, see post § 92.

Right to redeem, see post § 113.

Attaching creditor's right to redeem, see post § 113.

Execution creditor's right of subrogation upon redemption, see post § 117.

Right of action by mortgagee for conversion of mortgaged property by attaching creditor, see post §§ 143, 144.

Extent of recovery by trust mortgagee for wrongful seizure, see post § 146.

¶ 340. A sheriff or execution purchaser can obtain no title against a mortgagee of chattels without paying the amount due or performing the conditions, and being responsible for any unlawful interference.—Worthington v. Hanna, 23 Mich. 530.

¶ 341. A mortgagee's interest in chattels cannot be disturbed by an execution creditor unless the latter pays the mortgage or tenders payment, which he can do at any time before sale.—Wilson v. Montague, 57 Mich. 638.

¶ 342. A mortgagee may maintain trover against a sheriff who, having taken the mortgaged chattels on attachment or execution against the mortgagor, sells them in parcels; such a sale is an unlawful conversion.—Worthington v. Hanna, 23 Mich. 530; Ganong v. Green, 64 Mich. 488.

¶ 343. The possession of a mortgagee of chattels cannot ordinarily be disturbed by garnishment process for the sake of reaching a surplus after the lien is satisfied; and the receiver provided for by How. St., § 8065, can, at most, exercise no greater power over such chattels than a sheriff could in levying execution.—Smith v. Menominee Circuit Judge, 53 Mich. 560.

¶ 344. The seizure and sale of personal property, which is about to be sold under a mortgage, an invalid renewal of which was filed, by an attaching creditor, constitutes an unlawful conversion of the property where the attaching creditor had both constructive and actual notice of the rights of the mortgagee before levying its attachment.—Kratzmer v. Detroit Lumber Co., 195 Mich. 570.

§ 78. Submortgage or pledge.

¶ 345. That a mortgagee of live-stock, for his own protection, furnished feed for such stock while in the mortgagor's possession, does not justify an inference that the mortgagor was authorized to pledge the stock for its keeping.—Cleveland v. Koch, 108 Mich. 514.

III. LIEN AND PRIORITIES.

§ 79. In general; other levy or lien.

[Note. The effect and validity of the mortgage, rather than its priority, depends on its having been filed before other rights attached or on notice which is the equivalent of such filing. The necessity and effect of such filing and sufficiency of the filing or notice are treated ante I, C, D. It is assumed for the purpose of discussing lien and priority that the mortgage must have some validity.]

Modes of discharging lien, see post VI.

Extinction of mortgage and lien, see post VI.

Equity of mortgagee in after-acquired goods, see also ante § 12, ¶ 52.

Mortgage signed by husband and wife, see also ante ¶ 106.

Priority of mortgage given by mother to son over subsequent attachment, see also ante ¶ 196.

Priority of pledgee in possession, see also ante § 50, ¶ 216.

Divestiture of lien by consent of mortgagee to sale, see ante ¶ 330.
Pledge or submortgage by party in possession, see ante § 78.
Under particular circumstances, see post §§ 80-86.
Discharge by merger, tender or release, see post §§ 107-111.
Discharge of lien by tender, see post § 108.
Right of junior lienor to redeem, see post §§ 112, 113.
Right of subsequent lienor to redeem, see post § 113.
Extent of trust mortgagee's lien as affecting recovery from attaching creditor, see post § 146.
Priority of livery stable lien, see also Animals ¶ 119.
Priority of attachment over foreign mortgage not filed in Michigan, see Attachment ¶ 245.
Priority of attachment over unrecorded trust deed of land and chattels for security, see also Attachment, ¶ 247.
Rank and priorities of creditors under assignment, see Assignments for Creditors, § 23.

¶ 346. A clerk or agent whose wages are measured by profits has no lien on property in his possession as against a chattel mortgage given by his employer, but if he were a partner he would have a lien.—Wilcox v. Matthews, 44 Mich. 192.

¶ 347. A lien for the keep of a horse is subject to that of a valid, prior chattel mortgage, and the mortgagee need not tender the amount thereof to entitle him to possession. —Reynolds v. Case, 60 Mich. 76.

¶ 348. Where a chattel mortgage secures future liabilities and the mortgaged property is attached, the creditor increases his demands at his peril, for the attachment is of the mortgagor's interest as it then stands, and he cannot diminish that interest to the attaching creditor's detriment.—King v. Hubbell, 42 Mich. 597.

¶ 349. The relative rights of a mortgagee and of other creditors of the mortgagor represented by his assignee some of whom gave or extended credit while the mortgage was withheld from the files, are to be worked out by dividing the creditors into classes, those prior and those junior to the mortgage, and treating the mortgage as an intermediate lien for what remains of the proceeds of the mortgaged property after satisfying the prior ones, then pro rating the mortgagee with the general creditors for the unpaid balance of his debt.—Kennedy v. Dawson, 90 Mich. 79.

§ 80. Purchase money mortgages.

Mortgage with after-acquired clause as against seller of goods, see also ante § 43.
Inferiority of seller taking goods back for price after mortgage on them, see ante ¶ 184.

¶ 350. A sale and taking back of a chattel mortgage constitute one transaction so as to take priority over an earlier chattel mortgage of all personal property and all property to be acquired.—Hammel v. First Nat. Bank of Hancock, 129 Mich. 176.

§ 81. Priorities by notice or filing.

Effect of the mortgage as depending on filing or priority in filing, see ante I, D.
Effect of actual knowledge of unfiled mortgage upon priority, see ante §§ 37, 38.
Effect of unfiled mortgage as to second and subsequent mortgagees, see ante § 46.
Effect of tardy filing or of later being filed first, see ante §§ 48, 49.
Effect on priority of delay in filing, see ante § 49.
Necessity of renewal to maintain priority, see post § 97.
Ratification of act of attorney in accepting and filing mortgage as giving priority by relation to date of filing, see Attorneys, § 82.

¶ 351. A filed chattel mortgage is valid against a subsequent judgment, based on credit subsequently extended.—Eales v. Francis, 115 Mich. 636.

¶ 352. A chattel mortgage given in good faith to secure a valid indebtedness and duly recorded, takes priority over liens for labor performed after the giving and recording of such mortgage.—Presque Isle Sash & Door Co. v. Reichel, 179 Mich. 466.

§ 82. Between unfiled mortgages.

¶ 353. Under Comp. L. 1897, § 9523, which provides that chattel mortgages not filed nor accompanied by immediate change of possession, shall be absolutely void as against subsequent mortgagees in good faith, an unfiled mortgage of a growing crop taken in good faith and without notice, has priority over a previous mortgage contained in an unfiled lease of the land on which the crop is grown. —Lingle v. Owosso Sugar Co., 139 Mich. 203.

§ 83. Priority by agreement or terms of the mortgage.

Reference to prior mortgage as establishing priority without filing, see ante § 38.

¶ 354. A second chattel mortgage expressly subject to the first mortgage between the parties and also to a lease by the mort-

gagor on file is inferior to the lessor's right to look to the chattels for security of his accrued rents, regardless of whether the clause in the lease suffices as a chattel mortgage or merely suffices as a power in the lessor.—Crockett v. Bearce, 104 Mich. 257.

§ 84. ——Rights of subsequent creditors.

¶ 355. Subsequent creditors have not, merely by virtue of the provisions of Comp. L. 1897, § 9523, as amended by Pub. Acts 1907, No. 332, How. St., 2nd Ed., § 11407, providing that every chattel mortgage not accompanied by immediate delivery and followed by actual and continued change of possession of the chattels shall "be absolutely void as against creditors of the mortgagor * * * in good faith," unless a copy thereof be filed as directed by law, an actual lien upon the mortgaged property, but the mere right to a lien, requiring a proceeding of some kind for its fastening, when they become creditors during the period between the time of the making and the filing of the mortgage.—In re Huxoll, 193 Fed. 851; Detroit Trust Co. v. Pontiac Savings Bank, 196 Fed. 29, affirmed in 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509.

¶ 356. The right to liens of subsequent creditors becoming creditors during the time between the making and filing of a chattel mortgage, acquired by virtue of the provisions of Comp. L. 1897, § 9523, as amended by Pub. Acts 1907, No. 332, How. St., 2nd Ed., § 11407, providing that every chattel mortgage not accompanied by immediate delivery and followed by actual and continued change of possession of the chattels shall be absolutely void as against creditors of the mortgagor in good faith unless a copy thereof be filed as directed by the statute, is lost if a proceeding for the fastening of the lien is not commenced before bankruptcy.—In re Huxoll, 193 Fed. 851; Detroit Trust Co. v. Pontiac Savings Bank, 196 Fed. 29, affirmed 237 U. S. 186, 59 L. ed. 907, 35 Sup. Ct. Rep. 509.

§ 85. Waiver and estoppel of priority.

Waiver and estoppel between parties, see ante § 10.

Waiver and estoppel as to validity or existence of mortgage, see ante §§ 52-54.

Necessity of waiver by first mortgagee to give second mortgagee right of action against third persons for tort, see post § 143.

Joint right of action for torts by lienors waiving priority, see post § 145.

Purchase under levy or recognition of it as working estoppel to question execution or levy or sale thereunder, see Executions, XI.

Estoppel to assert satisfaction of prior judgment, see Judgments, XI.

¶ 357. A mortgagee taking possession of the mortgaged property under claim of absolute ownership does not thereby waive his mortgage lien.—Card v. Fowler, 120 Mich. 646.

¶ 358. A first mortgagee can waive his priority and let the second in upon the same footing with himself, so that in taking possession on default they become tenants in common of the securities and the goods therein specified.—Densmore v. Mathews, 58 Mich. 616.

¶ 359. A creditor does not lose the right to avail himself of How. St., § 6193, making a chattel mortgage, unaccompanied by change of possession, invalid as against a creditor whose claim accrues between the execution of the mortgage and the filing thereof, by taking a chattel mortgage to secure his own claim under circumstances not entitling him to protection as a subsequent good-faith incumbrancer; nor is such right affected by his failure either to take possession by virtue of his mortgage, or to have the same properly filed.—Vining v. Millar, 116 Mich. 144.

§ 86. Foreign mortgages and liens.

Place and time for filing, see ante §§ 30, 81.

¶ 360. Where goods in another state are mortgaged in that state, the mortgage being duly filed there, and are subsequently brought into this state by the mortgagor without the mortgagee's knowledge or consent, an attachment here in favor of the mortgagor's creditors prevails over such mortgage.—Corbett v. Littlefield, 84 Mich. 30.

¶ 361. Where a citizen of Michigan deals with personal property and its apparent owner in this state, in an action against him to recover the property by one having a recorded chattel mortgage thereon in another state his rights are not affected by the existence and record thereof.—Allison v. Teeters, 176 Mich. 216.

¶ 362. Where property on which a chattel mortgage exists in Indiana is brought to Michigan and sold by the mortgagor, in an action by the mortgagee against the purchaser to recover the property the rights of such purchaser are not affected by a decree of the Indiana court rendered prior to the sale foreclosing the mortgage and authorizing a sale, when the possession of the property by the mortgagor was not disturbed by the mortgagee though there was default in payments under the mortgage and it provides that in case of default the mortgagee may take possession of the property wherever found without process of law and it shall become his absolute property.—Allison v. Teeters, 176 Mich. 216.

IV. ASSIGNMENT OR TRANSFER OF THE MORTGAGE.

§ 87. Assignability and rights of assignee.

Sale or transfer of the mortgaged property, see ante II, B.
Mortgagability of the mortgage itself, see ante ¶ 45.
Sale of property by mortgagee in possession as working assignment of his rights, see also ante § 70.
Assignment or release, effect of particular writing, see post ¶ 418.
Amount required to redeem from assignee, see post § 115.
Assignment of mortgage to subrogee upon redemption, see post § 117.
Assignee's right of foreclosure, see post § 123.
Right of mortgagee as assignor to recover from attaching officer, see post ¶ 539.
Assignment for security of other debt, see also post ¶ 412; and see generally Pledges.

¶ 363. A chattel mortgage is a chose in action, and the proper subject of assignment; and the assignee has the right to direct a sale of the property pursuant to notice of foreclosure given by the assignor prior to the assignment.—Schmittdiel v. Moore, 101 Mich. 590.

¶ 364. The assignee under a bona fide mortgagee of chattels is entitled to the same protection as the mortgagee in an action of replevin brought by a claimant of the goods.—Mayer v. Soulier, 48 Mich. 411.

¶ 365. After the execution of a chattel mortgage upon a quantity of saw-logs to secure the payment of discounted drafts drawn by the mortgagee upon the mortgagors, it having been agreed between the parties to the mortgage and the holders of the drafts that the mortgagors should waive the conditions of the power of sale, and that the mortgagee should proceed under the mortgage, manufacture the logs into lumber, and market the same, pay the expenses, take up the drafts, and pay the surplus, if any, to the mortgagors, the mortgagee, in case he assigns the mortgage to himself as trustee, is, as assignee, entitled to follow the mortgaged property by trover against one buying it from the sawyer in possession.—Stanton v. Estey Mfg. Co., 90 Mich. 12.

¶ 366. The assignee of a mortgage of a vessel takes it with all the rights and powers which were possessed by the mortgagee: and no equities existing between several mortgagors will deprive the assignee of any of the usual remedies for the enforcement of the security.—Dalrymple v. Sheehan, 20 Mich. 224.

¶ 367. Notes of a mortgagor, indorsed by its former president to a bank and taken before the mortgage and not on its credit, belong to the bank and not to its cashier, a mortgagee in trust for it to secure the bank on paper of the mortgagor, held by it; and accordingly a junior mortgagee demanding assignment of the mortgage on payment cannot claim the surrender of such notes as collateral to the mortgage.—Schmittdiel v. Moore, 101 Mich. 590.

§ 88. Equities.

See also post ¶ 468.
Payment of mortgage as against assignee, see also pos ¶ 402.

¶ 368. One who buys a chattel mortgage with knowledge of an understanding between mortgagor and mortgagee that it shall be released on payment of the sum that he gives for it cannot, against a creditor of the mortgagor, enforce it for more than he has paid with interest.—Ganong v. Green, 71 Mich. 1.

¶ 369. The assignee of a mortgage of chattels stands only in the mortgagee's position, and cannot, where the mortgagee could not, maintain replevin against a sheriff who levies on the goods under execution against the mortgagor while they are in the possession of the mortgagor's lessee.—First Nat. Bank v. Summers, 75 Mich. 107.

¶ 370. The assignee of a chattel mortgage given to secure future advances does not acquire any rights if such advances are never made.—Judge v. Vogel, 38 Mich. 560.

¶ 371. The assignee of a chattel mortgage takes it only for what it is worth as between the original parties unless it secures negotiable paper.—Judge v. Vogel, 38 Mich. 569.

¶ 372. Where a chattel mortgage that is given for a fixed sum, but really to secure future advances, of which none is made, is assigned in good faith and for value to one who supposes it to be given for an actual indebtedness, the assignee obtains no greater rights than the mortgagee had, unless it is given to secure negotiable paper, when, if the assignment is made before maturity, he holds the paper and the mortgage discharged of pre-existing equities.—Judge v. Vogel, 38 Mich. 568.

§ 89. ——Under mortgage to secure negotiable paper.

¶ 373. A chattel mortgage, given to secure negotiable paper, and the note it secures, if assigned before maturity, is held by assignee discharged of pre-existing equities.—Judge v. Vogel, 38 Mich. 568.

¶ 374. One who purchases a note secured by a mortgage, and takes no legal transfer

by indorsement of the note or by assignment of the mortgage, acquires only an equitable interest, which, however, enables him to deal with the mortgage for all beneficial purposes, and if he afterwards purchases the mortgagor's interest subject to a levy, his title becomes complete except as against levy, which he is estopped from denying, and makes his seizure of the chattels while under the levy a trespass; he cannot insist that the judgment was satisfied by a levy which he himself has unlawfully defeated.—Nelson v. Ferris, 30 Mich. 497.

§ 90. Creditor as assignee.

¶ 375. A creditor who buys a chattel mortgage given by his debtor has no greater rights under it than any other assignee; as purchaser he gets only the mortgagee's right; as creditor he might contest the validity of the mortgage by attaching or levying on the goods.—Judge v. Vogel, 38 Mich. 569.

¶ 376. Whether the mortgagee in a trust chattel mortgage securing several of the mortgagor's creditors can assign to one of the creditors his interest in the mortgage, quære.—Simon v. Leland, 105 Mich. 226.

§ 91. Assignment of mortgage without debt.

Right of foreclosure by assignee of mortgage as trustee for owner of debt, see post § 123, ¶ 462.

¶ 377. A finding of facts which shows that a chattel mortgage was assigned to the plaintiff for a valuable consideration, and not showing that there was any other instrument witnessing the debt, or to which the mortgage was collateral, ought to be understood as a finding of an assignment which was effectual to pass the interest of the mortgagee. Whether the assignment of a mortgage collateral to some other instrument by which the debt is witnessed does not convey the mortgage to the assignee as trustee for the owner of the debt, so as to authorize that trustee to maintain a suit at law for the property mortgaged or for its proceeds, quære.—Giddey v. Uhl, 27 Mich. 94.

V. RENEWALS AND EXTENSIONS.

§ 92. Renewal and effect of nonrenewal.

Inserting renewal stipulation in mortgage on file, see also ante ¶ 41.

Effect of notice of unrenewed mortgage, see ante § 37.

Effect of nonrenewal to let second mortgage into priority, see also ante ¶ 160.

Renewal as payment, see post § 102.

Renewal and subsequent renewal, see Comp. L., §§ 11991, 11992; see also Pub. Acts, 1915, No. 163.

¶ 378. The annual renewal of a mortgage is required by Comp. L. 1871, § 4709 (How. St., § 6196), not only for the information of the mortgagor's general creditors, but for that of subsequent purchasers or mortgagees in good faith.—Briggs v. Mette, 42 Mich. 12.

¶ 379. The foregoing decision from Briggs v. Mette, 42 Mich. 12, seems to have been overruled by decisions that only those who became creditors after the expiration of one year from filing and before the renewal would be protected.—Wade v. Strachan, 71 Mich. 459; Watson v. Mead, 98 Mich. 330.

¶ 380. A chattel mortgage not renewed until after one year from its filing does not lose its force as against a second mortgage taken within the year; the second mortgage in such case is not one "in good faith" within the meaning of How. St., § 6196; and a renewal after the year preserves the lien except as against those acquiring rights in the interval.—Wade v. Strachan, 71 Mich. 459.

¶ 381. Where a husband as security for money he owes his wife gives her a bill of sale which is properly filed but not renewed, the goods never being delivered to the mortgagee, an execution upon the goods while the bill is unrenewed, holds.—Krum v. Downey, 98 Mich. 511.

¶ 382. Failure to renew a chattel mortgage does not avoid it as to creditors of the mortgagor who became such prior to the expiration of one year from the filing thereof. —Watson v. Mead, 98 Mich. 330.

¶ 383. Where an affidavit of renewal of a chattel mortgage was filed by the mortgagee after the expiration of the period prescribed by statute therefor but before general creditors of the mortgagor had obtained a mortgage or acquired any lien on the mortgaged property, held that the rights of such creditors of the mortgagor and the rights of the mortgagee were the same as if the affidavit had been made and filed within the prescribed period.—Symons Bros. & Co. v. Brink, 194 Mich. 389.

¶ 384. Under How. St., § 6196, providing "every such mortgage shall cease to be valid as against * * * subsequent purchasers * * * in good faith" if not renewed at the end of a year, the question of good faith of a purchaser at execution sale in hostility to the mortgage after the year and failure to renew was for the jury on evidence that part of the mortgage debt was fictitious for the purpose of defeating the execution creditor and that mortgagee knew of the debt to such creditor.—Watson v. Mead, 98 Mich. 330.

§ 93. ——Effect of taking possession.

¶ 385. Where a mortgage has been duly filed, and during the first year thereafter the goods are taken by the mortgagee into his own possession, the provision of the statute as to renewals does not apply unless the property is again put into the mortgagor's possession.—Wood v. Weimar, 104 U. S. 786, 26 L. ed. 779.

¶ 386. A renewal affidavit is not necessary in order to render a recorded chattel mortgage valid as against an attaching creditor, where public notice was given of the sale of the mortgaged property and an attorney for the mortgagee was in possession of the property and was on the point of selling the same at public auction when the property was seized by the attaching creditor.—Kratzmer v. Detroit Lumber Co., 195 Mich. 570.

§ 94. Place for renewal.

¶ 387. An affidavit of renewal of a chattel mortgage made before and filed by the deputy clerk of the city of Ionia in the clerk's absence is valid, if the deputy has been regularly appointed by the clerk and has taken and filed the oath of office.—Tower v. Welker, 93 Mich. 332.

§ 95. Sufficiency of affidavit.

Affidavit for renewal, see Comp. L. 1915, § 11991; see also Pub. Acts 1915, No. 163.

¶ 388. An affidavit for the renewal of a chattel mortgage is insufficient if it does not distinctly indicate the amount to which the mortgagee was entitled. So held where the mortgage secured an unexpired lease containing various stipulations, and there was nothing to show whether the lessee had observed the covenants or whether any rent remained due, the affidavit stating merely "that there was due and remaining unpaid on said mortgage the conditions as mentioned in said chattel mortgage lease, and that the mortgagee's interests in the chattels therein described remain unchanged and are hereby renewed for the amount above written."—Briggs v. Mette, 42 Mich. 12.

¶ 389. A renewal affidavit which states that a certain sum "constitutes the amount of interest" of the mortgagees in the property, mentioned in the mortgage, is sufficient.—Manwaring v. Jenison, 61 Mich. 117.

¶ 390. An affidavit of renewal of a chattel mortgage upon a stock of lumber and other material kept for sale in connection therewith, including all other lumber, stock or material of every kind which the mortgagors might thereafter add to said business, which states that the mortgagee's interest in the chattels described in the mortgage remains unchanged, and is hereby renewed for the amount claimed to be due upon the mortgage, is sufficient to continue the mortgage in force as to such after-acquired property.—Eddy v. McCall, 77 Mich. 242.

¶ 391. Where a mortgage shows upon its face that it is to be a continual indemnity, an affidavit of renewal stating that there is due and unpaid the sum for which the mortgage was given, and that the mortgagee's interest in the chattels remains unchanged, is sufficient, without stating the actual amount of the matured indebtedness at the date of renewal, so long as the obligations, both matured and not matured, exceed the sum mentioned.—Chafey v. Mathews, 104 Mich. 103.

¶ 392. Where an affidavit for the renewal of a mortgage described the mortgage as filed "with the clerk of the township of Bridgeport in Saginaw county, Michigan," and the attestation clause was, "Subscribed and sworn to before me this 20th day of August, 1879, at Bridgeport," it was held that the venue was sufficiently given.—Griffin v. Forrest, 49 Mich. 309.

§ 96. Record of renewal.

Sufficiency of record for filing, see ante § 83. Notice as dispensing with refiling, see ante ¶ 155.

¶ 393. The statute providing that a chattel mortgage shall cease to be valid after the expiration of one year unless, within thirty days next preceding, an affidavit of renewal shall be filed (Comp. L. 1871, § 4709, How. St., § 6196), does not require the hour of filing to be noted, but merely provides that the clerk "shall indorse the time when the same was filed." Held, that a renewal purporting to have been made on the anniversary of the filing of the mortgage is therefore sufficient.—Griffin v. Forrest, 49 Mich. 309.

§ 97. Effect of renewal on priority.

¶ 394. A new contract of indebtedness, not entitled to preference, and discharging the old debt, was not created by the mere giving of notes secured by a subsequent mortgage by a creditor entitled to a lien on goods for advances made without notice of a previous unfiled mortgage, nor did the extension by such mortgage of the time of payment, or a recital therein securing future indebtedness, alter the creditor's rights as against the mortgage not seasonably filed.—Dempsey v. Pforzheimer, 86 Mich. 652.

¶ 395. The owner of a stock of goods mortgaged them to secure an indorser of his note, after which he sold the goods and agreed with the purchaser to secure a release of the

mortgage, and the latter gave a chattel mortgage which was assigned with his consent and duly recorded. The vendor informed the first mortgagee of the sale, and of the buyer's desire to give another mortgage and to have the first one released, whereupon the first mortgagee executed the release with the understanding that he was to have the same interest in the new as in the old mortgage, but as a matter of fact the vendor procured and filed an assignment to him of the second mortgage, the purchaser of the goods claiming to have been defrauded in the amount and value of the goods sold him sought to rescind the sale and attached the goods which were replevied by the first mortgagee. On trial of the replevin suit, it was held that the first mortgagee occupied the same relative position to the purchaser as he did under the first mortgage, and that the vendor and assignee of the second mortgage were not agents of the first mortgagee, and the latter was not chargeable with their knowledge of the alleged fraud, and that he was a bona fide holder of the second mortgage. —Sanford v. Pettit, 83 Mich. 499.

§ 98. Premature renewal.

Time for renewal, see Comp. L. 1915, § 11991; see also Pub. Acts 1915, No. 163.

¶ 396. A mortgage dated July 31, 1882, was filed October 2, 1882, and a renewal affidavit sworn to before the township clerk was filed July 26, 1883. Held, that the renewal was ineffective.—Reynolds v. Case, 60 Mich. 76.

¶ 397. Where the original filing was subsequent to the date of the original mortgage and the renewal was more than 30 days before one year from the filing, held, that the mortgage remained in full force as notice for one year from the original filing.—Reynolds v. Case, 60 Mich. 76.

¶ 398. An attempted renewal of a chattel mortgage filed nearly eight months before the expiration of the year in which it was originally filed is not in compliance with Comp. L. 1897, § 9526, How. St., 2nd. Ed., § 11410, providing that a chattel mortgage shall cease to be valid as against the creditors of the person making the same or subsequent purchasers or mortgagees in good faith after the expiration of one year from filing the same or a copy thereof, unless within thirty days next preceding the expiration of such year an affidavit of renewal shall be filed.—Kratzmer v. Detroit Lumber Co., 195 Mich. 570.

¶ 399. Where an affidavit for the renewal of a chattel mortgage is invalid because filed more than thirty days before the expiration of the year in which the mortgage was originally filed and an attaching creditor has both constructive and actual notice of the claims of the mortgagee before his attempt to levy an attachment at the time the property is about to be sold at foreclosure, the mortgage lien is perpetuated and remains paramount to the attachment lien.—Kratzmer v. Detroit Lumber Co., 195 Mich. 570.

§ 99. Renewal of unfiled original.

¶ 400. A mortgage duly filed is not void because given in renewal of old mortgages that were never filed.—Johnson v. Stellwagen, 67 Mich. 10.

VI. PAYMENT, REDEMPTION AND DISCHARGE.

§ 100. Payment or satisfaction of debt.

Necessity of tender or payment to entitle subsequent purchaser to possession, see ante § 73.
Various media of payment and modes of satisfaction, see post §§ 101-104.
Evidence to prove extinguishment of debt, see post § 106.
Discharge of mortgage by tender, merger or release, see post §§ 107-111.
Bill to restrain foreclosure of discharged mortgage, see post § 116.
How chattel mortgage may be discharged, see Comp. L. 1915, § 11996.

¶ 401. A chattel mortgage does not cease to be a lien, and the debt it secures is not to be considered paid, merely because the mortgagor has an offset against his creditor exceeding the debt.—Warner v. Comstock, 55 Mich. 615.

¶ 402. A woman who held a bill of sale of personal property in security for a debt proceeded to sell the property. Part of it was covered by a chattel mortgage, and at her request this mortgage was purchased by a third person, and held for her. She sold property enough to pay both debts, and of that which was sold enough was included in the chattel mortgage to pay that off. Afterwards her son, who was cognizant of all the facts, took an assignment of the chattel mortgage. Held, that the chattel mortgage must be deemed satisfied.—Long v. Moore, 56 Mich. 23.

¶ 403. B. sold some horses and took back a mortgage, which he assigned to L., who seized the horses under it and re-assigned to B., who afterwards joined in a note with him for an individual debt, and to secure it gave another mortgage on the same horses. Afterwards, on paying L.'s note when it was past due, B. cut his own name off and assigned the note to P. in order to keep it alive against L., and P., without B.'s knowledge, assigned it to C., but paid B. the bal-

ance due from L. B. then demanded the horses from L. under the original mortgage, and the officer seizing them took them from C., who brought trover as for their conversion. Held that on receiving the amount due from L., B. had a right to suppose the transaction with him ended, and that he had a right to foreclose the original mortgage.—Corbitt v. Brong, 44 Mich. 150.

¶ 404. Where one holding property in mortgage converts it to his own use, the mortgage debt is thereby satisfied to the extent only of the value of the property.—Davis v. Rider, 5 Mich. 423.

§ 101. ——By labor or services.

¶ 405. The buyer of a portable saw-mill gave a series of notes for the unpaid portion of purchase price and secured them by a chattel mortgage on the mill. He also made a contract with the seller whereby he was to saw for him, and the latter was to be allowed to withhold one-third of the payments due for this work until it should amount to the unpaid balance. He did not do so, however, and when so much sawing had been done that a third of the payments therefor would have completed the payment for the mill, the first note only had been actually paid. As the remaining notes were not taken up, the seller demanded the property, and as the buyer refused to give it up he took it on a writ of replevin. Held, that as the seller had not withheld the money to which he was entitled, and it was therefore never allowed to apply on the mortgage, it did not follow that the mortgage was extinguished from the fact merely that enough sawing had been done to satisfy it.—McRae v. Davenport, 51 Mich. 633.

§ 102. ——By substituting or renewing notes for debt.

See also post ¶ 410.
Change or renewal of debt as affecting lien, see ante § 97.

¶ 406. Where the purchaser of a stock of goods has given in part payment a mortgage on the goods, which, for the protection of his credit, is withheld from filing but deposited in a bank for safe keeping and collection, and subsequently the parties join in a note to the bank, which is discounted, and out of the proceeds the mortgagee is paid off, and the mortgagor gives his note for what remains due on the mortgage debt to the bank, which thereupon surrenders the joint note, the transaction does not operate as a discharge of the mortgage.—Hyma v. Three Rivers National Bank, 79 Mich. 167.

¶ 407. A chattel mortgage was filed April 12, 1876, to secure a note payable in one year from April 10, 1876, and on April 2, 1877, a note for the amount left unpaid was given and the old note given up. There was conflicting evidence as to whether the mortgage remained in force as security for the new note. Held, error to charge in replevin by the holder of the mortgage that there was no question of its valid existence to April 12, 1877, and that its filing was notice until that time; it was for the jury to determine whether it also secured the new note.—Cadwell v. Pray, 41 Mich. 307.

§ 103. ——Foreclosure and application of proceeds.

Effect of irregular sale, see post § 137.

¶¶ 408, 409. The foreclosure of a chattel mortgage, and the purchase of the property by the mortgagee, subject to two prior mortgages held by him covering the same and other goods, were held not to operate as a discharge of the prior mortgages and a payment of the debts secured thereby.—Rose v. Page, 82 Mich. 105.

§ 104. ——Mortgage to secure indorsement or other secondary obligation.

¶ 410. The indorsers of a note were secured by a chattel mortgage from the maker. On the maturity of the note, without waiting for protest, they took it up, giving their own paper, which they finally paid. Held, that they did not lose their mortgage security.—Manwaring v. Jenison, 61 Mich. 117.

§ 105. Application of payments.

Application of proceeds of foreclosure, see post § 134.
General law as to application of payments, see Payment, III.

¶ 411. A mortgagor's monthly payments in excess of interest on a past-due chattel mortgage must be applied on the principal, though denominated by the parties a compensation for extensions of time.—Bateman v Blake, 81 Mich. 227.

§ 106. Evidence of payment or satisfaction.

Evidence and proofs of payment, see generally Payment, V.

¶ 412. A chattel mortgage was given to secure the payment of eleven promissory notes, and five of these notes with the mortgage were assigned by the mortgagee to the plaintiffs as collateral security for a debt due them. Defendants subsequently levied upon a part of the mortgaged property by virtue of executions against the mortgagor, and plaintiffs sued them in trover. Held, that it was competent for defendants in this suit to show that plaintiffs had appropriated sufficient of the mortgaged property, before the mortgage became due, to satisfy their debt,

since such evidence would show an extinguishment of plaintiffs' title to the property, and the residuum of the mortgage interest, if any, would revert to the mortgagee.—Place v. Grant, 9 Mich. 42.

¶ 413. If there were any facts to excuse the failure to apply the moneys received on the sale in satisfaction of the mortgage and a security bill of sale, they should have been affirmatively established, as the sale prima facie paid it where such mortg ge was assigned to a third person at the request of the holder of such bill of sale, and held for her, and where the personal property was sold for enough to pay both debts.—Long v. Moore, 56 Mich. 23.

§ 107. Merger and extinction.

Sale by mortgagor's assignee to mortgagee, effect of, see Assignments for Creditors, ¶ 162.

¶ 414. Chattel mortgage assigned by a debtor of a firm to a member thereof in payment of a firm debt, held paid by a bill of sale taken for the firm by another partner upon a purchase of the mortgaged property for the purpose of securing other indebtedness.—Rowley v. Bates, 97 Mich. 406.

¶ 415. A retail dealer secured his purchases of stock by giving ch ttel mortgages thereon. He afterwards gave to the same mortgagee another chattel mortgage, as to which it was disputed whether it was meant to supersede the earlier ones or not. The mortgagee received more than enough money to satisfy the latest mortgage, and, having seized the stock under one of the earlier ones, was sued in trover by the mortgagor. He conceded on the trial that if the last mortgage superseded the former ones he had no claim under it, and did not rely on it as a defense to the action. The jury found specially that it did supersede the earlier mortgages. Held, that this finding was conclusive, and that the mortgagee's concession left him without any justification for seizing the mortgagor's stock.—Kramer v. Gustin, 53 Mich. 291.

§ 108. Tender.

Necessity of tender of debt to hold mortgagee in trover, see ante § 70, ¶ 310.
Refusal of tender as forfeiture, see post § 125.
Decreeing surrender on completing tender, see also post ¶ 437.
Necessity of tender or payment to entitle subsequent purchasers to possession, see ante § 73.
General requisites of tender, see Payment, Tender and Deposit, I, B.
How mortgages may be discharged, see Comp. L. 1915, § 11996.
Penalty for refusal to discharge chattel mortgage, see Comp. L. 1915, § 11997.

¶ 416. A tender of the amount due at maturity discharges the lien of the mortgage; and if the mortgagee refuses to receive it and deliver up the property he cannot have the amount of his debt allowed, by way of recoupment or otherwise, in an action of trover brought by the mortgagor to recover the value of the property.—Fuller v. Parrish, 3 Mich. 211.

¶ 417. Under a chattel mortgage which authorizes, in default of payment, the sale of the property at public or private sale to s tisfy the debt, interest and reasonable expenses, and the seizure of the property at any time when the mortgagee shall deem himself insecure, and its disposition "in the manner above specified," a tender of the principal, with interest to date and accrued costs, the mortgagee having seized the property under the insecurity clause, discharges the property from the lien of the mortgage, and renders its further detention illegal.—Shattuck v. Cole, 91 Mich. 580.

¶ 417a. A tender by a second mortgagee of the amount secured by the prior mortg ge, if accompanied by a demand for an assignment not only of the mortgage, but of certain notes of the mortgagor upon which the owner of the first mortgage is indorser, and to which the second mortgagee has no right, will not discharge the lien of the first mortgage.—Schmittdiel v. Moore, 101 Mich. 590.

§ 109. Release.

By conversion by mortgagee in possession, see also ante § 70, ¶¶ 306-308.
How proved, see post § 111.
Release of mortgage as waiver of forfeiture, see also post ¶ 458.
General law of releases, see Releases.
Agreement for sale and account as consideration for release, see Contracts, V, B.

¶ 418. An instrument purporting, for a valuable consideration, to "assign, release, and deliver" to a third person all right, title, and interest in the security or property covered by a chattel mortgage therein described, is an assignment of the mortgage, and not a discharge thereof.—Aultman, Miller & Co. v. Sloan, 115 Mich. 151.

¶ 419. Silence by a mortgagee who is present when a bill of sale of the mortgaged property is read, in which a portion of the property is reserved by the vendor and mortgagor, and in which the vendee assumes the payment of the mortgage debt, will not amount to a consent to a release of the reserved property from the mortgage, or estop him from thereafter enforcing its lien thereon.—Riley v. Conner, 79 Mich. 497.

§ 110. ——Suing on debt or for value of property.

¶ 420. The commencement of a suit upon a promissory note does not extinguish the lien of a chattel mortgage collateral to the note.—Thurber v. Jewett, 8 Mich. 295.

¶ 421. In a bill to restrain the foreclosure of a mortgage of chattels complainant relied upon the discharge of the mortgage lien by a tender. The evidence of a valid tender was conflicting; but it was shown that in a subsequent replevin suit between the same parties, involving the right to the same chattels on other grounds, the holder of the mortgage had recovered judgment for the value, taking no account of the mortgage as an existing lien. This showing was held to support the allegation that the lien had been discharged.—Daugherty v. Byles, 41 Mich. 61.

§ 111. ——Evidence of release.

¶ 422. As bearing on the probability of a release by the mortgagee of part of mortgaged chattels, evidence of the value of the property covered by the mortgage is admissible.—Riley v. Conner, 79 Mich. 497.

¶ 423. Evidence of the value of the rest of mortgaged chattels is admissible as bearing on the probability of the release of part of such chattels.—Riley v. Conner, 79 Mich. 497.

¶ 424. The evidence does not sustain a finding that a mortgagee had released certain of the mortgaged property when it shows no express agreement that the property should be released, but only acts and words from which a release might be inferred.—Riley v. Conner, 79 Mich. 497.

§ 112. Right to redeem.

Compliance with power of sale to cut off right of redemption, see post § 125.

¶ 425. A mortgagor of chattels or claimants under him, such as his creditors or assignee, have the right to redeem the property by paying the debt when due and before sale.—Brink v. Freoff, 40 Mich. 610.

¶ 426. The right of redemption is not lost until there has been a sale of the property, so that some one sets up a title no longer conditional.—Haynes v. Leppig, 40 Mich. 602.

¶ 427. It cannot be said that a year to redeem was given by virtue of the original agreement to advance money and take a bill of sale in security, where the lender swore that the agreement gave only 30 days to redeem and the only other person who knew the terms of it, an agent of the borrower, did not testify.—Farrell v. Danbury, 141 Mich. 81.

§ 113. ——By execution creditor or subsequent lienor.

Right of redemption by junior incumbrancer omitted from notice, see post ¶ 478.

¶ 428. The right of an execution creditor to redeem from a chattel mortgage attaches as soon as a lien is acquired by the levy of execution on the property it covers, and is not postponed till after sale on the execution.—Lucking v. Wesson, 25 Mich. 443.

¶ 429. An execution creditor, upon payment of a chattel mortgage which is a prior incumbrance upon the chattels on which his execution has been levied, is entitled to be subrogated to the rights of the mortgagee; and to that end he has a right to demand and receive an assignment of the mortgage.—Lucking v. Wesson, 25 Mich. 443.

¶ 430. The holder of a subsequent lien upon mortgaged chattels has the same right to protect his interest in the property as if the prior lien be of any other nature, and may pay off the mortgage.—Lucking v. Wesson, 25 Mich. 443.

§ 114. Time for redemption.

See also ante ¶¶ 425-428.

¶ 431. A mortgagor of chattels, notwithstanding the forfeiture of the condition of the mortgage, may redeem in equity at any time before the mortgagee has foreclosed by a reduction of the property into possession or by a sale pursuant to the power conferred by the mortgage.—Van Brunt v. Wakelee, 11 Mich. 177.

¶ 432. Testimony of the borrower that after the money was advanced and a bill of sale given as security, he and the lender agreed that a chattel mortgage should be given with a year to redeem, that it was executed and tendered but after looking it over the lender declined to accept it, that they then agreed to a chattel mortgage with six months to redeem but that the lender thereafter refused to accept any mortgage at all, that thereafter the lender insisted on the borrower's paying a note to a third person on which the money was raised which the borrower tried to do, failing by the fault of the lender or the third person, does not tend to show that the original agreement was modified by making the redemption time one year.—Farrell v. Danbury, 141 Mich. 81.

§ 115. Amount required to redeem.

Taking possession of goods less in value than amount of mortgage, see also ante ¶ 311.

¶ 433. Where a mortgagor of chattels has difficulty in ascertaining under what claim the holders of the mortgages as assignees are holding the property, they having first caused it to be seized on execution, it is a question for the jury whether they are acting in good faith and entitled, upon redemption, to exact their costs of seizure.—Shattuck v. Cole, 91 Mich. 580.

§ 116. Bill to redeem or enjoin foreclosure.

See also post ¶ 512.

Bill to redeem by junior incumbrancer omitted from notice, see post ¶ 478.

¶ 434. A mortgagor of chattels may maintain a bill in equity to redeem after condition broken, and after the mortgagee has taken possession, if brought within a reasonable time.—Flanders v. Chamberlain, 24 Mich. 305.

¶ 435. A bill in equity which sets forth the facts upon which depends the equitable right to redeem mortgaged chattels after condition broken and possession taken by the mortgagee, and alleges that an amount stated was due on a day stated, and that complainant had offered to pay that amount, although it does not in so many express words offer to pay what may be found due upon the mortgage debt, contains all the substantial requisites of a bill to redeem, where the question arises upon a hearing upon the evidence and merits without a demurrer.—Flanders v. Chamberlain, 24 Mich. 305.

¶ 436. The substantial meaning of a prayer to be allowed to redeem, in a bill in equity brought for that purpose, is to be allowed to redeem by paying whatever may be found due upon the mortgage; and it makes no difference in this regard that it is claimed in the bill that the whole debt has been paid, as this is always open to denial by the answer, and when so denied the question of the amount due is put in issue, and if anything should be found due the prayer must still on the hearing be construed as one to be allowed to redeem by paying what may thus be found due.—Flanders v. Chamberlain, 24 Mich. 305.

¶ 437. Where mortgagors file a bill to restrain the foreclosure of a chattel mortgage, and for its surrender to them on payment of the sum admitted by the bill to be due thereon, which sum the complainants claim to have tendered to the assignee of the mortgage, and the court finds that the mortgage, so far as it had ever been a valid lien, was discharged by the tender, a decree should be made for the surrender of the mortgage upon payment of the amount of the tender.—Costigan v. Howard, 100 Mich. 335.

§ 117. Subrogation and assignment on redemption.

See also ante ¶ 429.

Collaterals passing as incident to mortgage, see also ante ¶ 367.

Necessity of subrogation to give second mortgagee right of action against third persons for tort, see post § 143.

¶ 438. An execution creditor redeeming the chattels from a prior mortgage thereon is entitled to be subrogated to the mortgagee's rights and to receive an assignment of the mortgage.—Lucking v. Wesson, 25 Mich. 443.

¶ 439. Tender of payment of a debt secured by mortgage, by a junior incumbrancer accompanied by a demand for an assignment of the mortgage, does not extinguish the mortgage.—Schmittdiel v. Moore, 120 Mich. 199.

¶ 440. A second chattel mortgagee tendering the holder of a first mortgage on the property the amount of his claim, has a right to have such first mortgage assigned to him.—Williams Bros. Co. v. Hanmer, 132 Mich. 635.

¶ 441. In a suit by a second chattel mortgagee to compel the holder of a first mortgage on some of the property covered by the second mortgage, to assign the mortgage to him, it is no defense that one of the signers of the notes secured was an accommodation maker where there was nothing on the face of the notes or mortgage to show that part of the property was owned by one maker and part by another, or that part of the debt was to be paid by each, or any suggestion that any part of the property was to be sold before the other.—Williams Bros. Co. v. Hanmer, 132 Mich. 635.

¶ 442. A junior incumbrancer who has tendered payment of the debt accompanied by a demand for an assignment of the mortgage, may maintain trover against the first mortgagee for conversion of the mortgaged property where the latter disposes of the equity of redemption so as to impair the junior incumbrancer's rights.—Schmittdiel v. Moore, 120 Mich. 199.

§ 118. Restoration of property on discharge.

Title as between the parties, see ante § 61.

Remedy for failure to restore upon tender, see post ¶ 515.

Mortgagor's remedy for retention of property after discharge of debt, see post § 138.

¶ 443. It seems that the mortgagor of chattels has the right on tendering payment to demand possession of them if still held by the mortgagee; but the mortgagee would be entitled to a reasonable time in which to comply.—Brink v. Freoff, 40 Mich. 610.

¶ 444. A chattel mortgagee who, having taken the goods into his possession for safe keeping, tenders them back to the mortgagor on the latter's paying the debt, need not return them except at the place where he has stored them for safe keeping.—Gale Mfg. Co. v. Phillips, 78 Mich. 86.

¶¶ 445, 446. Where, on the release of a mortgage on a stock of goods given to secure part of their purchase price, the mortgagor agrees to receive the goods then on hand as consignee, such goods to be sold on the mortgagees' account and accounted for on demand, the mortgagees being authorized to take possession whenever they have reasonable cause to deem themselves insecure, a finding in favor of the mortgagees on the issue as to their right of possession will not bar the mortgagor's right to tender the amount of his indebtedness to the mortgagees, and thereupon to demand and have his goods returned to him.—Norris, Allister & Co. v. Vosburgh, 98 Mich. 426.

¶ 447. A mortgagee in possession who sells part of the goods for enough to pay the debt becomes bailee of the rest, and if he denies the debtor's title thereto is liable in trover.—Iler v. Baker, 82 Mich. 226.

§ 119. ——Rights of other creditors.

Remedy of creditors and third persons on irregular or invalid sale, see post § 139.

¶ 448. It is a fraud upon the mortgagor's creditors to assert a mortgage lien after the mortgage has been paid, and if such creditors subsequently levy upon the property the mortgagees cannot maintain replevin against the officer.—Mueller v. Provo, 80 Mich. 475.

§ 120. Accounting for sale price or surplus.

See also post ¶ 519.

Accountability of mortgagee to mortgagor, see also ante ¶ 268.

Mortgagor's right to credit for value of goods sold privately in violation of mortgage provision for sale, see ante § 132.

Mortgagor's right to accounting for proceeds of fraudulent or irregular sale, see post § 138.

General practice on accounting suits, see Accounting Suits.

¶ 449. Where possession of a building on leased ground has been taken by the vendor under an agreement of sale that amounted to a chattel mortgage, and where the building has been subjected without foreclosure proceedings to the lien of such agreement, the vendor is required to account as against the vendee for the value of the building in excess of his lien.—Read v. Horner, 90 Mich. 152.

¶ 450. The rule that a party must come into equity with clean hands applies as against a complainant in a bill for an accounting, where such complainant under the guise of an assignment from the real party in interest sought to obtain an accounting for the benefit of such real party who had not acted in good faith, from a trustee as to the proceeds of a sale under a chattel mortgage.—Maher v. Hastie, 156 Mich. 144.

¶ 451. Two livery-stable keepers, after mortgaging their livery stock to secure the payment of part of its purchase price, sold part of the stock, and substituted therefor other stock of like character, after which one of them sold his interest in the stock and business to the other, who assumed the payment of the mortgage and accompanying note. The mortgagee sought to foreclose his mortgage. The mortgagor who had assumed the payment of the mortgage forbade the mortgagee from seizing the substituted property. Thereupon the mortgagee, who had seized the entire property, turned over to said mortgagor the substituted property, and he, with the assistance of the other mortgagor, sold it, the latter stating to the purchaser that the mortgage did not cover said substituted property, and that the mortgagee had no right thereto. The mortgagee sold the remainder of the property which he had seized, and then sued the mortgagors upon their note. The mortgagor who had sold his interest in the property alone defended, and sought to charge plaintiff with the value of the substituted property. Held, that he is not in position to insist that the note be reduced by the amount which said property would have brought at sale under the mortgage.—Cole v. Shaw, 103 Mich. 505.

VII. DEFAULT AND FORECLOSURE BY SALE OR OTHERWISE.

§ 121. Default and right to foreclose.

Title of mortgagee vesting by foreclosure, see also ante § 61.

Right to take possession, see ante §§ 67-69.

Default as maturing right to take possession, see ante § 68.

¶ 452. A breach in any of the conditions of a chattel mortgage will authorize seizure and foreclosure.—Lyon v. Ballentine, 63 Mich. 97.

¶ 453. Where, in a mortgage on a stock of goods, covenants to keep up the stock and to insure it are inserted, the provision that "a breach of these two covenants shall cause the whole sum secured to become due and payable" will not make a double breach essential to the right of foreclosure if the defeasance clause expressly authorizes foreclosure on breach of either.—Leland v. Collver, 34 Mich. 418.

¶ 454. A vendee under a contract in the nature of a chattel mortgage, requiring him to keep chattels insured for the benefit of the vendor, cannot be placed in default for nonpayment of insurance premiums which the vendor did not pay until after seizing the proporty.—Lehnen v. Ryan, 185 Mich. 246.

¶ 455. A vendor selling chattels under an insecurity clause of a contract in the nature of a chattel mortgage, held not insecure as a matter of fact at the time of taking possession of and selling the property.—Lehnen v. Ryan, 185 Mich. 246.

¶ 456. In order to sustain an action of replevin by a mortgagor against the mortgagee, who took the property on a claim that there was default, the mortgagor may show that he relied on a warranty of a chattel for the price of which the mortgage notes were given and that the warranty was broken by the seller, defendant in replevin.—Rogers v. Ferris, 107 Mich. 126.

§ 122. ——Waiver of forfeiture and release or avoidance of mortgage.

¶ 457. The commencement of a suit upon a promissory note secured by a chattel mortgage is a waiver of the forfeiture of the condition of the mortgage.—Thurber v. Jewett, 3 Mich. 295.

¶ 458. When tenants in common of a mill, one of whom has executed to the other a mortgage on the realty and a chattel mortgage on the machinery, agree that the latter shall be ignored and canceled, and the machinery treated as part of the realty, it cannot be foreclosed and a sale thereunder is void.—Dohm v. Haskin, 88 Mich. 144.

¶ 459. A mortgagor of goods who had been left in possession, and whose mortgage was not filed, made a general assignment for the benefit of his creditors. The assignee took possession and proceeded to sell the goods in execution of his trust. The mortgagee filed a bill in equity to foreclose. Held, that as the statute declared his mortgage void as against the very parties for whom the assignee was trustee, he had no standing whatever in equity, and his bill was dismissed. If, under any harsh rule of the common law, he may have an advantage, he will be left to seek it at law.—Putnam v. Reynolds, 44 Mich. 113.

§ 123. Party entitled; assignee or comortgagee.

Rights and equities of assignees, see ante IV.

Right of foreclosure by assignee who purchased for less than its face, see post § 132.

Right as between first and second mortgagee, see also ante ¶ 309.

¶ 460. Where a mortgage is given to several persons jointly to cover separate debts, either mortgagee may enforce his own claim by foreclosure of the mortgage, or both may foreclose jointly.—Lyon v. Ballentine, 63 Mich. 97.

¶ 461. Under How. St., § 7344, one who holds by parol assignment a chattel mortgage and the accompanying debt, not otherwise evidenced, may foreclose in his own name at law.—Hyma v. Three Rivers National Bank, 79 Mich. 107.

¶ 462. Whether the assignment of a mortgage collateral to some other instrument by which the debt is witnessed does not convey the mortgage to the assignee as trustee for the owner of the debt, so as to authorize that trustee to maintain a suit at law for the property mortgaged or for its proceeds, quære.—Giddey v. Uhl, 27 Mich. 94.

§ 124. Time for foreclosure; laches and limitations.

Accrual of mortgagee's right of possession, see ante §§ 68, 69.

Liability of mortgagee in possession for conversion, see ante § 70.

The statutes of limitation will necessarily operate on some particular action, such as replevin, by which the right is asserted, and therefore should be treated in Limitations of Actions, which see.

¶ 463. A mortgage stating no time of payment is due without demand of payment and can be foreclosed at once.—Lyon v. Ballentine, 63 Mich. 97; Beirss v. Preston, 66 Mich. 11; McGraw v. Bishop, 85 Mich. 72.

¶ 464. Chattel mortgages given to secure a pre-existing debt, and payable on demand, may be foreclosed at any time after demand at the mortgagee's option.—Sheldon v. Mann, 85 Mich. 265.

¶ 465. Where the holder of a mortgage on a propeller neglected for more than seven years after the debt came due to assert his lien, and knowingly permitted the mortgagor to sell it to innocent purchasers meanwhile, bars himself by his own negligence from all right of foreclosure.—Harkness v. Toulmin, 25 Mich. 80.

§ 125. Mode and requisites of foreclosure in general.

¶ 466. An assertion by a mortgagee of chattels that he refused a tender, and that he should take the mortgaged chattels, was

no foreclosure so long as he did not take them.—Van Brunt v. Wakelee, 11 Mich. 177.

¶ 467. A mortgage is not actually foreclosed until there has been a sale of the property so that some one sets up a title no longer conditional.—Haynes v. Leppig, 40 Mich. 602.

¶ 468. No equities between several mortgagors can deprive the assignee of the mortgagee of any of the usual remedies for the enforcement of the security.—Dalrymple v. Sheehan, 20 Mich. 224.

§ 126. Sale under power.

Restrictions on power and power under given conditions, see post §§ 127, 128.
Notice of sale and manner and terms of sale, see post §§ 129, 130.
Mortgagee as purchaser, see post § 131.
Application of proceeds, see post § 134.
Who may question sale of mortgaged goods, see post § 140.

¶ 469. The power of sale in a chattel mortgage must be strictly pursued, but it is only necessary that it be fairly executed.—Manwaring v. Jenison, 61 Mich. 117.

¶ 470. Where a chattel mortgage provides specially how and upon what notice the mortgagee may sell, these express provisions preclude all implications upon the subject, and he cannot cut off the equitable right to redeem, if asserted in a reasonable time, by a sale in any other mode, except perhaps by sale to a bona fide purchaser without notice of the mortgagor's equities.—Flanders v. Chamberlain, 24 Mich. 305.

§ 127. ——Collateral agreements affecting power.

See also ante § 62.
Agreement to consider mortgage as canceled, see ante ¶ 458.

¶ 471. The authority of the mortgagee of a stock of merchandise to sell in accordance with the terms of the mortgage may be limited by a collateral written agreement respecting the goods, made at the time the mortgage was executed, and, when such agreement exists, the instruments should be construed together in determining the rights of the parties.—Rolfe v. Burnham, 110 Mich. 660.

¶ 472. A court of equity will not permit an agreement collateral to the mortgage by the mortgagee to take charge of the business, and carry it on for the benefit of all parties, to be ignored, and a sale under the mortgage proceeded with, unless it appears that the agreement has been violated by the mortgagor or that the mortgagee was induced to enter into it by fraud.—Rolfe v. Burnham, 110 Mich. 660.

¶ 473. A mortgagee of chattels who had expressly fixed a certain time and place for payment of the mortgage, the time being a few days later than the date of the maturity of the debt, made himself a wrong-doer by seizing the chattels on the day before that which had been fixed for the payment; payment on that day would have been a satisfaction of the debt.—Baxter v. Spencer, 33 Mich. 325.

§ 128. ——Before maturity of debt; insecurity clause; instalments.

See also ante ¶ 473.
Right of possession before condition broken, see ante § 69.
Amount of goods that may be validly sold on default in instalment, see post § 133.

¶ 474. A clause in a chattel mortgage, which contains the usual power of sale, authorizing the mortgagee, at any time when he shall think himself insecured, to take possession of the mortgaged property, and dispose of the same in the manner specified in the mortgage, or in such other manner as he thinks best, gives the right, in case of a seizure thereunder, to sell at once, and before the maturity of the mortgage debt.—Schmittdiel v. Moore, 101 Mich. 590; Cole v. Shaw, 103 Mich. 505.

¶ 475. A mortgagee whose lien secures the payment of several notes to become due at different times, and which is the only lien upon the property, may, with the consent of the mortgagor, as against his creditors, foreclose for the whole amount, on default in payment of the note which first becomes due.—Hogan v. Hudson, 110 Mich. 54.

§ 129. ——Notice of sale.

Effect of lack of notice of foreclosure sale upon mortgagee's right to purchase, see post § 131.

¶ 476. A notice of a chattel mortgage sale, not giving the date or amount of the mortgage or the names of the parties, but describing the property correctly, held sufficient, there being but one mortgage on the property, and it not appearing that any one was misled by it.—Manwaring v. Jenison, 61 Mich. 117.

¶ 477. Where a chattel mortgage, executed prior to 1879, provided, in the power of sale, for a like notice as is required by law for constables' sales, held, that a notice omitting the names of the mortgagors and mortgagees did not invalidate a sale thereunder.—Manwaring v. Jenison, 61 Mich. 117.

¶ 478. The assignee of a chattel mortgage securing a number of notes transferred some with a power of sale, but retained a junior interest in the mortgage much larger than that which he transferred. The transferee fore-

closed without actual notice to the holder of the junior interest; and, with no other notice to the public than by posting notices the night before the sale and tearing them down immediately afterwards; the property was sold in bulk, and not in parcels, to purchasers who were in collusion with the mortgagor, for very much less than its actual value, which was sufficient to cover the whole debt. Held, that the assignee holding the junior interest should have had actual notice of the sale, and that he could maintain a redemption bill against the foreclosure purchasers, and under the general prayer therein have them account to him as trustees in their own wrong, and obtain payment from them of the notes secured by his interest in the mortgage.—Culbertson v. Young, 50 Mich. 190.

¶ 479. Where a chattel mortgage provides for a private sale in case of default and makes no provision for notice to the mortgagor, a sale after the debt is due is valid without such notice.—Rose v. Page, 82 Mich. 105.

§ 130. ——Method, place and terms of sale.

Necessity of sale giving unconditional title, see ante § 125.

Violation of mortgage provision for public sale, see also post ¶ 489.

Right of creditors and third person's right to insist on regularity of sale, see also post § 139.

¶ 480. A mortgagor may authorize the mortgagee to sell the mortgaged property at public or private sale; and, if no method of sale is specified, the mortgagee may sell at public auction or at private sale, by giving due notice to the mortgagor of the time and place of sale.—Fitzgerald v. McCandlish, 89 Mich. 400.

¶ 481. Foreclosure proceedings are not invalidated as to other creditors of the mortgagor by the fact that, with his consent, the property is sold in bulk instead of in parcels, where the mortgage does not designate the manner of sale, and the sale is so made in good faith, with the intention of procuring the highest price obtainable.—Hogan v. Hudson, 110 Mich. 54.

¶ 482. Where the mortgage is on an entire vessel a foreclosure sale should be of the entirety; the interests of the mortgagors should not be sold separately.—Dalrymple v. Sheehan, 20 Mich. 224.

¶ 483. Where a mortgage of timber provided that on default the mortgagee should be permitted to sell at public auction or at his option at private sale with or without notice, the mortgagee was not guilty of a conversion of the logs by the fact that he took possession of them through a deputy sheriff and had them towed to market for the purpose of selling them, and at the same time logs of another commingled with the mortgaged logs were also taken along, no claim being made to ownership in such logs.—Croze v. St. Mary's Canal Mineral Land Co., 143 Mich. 514.

¶ 484. There is no inflexible rule requiring the mortgagee to sell the mortgaged chattels at the place of seizure.—Croze v. St. Mary's Canal Mineral Land Co., 143 Mich. 514.

¶ 485. A sale on credit by the mortgagee of timber of which he is in possession after default does not amount to a conversion on his part; while a mortgagee should sell only for cash the only penalty for breach of this duty is to hold him responsible for any damage caused by his failure to do so.—Croze v. St. Mary's Canal Mineral Land Co., 143 Mich. 514.

§ 131. ——Mortgagee as purchaser.

Right of mortgagee to buy in on sale to foreclose, see Comp. L. 1915, § 11995.

¶ 486. Under Comp. L. 1897, § 9530, authorizing a chattel mortgagee to fairly and in good faith purchase the property at the foreclosure sale, a purchase by the mortgagee at a foreclosure sale of which the mortgagor has had no notice for a grossly inadequate price is void.—Castner v. Darby, 128 Mich. 241.

¶ 487. One of two mortgagees may buy the mortgaged goods on a foreclosure; How. St., § 6200, does not require that both should be present and bid together, or that one should purchase in the names of both.—Manwaring v. Jenison, 61 Mich. 117.

§ 132. Extent of sale; excessiveness.

Property described in mortgage, see ante §§ 15-17.

¶ 488. One who buys a mortgage for a sum less than its face, the amount being fixed by an arrangement between mortgagor and mortgagee of which he has knowledge, cannot enforce it against a creditor of the mortgagor for more than he has paid, with interest.—Ganong v. Green, 71 Mich. 1.

¶ 489. A chattel mortgage provided that goods seized under it should be sold at public auction after notice, and that the power of sale should be limited to so much of the property as the sale should show was needed to pay the debt. The mortgagee, however, retailed part of the goods at private sale. Held that as he did not observe the method ex-

pressly agreed on for liquidating the value of the goods, the mortgagor could elect to have the amount to be sold ascertained as in other cases, and in an action on the note secured by the mortgage the jury should have been charged to find the market value of the goods sold at private sale.—Botsford v. Murphy, 47 Mich. 536.

¶ 490. A sale of logs under a chattel mortgage cannot be said to be characterized by bad faith or unreasonableness where logs amounting to $5,300 were sold to satisfy an indebtedness of $4,950.40.—Croze v. St. Mary's Canal Mineral Land Co., 153 Mich. 363.

¶ 491. A chattel mortgagee of logs is not bound to sell logs one by one until he realizes enough to satisfy the mortgage, but may sell the logs in quantities, and, so long as he acts reasonably and in good faith, is liable only for the surplus of the proceeds of the logs sold, after satisfaction of the debt.—Croze v. St. Mary's Canal Mineral Land Co., 153 Mich. 363. (Moore, J., dissenting, upon the ground that the evidence showed an excessive sale.)

¶ 492. Under a conveyance of chattels by way of security, containing a defeasance clause operative when sufficient should be realized to pay the indebtedness secured, and providing for a reverter of the remainder after sufficient had been sold to satisfy the indebtedness, it was immaterial by what name the instrument was called, and trover was maintainable for a sale of more than was sufficient for such satisfaction.—Haynes v. Hobbs, 136 Mich. 117.

¶ 493. A receiver who sells property as mortgaged which the mortgage does not include is liable in trover for the conversion, without demand, even though he believed the property was so included.—Kenney v. Ranney, 96 Mich. 617.

§ 133. ——Instalments not yet due.

¶ 494. Upon default in payment of an instalment of a debt secured by chattel mortgage, the mortgagee can take possession of all the mortgaged property and sell enough to make the amount due, with interest and costs; but where the property consists of several articles, no more can be sold than is necessary to make good the instalment then due.—Brink v. Freoff, 40 Mich. 610.

¶ 495. A mortgagee of chattels seized the property when only one instalment was due, and sold it to a third person for the satisfaction of the whole mortgage, and the mortgagor brought suit against the mortgagee to recover the value of the property which had been illegally sold. Held, that he was entitled to recover the value of the chattels sold after satisfaction of the first instalment, together with special damages, if any were shown, but with deduction of the amount that then remained unpaid on the mortgage.—Brink v. Freoff, 44 Mich. 69.

¶ 496. A mortgagee of chattels who, where only one instalment of his mortgage is due, sells further after that is satisfied, is chargeable with a conversion.—Brink v. Freoff, 40 Mich. 610; Brink v. Freoff, 44 Mich. 69.

§ 134. Application of proceeds.

Extent of mortgagee's title and right to proceeds of property, see also ante § 61.
Application of payments on mortgage debt, see ante § 105.
Accounting for sale or proceeds, see ante § 120.
Right of defrauded vendor to proceeds of mortgage sale, see post ¶ 526.

¶ 497. Moneys received upon foreclosure of a chattel mortgage are rightly applied first in payment of the debts alone secured by the mortgage, and second upon debts otherwise secured.—Schloss v. Solomon, 97 Mich. 526.

¶ 498. The proceeds of sales by the mortgagee are to be treated as moneys collected to apply on the security, and do not belong to the mortgagee beyond the extent of his lawful claim as a creditor.—Kohl v. Lynn, 34 Mich. 360.

¶ 499. Inasmuch as Comp. L. 1897, § 10315 expressly provide that mortgaged property levied on must be sold as a whole subject to the mortgage, where it sells for more than enough to pay the mortgage the balance belongs to judgment debtor.—Munger v. Sanford, 144 Mich. 323.

§ 135. Purchaser's title.

See also post ¶ 507.
Mortgagee as purchaser, see ante § 131.

¶ 500. Purchasers on a foreclosure of a chattel mortgage have the rights of mortgagees in possession, and cannot be sued in trover by any one who is precluded from attacking the mortgage or who shows no right to contest the possession.—Lyle v. Palmer, 42 Mich. 314.

¶ 501. If property covered by a chattel mortgage is held by the mortgagor under a conditional sale, and the mortgagee forecloses, the rights of the original vendor are not subjected to those of the purchaser at the foreclosure sale by reason of his agent's attending the sale and giving no notice of them.—Thirlby v. Rainbow, 93 Mich. 164.

¶ 502. The title to certain logs sold under a mortgage passed to the purchaser where it appeared that before an alleged conversion the mortgagee had sold a part of a mass of logs that had been commingled with other logs, and the joint agent of the purchaser and the mortgagee had taken possession of the entire mass for the purpose of sorting and delivering them "to the several parties entitled thereto," which act was authorized by the contract of sale.—Croze v. St. Mary's Canal Mineral Land Co., 143 Mich. 514.

§ 136. ——Effect of irregularity or avoidance of proceedings.

Effect of bankruptcy on completed foreclosure and pending sale see Bankruptcy, ¶ 39.

¶ 503. The purchaser at an irregular or void mortgage sale gets only such rights as the mortgagee had.—Cavanaugh v. Sanderson, 152 Mich. 11.

¶ 504. Where plaintiff, a mortgagee, is entitled to possession, institutes a replevin suit, and gains the same, and proceeds to a foreclosure sale, without waiting for the result of an appeal of the replevin suit, the purchaser at the sale gains a good title despite the fact that the replevin suit is quashed on appeal.—Cavanaugh v. Sanderson, 152 Mich. 11.

¶ 505. Trover does not lie for a mere irregularity in a foreclosure sale made in good faith by a chattel mortgagee.—Rose v. Page, 82 Mich. 105.

§ 137. Fraud, defects and irregularities in sale.

Fraudulent dispossession as conversion, see also ante § 70.
Sufficiency of notice of foreclosure sale, see ante § 129.
Regularity and sufficiency of sale, see ante § 130.
Validity as affected by excessive amount of goods sold, see ante § 132.
Effect of irregularity upon title of purchaser at foreclosure sale, see ante § 136.
Mere irregularity, see also ante ¶ 505.
Estoppel to question sale, see post § 140.
Validity of auction sale where auctioneer represents conflicting interests, see Auctions and Auctioneers, ¶ 8.
Auctioneer at sale acting for both parties, see Auctions and Auctioneers.
Effect of admission of legality of levy upon attack on validity of sale, see Trial, V.

¶ 506. An irregular foreclosure sale where the mortgagee bids in and retains the property does not extinguish the debt or render the mortgagee liable as for a conversion.—Brown v. Mynard, 107 Mich. 401.

¶ 507. A valid mortgage is not extinguished by an irregular sale, but the purchaser succeeds to the rights of the mortgagee.—Kelsey v. Ming, 118 Mich. 438.

¶ 508. An invalid sale by a mortgagee of chattels to foreclose does not constitute a conversion where he bids in the goods and holds them.—Brown v. Mynard, 107 Mich. 401.

¶ 509. A sale in June of mortgaged goods, chiefly fur garments, for a sum somewhat less than half the amount at which the goods were appraised when the mortgage was given, is not to be disturbed as made for an inadequate price, it being common knowledge that when such garments are out of style their value is greatly depreciated.—Union Nat. Bank v. Rich, 116 Mich. 414.

¶ 510. The fact that a stock of goods sold at chattel mortgage foreclosure sale at less than 60 to 75 cents on the dollar, which price the testimony showed was a good price at such sales, was no justification for setting aside the sale, in the absence of fraud.—Smitton v. Seibert, 136 Mich. 410.

¶ 511. A sale of a stock of goods under a chattel mortgage given by a surviving partner, was set aside upon a bill filed by the administratrix of the estate of the deceased partner, where the auctioneer was also the agent of the buyer who was the surviving partner's wife, and where the sale was made subject to indefinite claims for exemption, which tended to dissuade bidders, and amount realized was below 60 to 75 cents on the dollar, a normal price on such sales.—Smitton v. Seibert, 136 Mich. 410.

§ 138. Remedy of mortgagor.

See also ante ¶ 505.
Right and remedy of mortgagor upon wrongful seizure by mortgagee, see ante § 70.
Trover for sale in excess of indebtedness, see ante § 132.
Liability for wrongful levy under the mortgage, see Executions, XII; Sheriffs, IV.

¶ 512. Where a mortgagee of chattels sells them in good faith the mortgagor's remedy for a mere irregularity is by bill to redeem or by assumpsit to recover surplus, not by action in tort for the value of goods.—Rose v. Page, 82 Mich. 105.

¶ 513. Assumpsit will lie to recover the value of goods purchased by a chattel mortgagee in possession at a public sale held to be void for unfairness and lack of proper notice.—Castner v. Darby, 128 Mich. 241.

¶ 514. Where a mortgagee removed certain logs for the purpose of sale at an improper and unseasonable time of the year

and in an improper manner, and neglected for an unreasonable time to sell them, he cannot be said to be guilty of a conversion where he had rightfully acquired possession after default, but he is liable in damages therefor.—Croze v. St. Mary's Canal Mineral Land Co., 143 Mich. 514.

¶ 515. A mortgagee of chattels who sells them before condition broken is liable in trover for not restoring them upon a proper tender of the amount due.—Ealow v. Mitchell, 26 Mich. 500.

¶ 516. Trover lies without demand or tender against a chattel mortgagee in possession who, having sold enough of the goods to satisfy his claim, denies plaintiff's title to the rest.—Iler v. Baker, 82 Mich. 226.

¶ 517. Where a mortgagee of chattels has obtained a bill of sale of them by fraud, a tender by the mortgagor of the amount due upon the mortgage, before bringing suit for conversion, is unnecessary.—Rall v. Cook, 77 Mich. 681.

¶ 518. In case of a foreclosure and sale under agreement of the mortgagor to receive the goods as consignee and sell for account of the mortgagees, thereby releasing the mortgage, the mortgagees would be liable to account to the mortgagor for any surplus remaining after satisfying their claim and the costs.—Norris, Allister & Co. v. Vosburgh, 98 Mich. 426.

¶ 519. The seller of a business under a contract in the nature of a chattel mortgage, who takes possession and sells the goods, himself becoming the purchaser, at a time when the vendee was not in default, held required to account to the latter for cash on hand at the time of such seizure, and money collected belonging to the vendee, as well as for goods originally belonging to the latter, which were included as additional security, and sold under the mortgage.—Lehnen v. Ryan, 185 Mich. 246.

§ 139. ——Rights and remedies of creditors and third persons.

Persons entitled to notice of foreclosure sale, see ante § 129.
Consent of mortgagor as affecting validity of sale, see ante § 130.
Rights of mortgagee in possession under defective foreclosure, see also ante ¶ 327.
Right of attorney to be indemnified by client for liability incurred in selling under chattel mortgage, see Attorneys, ¶¶ 135, 136.

¶ 520. Creditors who levy subject to a mortgage are in position to require the mortgagee to pursue the methods prescribed in the mortgage as to the mode of sale and the disposition of the proceeds.—Densmore v. Mathews, 58 Mich. 616.

¶ 521. Where, pending chancery foreclosure of a chattel mortgage, replevin was brought against the mortgagee by a subsequent purchaser from the mortgagor, it was held that the validity of the mortgage as a lien on the property intended by it in defendant's hands belonged to the court of chancery, and plaintiff could only recover, if at all, by showing that the property he claimed was not within the mortgage.—Austin v. French, 36 Mich. 199.

¶ 522. Under a bill by the administrator of a deceased partner to set aside a chattel mortgage sale under bill framed so as to ask complete relief, a resale was ordered, a receiver was directed to be appointed and the defendants were directed to be charged in the accounting with the amount received and credited with payments made including trustees' and attorneys' fees, and the remaining goods were ordered resold if ascertainable, and the proceeds turned over to the receiver for payment to creditors of the late partnership, and the defendant, wife of the surviving partner and mortgagor, was permitted to bid at a resale, there being no proof of bad faith but the first sale being irregular.—Smitton v. Seibert, 136 Mich. 410.

¶ 523. Purchasers subject to the equities of a chattel mortgagee in possession cannot divest such possession without redemption even if foreclosure has not been regular.—De Graff v. Byles, 63 Mich. 25.

¶ 524. Trover will not lie against purchasers on foreclosure of a chattel mortgage where plaintiff by privity to the mortgagor is precluded from attacking the mortgage, or has no right to contest the possession.—Lyle v. Palmer, 42 Mich. 314.

¶ 525. The right of a mortgagor of chattels to treat an irregular sale on foreclosure as a conversion by the mortgagee, and a payment of the debt to the extent of the value of the goods, is not available to a creditor of the mortgagor under an attachment on other property, for the purpose of defeating or reducing the claim of the mortgagee as against the attached property, in the absence of an assignment of such right from the mortgagor.—Brown v. Mynard, 107 Mich. 401.

¶ 526. The rights of a defrauded vendor must be settled in equity as to the proceeds of a mortgage sale foreclosed by a subsequent mortgagee without notice of the fraud, whose mortgage secured previous debts and new advances.—Zucker v. Karpeles, 88 Mich. 413.

¶ 527. A vendor entitled to rescind a sale for fraud on the vendee's part may recover in trover against a mortgagee whose mortgage was given to secure a pre-existing debt. —Edson v. Hudson, 83 Mich. 450.

¶ 528. One who has a right to replevy mortgaged goods then being foreclosed, in which foreclosure suit a receiver has been appointed without his consent, cannot be relegated to an action of trover with the possibility of recovering only the net proceeds after taking out the expenses of the receivership.—Merchants' and Manufacturers' Nat. Bank v. Kent Circuit Judge, 43 Mich. 292.

§ 140. Estoppel to question sale.

Estoppel of mortgagor's privy to bring conversion against purchaser at foreclosure, see ante ¶ 524.

¶ 529. The fact that a mortgagor of chattels was present at the mortgage sale thereof without objecting does not estop him, as against the mortgagee, or the mortgagee's assignee, from contesting the sale on the ground that the indebtedness covered by the mortgage was usury though it might as against a purchaser who relied upon his silence.—Canning v. Harlan, 50 Mich. 320.

¶ 530. A mortgagor who, being present at a foreclosure sale of the mortgaged chattels, does not raise objection to the sale for irregularities such as selling in a lump distinct and different articles covered respectively by different mortgages, and not having the goods all present in view at the sale, may reasonably be said to be estopped from questioning the sale.—Brown v. Mynard, 107 Mich. 401.

¶ 531. Complainant bank always understood and claimed that in a certain chattel mortgage to it by a corporation, the after-acquired property of the corporation was included. The language did not in fact so include it. Complainant foreclosed the mortgage, took possession of the after-acquired property from the mortgagor, advertised and sold it, no creditor objecting. Held, that after this the trustee in bankruptcy of the corporation came in too late to claim said property for creditors.—Marine Sav. Bank v. Norton, 160 Mich. 614.

VIII. REMEDIES AND PROCEDURE OTHER THAN FORECLOSURE.

§ 141. In general; action on the debt.

Effect of action for debt to discharge lien, see ante § 110.

Effect of recovery of chattels on inconsistent ground, see also ante § 110.

Remedies of mortgagor against invalid sale, see ante § 138.

Bill to redeem, see ante § 116.

Necessity that mortgage have become effective to base right of action or defense thereon, see also ante ¶ 314.

Allowance of amount realized from goods in action on note, see ante ¶ 489.

Commencement of suit upon debt secured as waiver of forfeiture, see ante § 122.

¶ 532. Where the undertaking of the makers of a chattel mortgage note is for the absolute payment of the secured debt, it is not necessary that the mortgagee should exhaust his security before bringing suit upon the note.—Cole v. Shaw, 103 Mich. 505.

§ 142. Suit on mortgaged choses in action.

¶ 533. A chattel mortgagor may maintain an action on an account covered by the mortgage if he is not in default, where the mortgage provides that until default he may keep and use the mortgaged property in the regular course of his business.—Swan v. Thurman, 112 Mich. 416.

§ 143. Torts by third persons.

Conversion by taking goods with notice that after-acquired clause covers them, see also ante ¶ 186.

Action against officer for levy and sale, see also ante § 77.

Evidence of notice in suit by mortgagee for conversion of mortgaged property by third person, see ante ¶ 255.

Evidence and instructions as to title or right of possession in mortgagee, see also ante §§ 71, 72.

Actions on contracts between mortgagor and mortgagee, see Contracts, X.

Right of chattel mortgagee to replevin attached goods from sheriff levying in defiance of prior mortgage, see also Attachment, ¶ 378.

Title sufficient to maintain trover, see Conversion, II.

Defenses by sheriff in action for wrongful levy and sale of mortgaged chattels, see Sheriffs, IV, F.

¶ 534. A mortgagee of chattels not being the owner of the goods cannot recover in assumpsit for their value if they are seized or converted, nor for the amount received for them if they are converted and sold. —Randall v. Higbee, 37 Mich. 40; Carpenter v. Graham, 42 Mich. 191; Carpenter v. Graham, 46 Mich. 531; Warner v. Beebe, 47 Mich. 435.

¶ 535. The mortgagee may maintain trespass, trover or replevin for any intermeddling with property by third party.—Tannahill v. Tuttle, 3 Mich. 104; Grove v. Wise, 89 Mich. 161.

¶ 536. A mortgagee of chattels may bring trover for the conversion of them by an attaching creditor.—Canfield v. W. J. Gould & Co., 115 Mich. 461.

¶ 537. A mortgagee of chattels, whether in or out of possession, may sue for any unlawful damage done to his security, without previously looking to the personal responsibility of his debtor, or showing the latter's insolvency, for the legal value of such a security is the means it furnishes the mortgagee of obtaining satisfaction of the mortgage debt out of the property.—Worthington v. Hanna, 23 Mich. 530.

¶ 538. A mortgagee, whose property has been wrongfully disposed of under an execution sale, need not pursue the purchaser and recover the goods but may sue the sheriff for the conversion.—Worthington v. Hanna, 23 Mich. 530.

¶ 539. That the mortgagee has assigned the mortgage as collateral security for a debt does not affect his right to recover against an officer who has attached and sold the property, if before suit the assignee has surrendered the mortgage to him.—Eddy v. McCall, 77 Mich. 242.

¶ 540. Any parol understanding between mortgagor and mortgagee regarding the possession of the mortgaged chattels could afford third parties who had unlawfully converted the property no protection against the mortgagee's action of trover.—Harvey v. McAdams, 32 Mich. 472.

¶ 541. A vendee and mortgagor permitted by the vendor and mortgagee to remain in possession of the chattels sold and mortgaged may maintain trover for their value against a trespasser, and the latter cannot defend by showing that the mortgagee has the right of possession.—Parkhurst v. Jacobs, 17 Mich. 302.

¶ 542. A second mortgagee cannot maintain trover against his mortgagor's attaching creditor who took the goods from the first mortgagee, unless the latter has waived his rights and unless the second mortgagee has become subrogated thereto.—McGraw v. Sampliner, 107 Mich. 141.

¶ 543. A second mortgagee may, without paying or tendering payment of a judgment previously recovered against defendant for a conversion of the first mortgagee's interest, maintain trover against one who has wrongfully converted the goods.—Huellmantel v. Vinton, 116 Mich. 621.

¶ 544. Where chattels owned by one partner, but used by the firm without being converted into partnership assets, were mortgaged by the other partner without the owner's knowledge, and were sold by the mortgagee under the mortgage, a former mortgagee from the owner can maintain trover against the latter mortgagee for their conversion.—Cutler v. Hake, 47 Mich. 80.

§ 144. ——Before condition broken.

Conversion by first mortgagee of second mortgagee's interest in the property, see ante § 117.

¶ 545. Even before condition broken, a mortgagee whose right of possession is wrongfully interfered with may maintain trover.—Wright v. Starks, 77 Mich. 221.

¶ 546. Even before condition broken a mortgagee of chattels entitled under his mortgage to the possession thereof can maintain trover for their conversion.—Grove v. Wise, 39 Mich. 161.

¶ 547. Chattel mortgagees whose mortgage provides that they may take possession whenever they consider their claim in jeopardy may, even before condition broken, bring trover against an attaching creditor who refuses their demand for possession.—McGraw v. Bishop, 85 Mich. 72.

¶ 548. The mortgagee of chattels may, even before condition broken, maintain trover against any person wrongfully interfering with his right of possession, at which time demand made for possession of the chattels is sufficient.—Wright v. Starks, 77 Mich. 221.

§ 145. Rights of comortgagee or comortgagor.

Right of foreclosure, see ante § 123.

¶ 549. Where a chattel mortgage is given to secure the claims of several creditors, who are named as mortgagees, and whose claims are further evidenced by the accompanying notes of the mortgagor, one of said creditors may proceed to collect his debt by a foreclosure of the mortgage, or may protect himself by seizing the property, if in danger of destruction or loss, without joining the remaining mortgagees as plaintiffs, which he would have no right to do without their consent, and he will hold possession of the property subject to the rights of his comortgagees.—Watson v. Mead, 98 Mich. 330.

¶ 550. A first and second mortgagee, when priority has been waived between them, may jointly bring trespass for interference with the goods.—Densmore v. Mathews, 58 Mich. 616.

§ 146. Rights of trust mortgagee.

See also ante ¶¶ 365, 367.

Assignment to one of creditors secured, see ante ¶ 376.

Accounting for proceeds of sale, see ante § 120.

¶ 551. One who takes a mortgage as security for his own debt and for notes indorsed by him becomes a trustee of the mortgaged property for the benefit of the holders of and sureties upon the notes, and where other creditors attach the property the mortgagee is entitled to recover to the full amount of the mortgage, less what was paid before the seizure.—Showman v. Lee, 79 Mich. 653.

CHATTELS to CIVIL ACTIONS.

Cross-References.

Chattels—
- Abandonment of, see Abandonment.
- Intermixture of, see Accession and Confusion.
- Sale or transfer inter vivos, see Assignments; Sales; Gifts.
- Fraudulent transfers, see Chattel Mortgages; Fraudulent Conveyances.
- Devolution or descent, see Descent; Wills.
- Liens and mortgages, see Chattel Mortgages; Liens; Pledges.
- Levy and sale, see Attachment; Executions; Exemptions.
- Bailments of, see Bailments; and see also Carriers; Inns; Warehousing.
- Torts affecting, see Conversion; Trespass.
- Crimes affecting, see Crimes, II; Larceny; Indictment.
- Remedies for recovery, see Replevin; Conversion; Trespass.
- As assets of estates, see Estates of Decedents, V; Assignments for Creditors; Bankruptcy.
- As fixtures by annexation, see Fixtures.
- Distinguished from realty, see Property; Real Property.
- What law governs character and extent of rights, see Conflict of Laws.
- See also other specific topics treating of the kind of chattels in question or of the subject involving them.

Chauffeurs—
- General motor vehicle laws, see Highways, XIV.
- Negligence in use of the road, see Highways, XIII.
- Liability of master for acts, see Master and Servant, IV.

Cheats—
- As crimes, see Crimes, II (false pretenses); Indictment.
- As fraud, see Fraud; Fraudulent Conveyances.

Check room—
- Liability of carrier for baggage checked, see Carriers, § 253.

Checks—
- See Banking; Negotiable Instruments.
- As payment, see Payment, I.
- As assignment of fund, see Assignments, II.
- Gift of check, see Gifts.
- Conversion or replevin of, see Conversion: Replevin.
- Effect of alteration, see Alteration of Instruments.
- Forgery and uttering, see Crimes, II; Indictment.
- Larceny of, see Larceny.
- Baggage checks, see Carriers, V.

Cheese—
- See Adulteration; Food.

Chemists—
- Expert testimony, see Evidence, VI; Indictment, VIII.

Chief of police—
- See Municipal Corporations, XV.

Children—
- See Adoption; Apprentices; Divorce; Infants; Parent and Child.
- Crimes against, see Crimes, II; Rape; Indictment.
- Poor, settlement and support, see Poor Persons.

Choses in action—
- Assignments of, see Assignments.
- Mortgages of, see Chattel Mortgages.
- Devolution and succession, see Descent; Estates of Decedents; Wills.
- Gifts of, see Gifts.
- Pledges of, see Pledges.
- Leviability, see Attachment; Executions; Garnishment; Exemptions.
- Fraudulent transfers and creditors' remedies, see Fraudulent Conveyances; Creditors' Suits.
- Conversion of, see Conversion.
- Replevin to recover paper evidences of, see Replevin.
- Champertous dealings in, see Champerty.
- See also references ante under "Chattels."

Christian associations—
- See generally Associations; Corporations; Religious Societies.
- Exemptions from taxation, see Taxes, III.

Christian science—
- Treatment for disease, see Medicine and Surgery.

Christianity—
- Religious liberty, see Constitutional Law, VII.
- Associations for, see Religious Societies.
- Purpose of gift, see Charities; Wills, VI.
- Crimes against, see Crimes, II; Indictment.
- Sunday observance, see Crimes, II; Sunday.
- Instruction in schools, see Schools, VI.

Churches—
- See generally Religious Societies; Charities.
- Exemption from taxation, see Taxes, III.
- Church burying ground, see Cemeteries.
- Privileged communications to priests, see Witnesses, V, C.
- Privileged communications in law of libel and slander, see Libel and Slander, III.
- Rights in pews, see Religious Societies.
- Criminal disturbances of worship, see Crimes, II; Indictment.
- See also references under "Christianity."

Cider—
As an intoxicant, see Intoxicating Liquors.
Purity, adulteration and false labeling, see Adulteration; Food.
Cigars and tobacco—
Validity of regulations, see Constitutional Law.
Offenses relating to, see Crimes, II; Indictment.
Circuity of action—
Ground for equitable jurisdiction, see Equity, III, C.
Administration of complete relief to avoid, see Equity, X; and see also topics like Injunctions; Quieting Title; Reformation; Rescission and Cancellation; Specific Performance; wherein ancillary relief is administered for complete justice.
Circulars—
False representations by circulars as fraud, see Fraud, I.
Unfair trade by circularizing, see Fraud.
Fraud in prospectuses of corporations, see Corporations, VI.
Injunctions against injury by circularizing, see Injunctions, II, F.
Circumstantial evidence—
The admissibility of the several circumstances will be governed by the general rules for relevancy and competency. As to such rules, see for competency, Evidence, IV-IX; Indictment, VIII, B; and see for relevancy in civil matters the specific topics treating of the subject matter or issue to be proved, also Evidence, III. For relevancy of criminal evidence, see Indictment, VIII, B; Assault and Battery, I; Homicide, VII; Larceny, II; Rape; Seduction, II.
The sufficiency and weight of circumstantial evidence is treated, as to crimes, in Indictment, VIII, C; Assault and Battery, I; Homicide, VII; Larceny, II; Rape; Seduction, II; and in respect of civil issues is treated in Evidence, X; and particularly in the portions of the specific topics dealing with "Weight and Sufficiency" of evidence.
Circus—
See Exhibitions and Shows.
Licenses for, see Licenses; and see also Municipal Corporations, IX.
Citations—
In the sense of process, see Process.
Notices generally, see Notices.
Out of probate courts, see Probate Courts, II.
In particular proceedings, see specific topics such as Estates of Decedents; Insane Persons; Wills, V.
Cities and villages—
See Municipal Corporations.
Citizens—
See Aliens and Citizens.
Domicile and residence, see Domicile.
City courts—
See Municipal Courts; Courts; Justices of the Peace.
Civil actions and procedure—
See Actions; and see specific topics treating of the various actions, e. g., Assumpsit; Conversion; Ejectment; Nuisances; Replevin; Trespass; Waste; Accounting Suits; Creditors' Suits; Divorce; Foreclosure; Injunctions; Interpleader; Partition; Quieting Title; Reformation; Rescission and Cancellation; Sequestration; Specific Performance; and see also specific substantive topics for appropriate actions.
Proceedings for review, see Appeal and Error; Certiorari.
Extraordinary legal remedies, see Certiorari; Habeas Corpus; Mandamus; Quo Warranto; Prohibition.
Special and statutory proceedings, see Attachment, IX (dissolution); Civil Arrest, II (fraudulent debtor proceedings); Eminent Domain; Forcible Entry; Forestry, III (log lien proceedings); Mechanics' Liens; Submission of Controversy; Workmen's Compensation Law.
Administration and probate proceedings, see Estates of Decedents; Guardianship; Insane Persons; Wills; Probate Courts.
Process, see Process; Attachment; Garnishment.
Proceedings incident to actions and suits see specific topics, such as Abatement and Revival; Continuances; Consolidation and Severance of Actions; Costs; Discontinuance; Depositions; Directing Verdict; Equity; Guardians Ad Litem; Instructions; Jury; Lis Pendens; Motions and Orders; Notices; Pleading; Receivers; Reference; Removal of Causes; Security for Costs; Stay of Proceedings; Stipulations; Trial; Venue (change of); Verdicts and Findings.
Judgment and enforcement, see Judgments; Executions; Creditors' Suits; Judicial Sales.
Evidence in, see Evidence; Depositions; Examination of Witnesses; Witnesses; and see specific topics.

CIVIL ARREST AND BAIL.

TREATS of the arrest of fraudulent debtors or of defendants in civil actions either on original or final process, to wit, capias ad respondendum and capias ad satisfaciendum, and of bail by them, and discharge of persons so arrested, excluding attachment and commitment of persons in contempt for nonperformance of judgments or orders of court.

Analysis.

I. Capias Ad Respondendum.

§ 1. In general; strictness of procedure.
§ 2. Immunities and privileges from arrest.
§ 3. Liability to second arrest.
§ 4. Grounds and causes for capias.
§ 5. ——Actions on contract.
§ 6. ——"Professional employment."
§ 7. Affidavit for capias.
§ 8. ——Joinder and misjoinder of causes.
§ 9. Title and caption of affidavit.
§ 10. Competency of affiant.
§ 11. Personal knowledge of affiant.
§ 12. The writ and its requisites.
§ 13. Annexation of papers to writ.
§ 14. Execution of writ and return.
§ 15. Affidavit to hold to bail.
§ 16. Holding to bail.
§ 17. Order for appearance.
§ 18. Objections, and quashal of writ, or discharge.
§ 19. Further process and proceedings in the action.
§ 20. Review of proceedings.

II. Fraudulent Debtor Proceedings.

§ 21. Grounds and occasion.
§ 22. ——Fraud.
§ 23. Nature of proceedings.
§ 24. Jurisdiction of proceedings.
§ 25. Application or complaint, and pleas or objections.
§ 26. Affidavit and warrant.
§ 27. ——Sufficiency of facts:
§ 28. ——Averment as to fraud.
§ 29. ——Averment as to debt.
§ 30. ——Averment as to judgment.
§ 31. ——Personal knowledge of affiant.
§ 32. ——Affidavit by attorney or agent.
§ 33. Affidavits against proceedings.
§ 34. Examination of defendant.
§ 35. Order and findings on hearing.
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III. Capias Ad Satisfaciendum.

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§ 39. Form and sufficiency of writ.
§ 40. Stay of execution.

§ 41. Execution and return to writ.
§ 42. Alias writs.

IV. Bail and Recognizance, Surrender or Liberation, and Discharge.

§ 43. In general.
§ 44. Time for bail and defaults.
§ 45. Perfecting bail.
§ 46. Requisites of bond or recognizance.
§ 47. Entry of record.
§ 48. Amendments and further bond or recognizance.
§ 49. Obligation and liabilities of bail.
§ 50. ——On appearance bail.
§ 51. Surrender by bail.
§ 52. Certificate of surrender.
§ 53. Exoneration of bail.
§ 54. Keeping and jail liberties.
§ 55. Bond for jail limits or release.
§ 56. ——Liability on bond.
§ 57. Discharge of sureties.
§ 58. Discharge of principal from bail.
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V. Actions and Procedure on Bond or Recognizance.

§ 60. Right of action in general.
§ 61. ——Assignment of bond.
§ 62. Pleading.
§ 63. Issues and evidence.
§ 64. Questions of law and fact.
§ 65. Judgment.

Wrongful arrest as false imprisonment, see False Imprisonment.

I. CAPIAS AD RESPONDENDUM.

§ 1. In general; strictness of procedure.

Grounds for capias see post §§ 4-6.
The affidavit, see post §§ 7-11.
The writ, see post §§ 12-14.
Nature and extent of liability on bonds see post §§ 49, 50.
Surrender of principal and exoneration of sureties, see post §§ 51-53.
Liability of sureties as strictissimi juris, see post § 57.

¶ 1. No suit can be commenced by capias, or after arrest be carried to judgment, except in compliance with statute.—Fish v. Barbour, 43 Mich. 19.

§ 2. Immunities and privileges from arrest.

Immunity of woman from being held to bail, see post § 16.
Quashal of writ because arrest was in violation of privilege of arrested person, see post § 18.

¶ 2. Comp. L. 1871, § 6119 (see How. St. § 7704), prohibiting the imprisonment of females on process in civil actions, was meant to declare the settled policy of the state, and any later act providing for imprisonment on civil process will be considered as passed with reference to this policy and as not applying to females; so held of Comp. L. 1871, § 2143, authorizing suits under the prohibitory liquor law to be begun by capias. —People ex rel. Strickland v. Bartow, 27 Mich. 68.

¶ 3. The common-law privilege from arrest does not extend to the seller of a boat who comes into a jurisdiction to conclude the sale and to clear up a suit against the boat for supplies.—Monroe v. St. Clair Circuit Judge, 125 Mich. 283.

¶ 4. Comp. L. 1897, § 10157, relating to the privilege of witness or suitors from arrest, does not cover the case of a seller of a boat who comes into a jurisdiction to conclude the sale and to clear up a suit against the boat for supplies.—Monroe v. St. Clair Circuit Judge, 125 Mich. 283.

¶ 5. Bastardy proceedings, though special and statutory, are nevertheless so far crimi-

nal proceedings that a person is not privileged from arrest on a charge of bastardy while he is in the state only for the purpose of furnishing special bail in an action in which he was arrested upon a writ of capias ad respondendum.—Cady v. St. Clair Circuit Judge, 139 Mich. 618.

§ 3. Liability to second arrest.

After discharge as poor debtor, see Jud. Act, Chap. XLIII, § 12; Comp. L. 1915, § 13628.

¶ 6. An arrest in a civil action, and a subsequent discharge at the instance of the party procuring the same, does not render one exempt from a second arrest for the same cause of action, where the circumstances show a want of malice and of attempt to oppress.—Breckton v. Ottawa Circuit Judge, 109 Mich. 615.

§ 4. Grounds and causes for capias.

Necessity of setting forth in affidavit, see post § 7.

Objections to writ for want of grounds or for other cause, see post § 18.

Common-law rule that capias ad satisfaciendum could issue only where capias ad respondendum might, see post § 37.

Constitutional provision relating to imprisonment for debt, see also Constitutional Law, VIII.

Provisions of statute, see Jud. Act, Chap. XIII, §§ 11, 12; Comp. L. 1915, §§ 12414, 12415.

In actions before justices, see Jud. Act, Chap. LXXII §§ 1, 2; Comp. L. 1915, §§ 14324, 14325.

¶ 7. Since imprisonment for debt has been abolished, the mere existence of a cause of action does not show the propriety of a capias.—Josselyn v. McAllister, 22 Mich. 300.

¶ 8. Seduction, through promise of marriage, is fraud; and where it is averred in the affidavit, the constitutional prohibition against imprisonment for debt on contract, except in cases of fraud, breach of trust, etc., will not prevent an arrest on a capias in an action for breach of promise to marry.—In re Sheahan, 25 Mich. 145.

¶ 9. Arrest on capias is permitted in an action on the case for fraud.—People ex rel. Cohn v. Detroit Superior Court Judge, 40 Mich. 169.

¶ 10. Where a prima facie case is made out by an affidavit in an action of trover a writ of capias ad respondendum will lie under Comp. L. 1897, § 9008 (How. St., 2nd Ed., § 12661).—Timm v. Cass Circuit Judge, 192 Mich. 508.

§ 5. ——Actions on contract.

¶ 11. An action on contract can be begun by capias only in some of the cases specified in Comp. L. 1857, § 4119, How. St., § 7302.—People ex rel. Singer Mfg. Co. v. McAllister, 19 Mich. 215.

¶ 12. A claim against a railroad superintendent for moneys belonging to the company which he had collected, and failed, on demand, to account for, is one "arising upon contract" within the meaning of Comp. L. 1871, § 5734, How. St., § 7302; but the cause of action not being one of those enumerated as authorized to be begun by capias, the writ and arrest, upon an affidavit setting forth such facts, are illegal.—In re Stephenson, 32 Mich. 60.

¶ 13. Under Comp. L. 1897, § 9008, a proceeding by capias ad respondendum is justified where the defendant received money on Monday upon false pretenses made on Sunday even though the plaintiff agreed on Sunday to send the money.—Clark v. Kent Circuit Judge, 125 Mich. 449.

§ 6. ——"Professional employment."

Sufficiency of affidavit, see post § 7.

¶ 14. The term "office or professional employment," used in the Non-imprisonment Act (How. St., § 7302), does not include a mere agency to establish a claim.—Bronson v. Newberry, 2 D. 38.

¶ 15. The term "office or professional employment," as used in the Non-imprisonment Act (How. St., § 7302), does not include an agency for the sale of sewing machines.—People ex rel. Singer Mfg. Co. v. McAllister, 19 Mich. 215.

¶ 16. The term "professional employment," as contemplated by Comp. L. 1871, § 5734 (How. St., § 7302), cannot be applied to the business of a real estate agent.—Pennock v. Fuller, 41 Mich. 153.

¶ 17. A suit by capias is a civil remedy, and the writ cannot issue under Comp. L. 1871, § 5734; How. St., § 7302, in actions for damages for misconduct or neglect in office or professional employment, unless under conditions applicable to contracts.—Pennock v. Fuller, 41 Mich. 153.

§ 7. Affidavit for capias.

Affidavit to hold to bail, see post § 15.

Affidavits under Fraudulent Debtor Act, see post §§ 26-33.

Application for warrant for arrest of fraudulent debtor, see post § 25.

Annexation of affidavit to the writ, see post § 13.

Necessity that averments be on personal knowledge and not hearsay or conclusions, see post § 11.
Objections to affidavit for writ, see post § 18.
Liability of sureties as measured by capias, see post § 49.
Departure of declaration on bail bond from affidavit, see post § 62.
Affidavit before justices, see Jud. Act, Chap. LXXII, §§ 1-3; Comp. L. 1915, §§ 14324-14326.

¶ 18. The affidavit being the basis for a capias under Comp. L. 1871, § 5734; How. St., § 7302, if it fails to set forth a case within the statute the arrest is illegal, and giving bail and pleading to the action will not confer jurisdiction.—In re Stephenson, 32 Mich. 60.

¶ 19. An affidavit for a capias ad respondendum, or for any writ that will deprive one of his liberty, must set forth in detail the facts and circumstances on which it rests and not merely inferences; and the facts must be within deponent's personal knowledge.—Soule v. Ottawa Circuit Judge, 175 Mich. 127.

¶ 20. Where the affiant in an affidavit for a capias ad respondendum charging fraudulent representations as to the value of real estate, states that the facts are within his personal knowledge, and where the fact stated is one with which any witness might personally be familiar, and is one to which an ordinary witness might testify and is one on which the testimony of an expert is not necessary, the court will not add to the statutory requirement, and the things going to determine the weight of the statement need not be stated in detail.—Pratt v. Allegan Circuit Judge, 177 Mich. 558.

¶ 21. Arrest on a civil capias, issued upon an affidavit charging simply a breach of promise to marry, is unlawful.—In re Tyson, 32 Mich. 262.

¶ 22. A general allegation in an affidavit for arrest that the defendant received certain moneys as agent on the sale of property for the plaintiff, and has a balance in his hands which he refuses to account for, and has fraudulently converted to his own use, is not sufficient to justify a capias.—People ex rel. Singer Mfg. Co. v. McAllister, 19 Mich. 215.

¶ 23. An affidavit for a capias stated facts to the effect that defendant, having mortgaged certain chattels, and knowing that the first mortgage was not on file, made a second with the design of supplanting the first. Held, that the property so taken out from the operation of the first mortgage was wrongfully converted; that an action of tort would lie, and that the affidavit justified the mortgagor's arrest.—In re Hicks, 20 Mich. 280.

¶ 24. An affidavit for a capias which clearly charges an unlawful conversion of the property of the plaintiffs is not objectionable for insufficiency.—Wilcox v. Ismon, 34 Mich. 268.

¶ 25. The affidavit for arrest is prima facie sufficient if it tends to show that the defendant had bought goods without intending to pay for them and knowing himself to be insolvent at the time, or fraudulently intending to give his affairs the appearance of solvency.—People ex rel. Watson v. Superior Court Judge, 40 Mich. 729.

¶ 26. The affidavit for a capias suffices if it positively states that defendant obtained goods from plaintiff by means of representations which are set forth and stated to be false as of affiant's knowledge.—Hatch v. Saunders, 66 Mich. 181.

¶ 27. An affidavit for a capias for assault is sufficient if it states facts that would make a prima facie case on a criminal trial.—Pease v. Pendell, 57 Mich. 315.

¶ 28. Statements in an affidavit for a capias that defendant, when he made certain representations as to his financial condition, was not worth enough to pay his debts, and was insolvent, and held his property subject to mortgages which, as deponent believed, would be the full value of his property, are too indefinite to amount to legal proof.—Sheridan v. Briggs, 53 Mich. 569.

¶ 29. An affidavit for capias need not particularize the damages for which suit is brought; it is enough if it states the facts constituting the cause of action. In an action on the bail bond the particulars of damage may be set forth in the declaration.—Cumer v. Moyer, 57 Mich. 375.

¶ 30. An affidavit for a capias ad respondendum alleging that the plaintiffs sent a note for $700 for collection and the defendant received $100 in cash and a new note payable to himself for $600 and refused to deliver either, shows unlawful conversion sufficient to support the action.—Clark v. Kent Circuit Judge, 125 Mich. 449.

¶ 31. An affidavit for a capias ad respondendum which alleges that the defendant is a broker and dealer on commission in stocks, etc., that the plaintiffs contracted to furnish market quotations to him does not show a gambling contract under Comp. L. 1897,

§ 11373.—Clark v. Kent Circuit Judge, 125 Mich. 449.

¶ 32. An affidavit in support of a writ of capias ad respondendum is sufficient where it alleges that the defendants in an exchange of land represented to the deponent that they owned an equity in the land by virtue of a land contract, that they were in possession and collecting $15 per month rent, that the defendants relied upon these representations, but subsequently found that the rights of the defendant had been forfeited and annulled and the property taken away from them prior to the transfer, that they had no right, title or interest, were not in possession, were collecting no rent, that they refused to make a reconveyance and that the deponent's damages were $1,000.00.—McLeod v. Wayne Circuit Judge, 125 Mich. 344.

¶ 33. The affidavit attached to a writ of capias ad respondendum in an action brought under Comp. L. 1897, (§§ 9998, 9999), is sufficient if it shows the nature of the plaintiff's claim, and is not required to contain any statement that plaintiff believes himself entitled to an amount exceeding one hundred dollars.—Benie v. Wayne Circuit Judge, 154 Mich. 591.

¶ 34. An affidavit accompanying an application for a writ of capias ad respondendum alleged that one Ord, deponent's agent, had had consigned to him a large quantity of wheelbarrows to sell; that he disposed of a large number of these, and failed to remit monthly as required; that he admitted there were outstanding accounts to the extent of two hundred dollars due from purchasers, and agreed to furnish a list of them, and let deponent collect the money; and that he failed to do so and collected and appropriated the money himself. Held, mandamus by Ord, the relator, would not lie to order the lower court to quash the writ on the ground that the affidavit did not set forth sufficient specific facts.—Ord v. Wayne Circuit Judge, 160 Mich. 569.

¶ 35. An allegation in an affidavit that the defendant secretly converted apples and that the records of the railroad show that defendant shipped them without reporting such shipments to plaintiff, is not a sufficient allegation of the fact that the apples were shipped fraudulently without plaintiff's consent, so as to sustain a writ of capias ad respondendum.—H. J. Cheney Co. v. Allgeo, 165 Mich. 384.

¶ 36. Affidavits in support of a capias ad respondendum averring the receipt by defendant by mistake of a check intended for another, of the cashing of same by him, his admission that the money did not belong to him, his appropriation of the proceeds to his own use, and his refusal to pay same to the plaintiff, held to state a cause of action sounding in tort based on personal knowledge.—Tidey v. Kent Circuit Judge, 179 Mich. 580.

¶ 37. A writ of capias may issue on a showing in substance that the defendant by false and fraudulent representations, on which he knew the plaintiff relied, as to the character, value and nature of the land and buildings owned by him, induced the plaintiff to exchange her property therefor.—Merlau v. Kalamazoo Circuit Judge, 180 Mich. 393.

¶ 38. In an action to recover damages for false imprisonment against a sheriff who served a writ of capias ad respondendum and a person making affidavit for the writ as agent of another on the ground that defendants were responsible for plaintiff's unlawful arrest under a defective writ, held that although the affidavit was technically defective, the facts set out were upon personal knowledge, disclosed actionable misconduct on the part of plaintiff and a cause of action proper to be commenced by capias, and furnished protection to the defendants.—Thomas v. Rosecrantz, 193 Mich. 357.

¶ 39. An affidavit, upon which a writ of capias is based and issued, setting up an alleged agreement for the purchase of wood by the deponent, that the deponent agreed to accept and did accept a draft for a specified sum as an advance on the wood on condition that the wood should be delivered promptly, and that the seller delivered no wood at all and refused to see the deponent, and that the deponent has a good cause of action against the seller for the amount of the draft paid, discloses a cause of action based upon contract, and hence the writ will be quashed on motion.—Welsh v. McKerral, How. N. P. 12.

¶ 40. An affidavit for a capias spoke of the defendant as being "of the city of Niles," which is in Berrien county. Held, that this was not such an averment of residence as would preclude plaintiff from showing in justification of a capias issued in Cass county that defendant actually resided in Cass county.—Hatch v. Saunders, 66 Mich. 181.

§ 8. ——Joinder and misjoinder of causes.

¶ 41. An affidavit for a capias ad respondendum concluding "the plaintiffs have a good cause of action in an action of trespass on the case, and for fraud and breach of trust arising by contract, express and implied" does not constitute a misjoinder where the body of the affidavit discloses an action for money paid to the plaintiff's use and an action for unlawful conversion of

other funds.—Clark v. Kent Circuit Judge, 125 Mich. 449.

§ 9. Title and caption of affidavit.

In general, see Affidavits.

¶ 42. An affidavit for a capias need not be entitled in the cause. Strictly speaking no cause is pending when the affidavit is made.—Hatch v. Saunders, 66 Mich. 181.

§ 10. Competency of affiant.

Personal knowledge of affiant, see post § 11.

¶ 43. An affidavit for a capias ad respondendum must contain allegations which the affiant can competently testify to upon the trial, and the writ should be quashed where the affiant charges the negligent performance of a surgical operation on the affiant's wife, and contains nothing indicating the affiant's medical knowledge or qualification to testify to the fact.—Church v. Calhoun Circuit Judge, 129 Mich. 126.

¶ 44. A capias in action by a husband against defendant for stupefying his wife with drink and having intercourse with her in that helpless condition may be issued on the affidavit of the wife to those facts, since they constitute rape, if true, and not adultery with defendant of which she would be incompetent to testify.—Hirdes v. Ottawa Circuit Judge, 180 Mich. 321.

§ 11. Personal knowledge of affiant.

See also ante ¶¶ 19, 20, 26, 36.
Quashal for want of personal knowledge of affiant, see post § 18.
Affidavits to hold to bail, see post ¶ 71.
In affidavit for arrest under Fraudulent Debtor Act, see post § 31.

¶ 45. An affidavit for a capias, or for any writ that will deprive one of his liberty, must set forth in detail the facts and circumstances on which it rests, and not merely inferences and conclusions from such facts, and the facts must be within deponent's personal knowledge.—People ex rel. Singer Mfg. Co. v. McAllister, 19 Mich. 215; People ex. rel. Hackett v. Wayne Circuit Judge, 36 Mich. 334; Sheridan v. Briggs, 53 Mich. 569.

¶ 46. An affidavit for the writ of capias ad respondendum is insufficient where the statements therein are made on hearsay only.—Gardiner v. Wayne Circuit Judge, 155 Mich. 414.

¶ 47. If an affidavit for a capias ad respondendum to arrest a defendant sued for slander is based on hearsay matters, it is faulty, and if an affidavit on a motion to quash the proceedings does not admit the truth of the hearsay affidavit, the Supreme Court will issue a writ of mandamus directing the lower court to quash the proceedings.—Martin v. Saginaw Circuit Judge, 173 Mich. 22.

¶ 48. Where an affidavit for a writ of capias ad respondendum states that defendant mailed slanderous letters through the mails, and that the persons addressed received them, and there is no statement that affiant saw the letters mailed or received, and there is no affidavit by any of the recipients, such affidavit is hearsay and fatally defective.—Soule v. Ottawa Circuit Judge, 175 Mich. 127.

¶ 49. A writ of capias ad respondendum should be quashed where the affidavit attached thereto states that plaintiff was induced to complete a trade and accept a note by fraudulent representations made by defendant as to his financial responsibility and that of his surety, that plaintiff has ascertained that defendant and his surety did not own property as represented and that the surety does not now own such property and defendant admits that he now has nothing, since such statements are not statements of personal knowledge.—Rice v. Kalamazoo Circuit Judge, 176 Mich. 322.

¶ 50. An affidavit by an agent and attorney of the owner for a writ of capias ad respondendum for the unlawful cutting of timber must show that the facts of want of consent of the owner are within the personal knowledge of deponent, or must set forth in detail the facts and circumstances which are the basis of his conclusions.—Shaw v. Ashford, 110 Mich. 534.

¶ 51. An affidavit for a capias ad respondendum was based upon affiant's personal knowledge in the ordinary meaning of its language, when it alleged among other things, that on a given day defendant said of and concerning deponent, you (meaning deponent) stole my wheel; and that the defendant stated to the police officer, "That woman (meaning deponent) stole my wheel and I want her locked up," and that thereupon defendant then and there maliciously caused and procured deponent to be arrested, etc.—Wright v. Wayne Circuit Judge, 119 Mich. 499.

¶ 52. An affidavit for a capias ad respondendum must state facts and not conclusions of the affiant; and where the most important fact attempted to be stated, the debauching of the affiant's wife is manifestly an inference from facts and circumstances not disclosed in the affidavit, as appears from the affidavit stating that "said actions and doings took place at the said village of Lawton and at other places in said county unknown to this deponent," such affidavit is defective and insufficient to justify the issu-

ance of the writ.—Conrad v. Van Buren Circuit Judge, 144 Mich. 492.

¶ 53. An affidavit for a capias in an action for fraud based on false representations, setting out alleged representations in detail, and that they were made by defendant to plaintiff personally, is sufficient, though the falsity of some is not stated on the personal knowledge of plaintiff, where the falsity of sufficient of them is so made to appear as to authorize the issuance of the writ.—Muir v. Wayne Circuit Judge, 151 Mich. 117.

¶ 54. The general rule that affidavit for a capias must aver in terms that the facts stated are true to the personal knowledge of the affiant, has an exception where the facts are evidenced by record showing a wrongful act but there is no one who can testify personally to the making of the record or to the truth of the entries found therein, and the affiant supports his affidavit by certified copies of such records.—Robinson v. Branch Circuit Judge, 142 Mich. 70.

§ 12. The writ and its requisites.

Of capias ad satisfaciendum, see post § 39.
Papers to be attached to writ, see post § 13.
Indorsement of amount of bail, see post § 16.
Objections and quashal of writ, see post § 18.
Writ from justice, see Jud. Act, Chap. LXXII, § 4; Comp. L. 1915, § 14327.

¶ 55. It is unimportant that a capias purports to be in an action of trespass on the case, if the affidavit therefor recites facts sufficient to sustain it as a capias in trespass.—Pease v. Pendell, 57 Mich. 315.

¶ 56. A capias is not fatally defective for misstating the date of its return day where it also contains a recital showing that it is to be returned on the first day of the term.—Wonderly v. Kent Circuit Judge, 41 Mich. 722.

¶ 57. A capias must be made returnable on the first day of term.—People ex rel. Whitney v. Kent Circuit Judge, 38 Mich. 308.

¶ 58. Under How. St., § 7306, giving the defendant in a capias ad respondendum 20 days after the return day for the entry of his appearance, and section 7295, providing what the form of the writ shall be and contemplating that it may be altered by rule of court, a writ made returnable within 15 days after service, and following the form prescribed by C. C. Rule 1, was not void.—Wright v. Wayne Circuit Judge, 119 Mich. 499.

¶ 59. A writ of capias ad respondendum was issued August 16, 1906. On August 17, 1906, the affidavit was filed, the court indorsed the bail on the writ, and the same was served on the defendant in the proceeding. Held, the writ of capias ad respondendum was not prematurely issued, and therefore void, because dated one day before the affidavit and the indorsement of bail, since the writ was not operative until bail was indorsed.—People ex rel. McCallum v. Gebhardt, 154 Mich. 504.

§ 13. Annexation of papers to writ.

Service with writ in execution of same, see post § 14.

¶ 60. How. St., § 7305, which provides that the order to hold to bail shall be made only upon the affidavit of plaintiff, or some person in his behalf, showing the nature of plaintiff's claim, which affidavit shall be annexed to the writ, does not require that authenticated copies of judicial proceedings, or documentary evidence of facts within plaintiff's own knowledge, be attached.—Paulus v. Grobben, 104 Mich. 42.

¶ 61. Comp. L. 1897, §§ 9996 and 9999, do not require an affidavit attached to a writ of capias ad respondendum to bear the same date as the writ.—Clark v. Kent Circuit Judge, 125 Mich. 449.

§ 14. Execution of writ and return.

Privilege from arrest, see ante § 2.
Keeping of prisoner when surrendered by bail into hands of sheriff, see post ¶ 160.
Conclusiveness of return to service in general, see Process, II, D.
Provisions of statute, see Jud. Act, Chap. XIII, § 14 et seq.; Comp. L. 1915, § 12417 et seq.
Writ from justice, see Jud. Act, Chap. LXXII, § 5; Comp. L. 1915, § 14328.

¶ 62. Service of a writ of capias ad respondendum is defective where the sheriff merely arrests the defendant and keeps him in custody, when the statute in force (Pub. Acts 1899, No. 168) requires the officer making the arrest to also "serve a copy of the writ, and of the affidavit or affidavits upon which said writ is founded, upon said defendant," but the fact that the officer or attorney did not know of the later statute, does not operate to render the service fatally defective, or to deprive the court of jurisdiction to proceed with the case, as the statute in question requiring service of copies of the writ, is directory merely, the failure to serve such copies does not prejudice the defendant, and the objection is technical.—Pixley v. Berrien Circuit Judge, 121 Mich. 629.

§ 15. Affidavit to hold to bail.

Annexation to the writ, see ante § 13.
Sufficiency of affidavit for capias, see ante § 7 et seq.

Statutes, see Jud. Act, Chap. XIII, § 13; Comp. L. 1915, § 12416.

¶ 63. An affidavit to hold to bail must be of the same legal quality as evidence, as would be required at the trial to establish the facts relied on as the ground of arrest. —Sheridan v. Briggs, 53 Mich. 569.

¶ 64. In an affidavit under How. St., § 7305, for an order for bail required by section 7304, to be indorsed on capias, plaintiff need only set forth the nature of his claim, and the circuit judge judicially determines whether the case comes within the exceptions of the statute, and whether it warrants the indorsement and issuance of the writ.—Johnson v. Morton, 94 Mich. 1.

¶ 65. Whether an affidavit that does not state that plaintiff has suffered damage will warrant holding defendant to bail on a capias, quæere.—Fish v. Barbour, 43 Mich. 19.

¶ 66. An affidavit under How. St., § 7305, for an order for bail on capias, was uncertain and insufficient where it charged fraud and intent to embezzle and convert money as agent but set forth no facts indicating fraud or breach of trust.—Johnson v. Morton, 94 Mich. 1.

¶ 67. An affidavit to hold to bail in an action for libel, after setting forth, as the libel complained of a privileged writing, to wit, the making by defendant of a complaint before a justice of the peace charging plaintiff with larceny, contained the further averment that defendant afterwards, in divers places in a designated village, and to divers people, repeated the same slanderous words and charges. Held, that, if this latter averment was intended also to cover an action for slander, it was not sufficient, being too indefinite, and not purporting to be based upon the personal knowledge of the affiant. —Graham v. Cass Circuit Judge, 108 Mich. 425.

¶ 68. Where an affidavit to hold to bail sufficiently shows defendant's connection with plaintiff's arrest and imprisonment, and also shows that such arrest was based upon an affidavit that did not give jurisdiction to the justice, it states a case of false imprisonment. —Paulus v. Grobben, 104 Mich. 42.

¶ 69. The fact that the affidavit to hold to bail fails to negative the averment in the affidavit for arrest that suit had been commenced before the justice of the peace for the recovery of the alleged debt is immaterial, where said affidavit states sufficient other facts to warrant the issue of the capias. —Paulus v. Grobben, 104 Mich. 42.

¶ 70. It is not material that affidavit to hold to bail fails to deny that plaintiff was indebted to defendant; plaintiff's right to maintain his suit not being dependent upon whether he was so indebted.—Paulus v. Grobben, 104 Mich. 42.

¶ 71. An affidavit to hold to bail in a suit for malicious prosecution of the affiant under the fraudulent debtor's act cannot be held to have been made without affiant's personal knowledge where, after averring as upon such knowledge the making of the affidavit upon which the warrant of arrest issued, it sets forth that affidavit in full, and avers service upon the affiant of a certified copy thereof by the officer who made the arrest.—Paulus v. Grobben, 104 Mich. 42.

§ 16. Holding to bail.

See also ante ¶ 64.
Order for appearance in lieu of holding to bail, see post § 17.
Time for bail, see post § 44.
Requisites of bail, see post § 46.
Discharge from bail, see post § 58.
Provisions of statute, see Jud. Act, Chap. XIII, § 12; Comp. L. 1915, § 12415.
Taking appearance bail, liberation of defendant thereon, and giving bail piece, see Jud. Act, Chap. XIII, § 15 et seq.; Comp L. 1915, § 12418 et seq.

¶ 72. A woman could not be held to bail upon a capias issued under the penal section of the prohibitory liquor law (Comp. L. 1871, § 2138), since it is a civil action and such imprisonment is forbidden by chapter 192, § 45.—People ex rel. Strickland v. Bartow, 27 Mich. 68.

¶ 73. There is a fixing and an indorsement of bail on a writ of capias ad respondendum by the "judge of the court from which the writ issues" within Comp. L. 1897, § 9998 (How. St., 2nd Ed., § 12661), where the judge fixes and indorses the bail in a county in his judicial district other than that in which a suit was instituted.—Timm v. Cass Circuit Judge, 192 Mich. 508.

§ 17. Order for appearance.

¶ 74. Where, on defendant's motion, an order to hold to bail is vacated, it is within the discretion of the circuit judge, as a part of the order vacating it, to require defendant to enter his appearance in the cause.—People ex rel. Randall v. Wayne Circuit Judge, 36 Mich. 500.

§ 18. Objections, and quashal of writ, or discharge.

See also ante ¶ 69.
Privilege from arrest, see ante § 2.

Sufficiency of the affidavit, see ante § 7.
Variance between dates of affidavit and writ, see ante ¶ 61.
Averments of conclusions or on hearsay as grounds of insufficiency of affidavit, see ante § 11.
Sufficiency of affidavit to resist mandamus to quash, see ante ¶ 34.
Order for appearance on vacating order to hold to bail, see ante § 17.
Mode of raising question of waiver by subsequent suit in assumpsit and recovery of judgment, see post ¶ 186.
Discharge of defendant from imprisonment, see post § 59.
Motion or plea as proper mode of objection, see Pleading, IV, B.
Issues of fact on question of jurisdiction, and evidence thereon, see Courts, V.
Appearance as waiving objection to jurisdiction or process, see also Appearance, § 11.

¶ 74a. The appearance of a defendant by putting in bail upon a capias ad respondendum is a waiver of any insufficiency in the affidavit for the writ.—Stewart v. Hill, 1 Mich. 265.

¶ 75. After pleading and going to trial in an action begun by capias, defendant cannot insist on objections to the sufficiency of the affidavit for the writ or for bail.—Taylor v. Adams, 58 Mich. 187; Wasey v. Mahoney, 55 Mich. 194; Wiest v. Luyendyk, 73 Mich. 661; Reed v. McCready, 170 Mich. 532.

¶ 75a. By pleading the general issue and going to trial without objection defendant waives objections to a defective affidavit for a civil warrant in justice's court.—Jacklin v. Soutier, 82 Mich. 648.

¶ 76. Pleading to the merits does not waive the defects in an affidavit for the arrest of the defendant, if he has already moved to quash the proceedings and the motion has been denied.—Warren v. Crane, 50 Mich. 300.

¶ 77. Irregularities or errors in a civil capias, however serious, cannot, if not jurisdictional, be attacked collaterally, and may be waived by a failure to take advantage of them in time, so as not to be open to objection even in a direct proceeding to review the judgment.—Pardee v. Smith, 27 Mich. 33.

¶ 77a. A defendant in the county court who, after arrest, applied for and obtained an adjournment, was too late to object to irregularities in the preliminary proceedings on the adjourned day.—Stewart v. Hill, 1 Mich. 265.

¶ 77b. Jurisdictional defects in an affidavit for a capias are not waived by putting in special bail and pleading in a cause.—In re Stephenson, 32 Mich. 60.

(1 Mich. Dig. 60)

¶ 77c. After putting in and perfecting special bail and entering appearance, defendant cannot object that the affidavit to hold to bail was insufficient to confer jurisdiction to issue the writ or to make the order holding to bail.—Graham v. Cass Circuit Judge, 108 Mich. 425.

¶ 78. Where the allegations of fraud in an affidavit for a capias ad respondendum are hearsay, mandamus will not lie to vacate an order quashing the writ for insufficiency.—Moyle v. Houghton Circuit Judge, 97 Mich. 636.

¶ 79. A writ of capias ad respondendum is properly quashed where the material allegations in the affidavit were not made upon the personal knowledge of the affiant and are indefinite, uncertain and general.—Northrop v. Ionia Circuit Judge, 128 Mich. 415.

¶ 80. One Teeter was brought from another state into Michigan on a charge of wife abandonment. Immediately after being freed from jail, he was arrested on a capias by relator in a civil suit. Held, mandamus would not lie to compel the respondent judge to vacate his order quashing the capias, since the prisoner was entitled to a reasonable time to leave the state before being subject to arrest.—Weale v. Clinton Circuit Judge, 158 Mich. 563.

¶ 81. In an action on a claim, the defense that it was purchased by plaintiff, an attorney, for the purpose of bringing suit in violation of Comp. L. 1897, § 1135, How. Ann. St., 2nd Ed., § 12553, cannot be raised in a preliminary proceeding on a motion to quash a writ of capias ad respondendum.—Tidey v. Kent Circuit Judge, 179 Mich. 580.

¶ 82. Where a writ of capias ad respondendum is issued in connection with an action of trover against defendant, and plaintiff's affidavits do not sufficiently allege that the defendant disposed of the goods in question fraudulently and without plaintiff's consent, the trial court properly quashes the writ on motion of defendant.—H. J. Cheney Co. v. Allgeo, 165 Mich. 384.

¶ 83. In quashing a writ of capias ad respondendum for insufficiency of affidavits, it is error for the trial court to make a final order so as to dismiss the entire cause and take away the right of plaintiff to proceed on the summons clause.—H. J. Cheney Co. v. Allgeo, 165 Mich. 384.

§ 19. Further process and proceedings in the action.

Retention of cause on summons clause after quashing capias, see ante § 18, ¶ 83.
Unavailability of defense to the action on motion to quash, see ante § 18, ¶ 81.

Variance of declaration from capias affecting liability of bail, see post ¶ 183.
Necessity of notice of judgment to hold special bail, see post ¶ 192.
Pleading and trial of the action, see generally topic treating of the specific cause of action, e. g., Conversion; Fraud; etc., and general practice topics such as Pleading; Evidence; Trial; Judgments, etc.

In actions before justices, see Jud. Act, Chap. LXXII, §§ 6-8; Comp. L. 1915, §§ 14329-14331.

¶ 84. Where a defendant was arrested on a capias ad respondendum in a libel suit, and such writ was stipulated to stand in place of a summons, a notice to other defendants under P. A. 1911, Act No. 233, How. St., 2nd Ed., § 13140, must be given within 15 days from the date of the issuance of the writ.—Kirby v. Soule, 178 Mich. 406.

§ 20. Review of proceedings.

Case made to review setting aside of capias, see Appeal § 5, ¶ 37.
Right to review matters on appeal from judgment, see Appeal, § 290.
Writ of error to discharge from capias, see Appeal, § 49.

¶ 85. Any error of a court in overruling a motion to quash a writ of capias for insufficiency of the affidavit for the writ should be raised by habeas corpus or mandamus before pleading.—Baxter v. Woodward, 191 Mich. 379.

II. FRAUDULENT DEBTOR PROCEEDINGS.

§ 21. Grounds and occasion.

What constitutes "misconduct or neglect in professional employment," see ante § 6.
Showing as to levy outstanding on motion to dismiss, see post § 33.
Averment as to judgment and inability to arrest under other sections of the act, see ante ¶¶ 99, 104.
Objections by counter affidavits and examination of defendant, see post §§ 33, 34.
Statutes, see Jud. Act, Chap. XLIV, §§ 1-3; Comp. L. 1915, §§ 13630-13632.

¶ 86. It is not necessary to a proceeding against a fraudulent debtor, except under the second clause of Comp. L. 1857, § 5390; How. St., § 8754, that the creditor intended to be defrauded should be shown to be a judgment creditor.—Johnson v. Maxon, 23 Mich. 129.

¶ 87. A warrant issued after suit commenced by attachment is not made void by the fact that there is a pending levy under the attachment.—Johnson v. Maxon, 23 Mich. 129.

§ 22. ——Fraud.

Seduction as fraud, see also ante § 4.
For capias ad respondendum, see also ante §§ 4-6.

¶ 88. Whether the fraudulent acts of a debtor occurring without the state can be made the basis of proceedings against him in this state under the Fraudulent Debtors' Act, quære, the court being equally divided.—Bromley v. People, 7 Mich. 472.

¶ 89. The Fraudulent Debtors' Act does not cover cases of mere constructive fraud nor apply to those who are guilty of no personal delinquency, and compel them to account for transactions of others which they cannot be presumed able to explain.—Watson v. Hinchman, 42 Mich. 27.

§ 23. Nature of proceedings.

¶ 90. Proceedings under the Fraudulent Debtors' Act are not of a criminal nature.—Johnson v. Maxon, 23 Mich. 129; Wayne County v. Randall, 43 Mich. 137; Dummer v. Nungesser, 107 Mich. 481.

§ 24. Jurisdiction of proceedings.

¶ 91. Proceedings under the Fraudulent Debtors' Act can only be taken before the magistrate who has before him the civil proceedings to which they are collateral.—Stensrud v. Delamater, 56 Mich. 144.

¶ 92. The jurisdiction to issue the warrant of arrest does not depend on the weight of the evidence in the abstract, or on the conflicting opinions of different courts respecting its conclusiveness. A mistake of the justice in this regard may involve an error for correction, but his decision will be unassailable for defect of jurisdiction, and will stand good until reversed.—Johnson v. Maxon, 23 Mich. 129.

§ 25. Application or complaint, and pleas or objections.

Affidavits against the proceedings, see post § 33.

¶ 93. A complaint that specified partners had disposed of their property with intent to defraud, and a finding that one of them had failed to account for the firm assets and to explain the doings of all, will not sustain a conviction of the individual partner under the Fraudulent Debtors' Act.—Watson v. Hinchman, 42 Mich. 27.

¶ 94. A plea in abatement in proceedings under the Fraudulent Debtors' Act, which averred that the justice before whom such

proceedings were taken, was an attorney for certain parties who were plaintiffs in a replevin suit then pending in the circuit court, which involved the title to the same property complained of being fraudulently concealed by defendant in such fraudulent debtor proceedings, was sufficiently certain and, being admitted by demurrer, ousted jurisdiction. —Clark v. Mikesell, 81 Mich. 45.

¶ 95. A plea in abatement to the proceeding is not waived, where, after being overruled on demurrer, the defendant pleads not guilty and files a sworn denial of fraud.—Clark v. Mikesell, 81 Mich. 45.

§ 26. Affidavit and warrant.

Affidavit for capias, see ante § 7 et seq.

Sufficiency of the facts averred, see post §§ 27-31.

Counter affidavits, see post § 33.

Release bond given where affidavit and warrant were void, see post ¶ 170.

Contents of affidavit, see Jud. Act, Chap. XLIV, § 4; Comp. L. 1915, § 13633.

Issuance and requisites of warrant, execution of same and bringing prisoner before issuing officer, see Jud. Act, Chap. XLIV, § 5 et seq.; Comp. L. 1915, § 13634 et seq.

¶ 96. An affidavit under the statute for the arrest of a person as a fraudulent debtor, must make out a prima facie case of fraud. —In re Teachout, 15 Mich. 346.

¶ 97. A reference to "chapter 141 of the Revised Statutes of this State," contained in the affidavit for arrest sufficiently designates the revision of 1846, as all other revisions are entitled "Compiled Laws" or Howell's Annotated Statutes."—Dummer v. Nungesser, 107 Mich. 481.

§ 27. ——Sufficiency of facts.

As to fraud, debt or judgment, see also post §§ 28-30.

Review of sufficiency, see post § 36.

¶ 98. A warrant of arrest will not be void for want of jurisdiction if the affidavit has a legal tendency to make out a proper case in all its parts, though the proof which satisfies the magistrate is slight and inconclusive. —Johnson v. Maxon, 23 Mich. 129; Supe v. Francis, 49 Mich. 266.

¶ 99. An affidavit for a warrant under the Fraudulent Debtors' Act is sufficient if it shows the demand on which it is issued to be in judgment, and that the defendant could not be arrested on it (see Comp. L. 1871, chap. 230).—Willison v. Desenberg, 41 Mich. 156.

§ 28. ——Averment as to fraud.

See also post ¶ 104.

¶ 100. The facts that a debtor has admitted that he has sold his stock and refuses to pay more than thirty cents on the dollar, and that the sale was made at less than half the value of the goods, are not in themselves sufficient to warrant his arrest. —Stensrud v. Delamater, 56 Mich. 144.

¶ 101. An affidavit which, after averring that the debtor is indebted to affiant in a certain sum, and that suit has been commenced before a certain justice of the peace, alleges that, as affiant has good reason to believe, and does believe, the debtor is about to remove his property out of the county where the affidavit is made, with intent to defraud his creditors,—that the facts and circumstances constituting the grounds of such belief are, that the debtor has lately received $608, as a pension, that he refuses to pay affiant any part of his claim, that he has sold some of his property, and openly declares he is about to remove from this state to Canada, is insufficient under How. St., § 8753.—Paulus v. Grobben, 104 Mich. 42.

¶ 102. Affidavits are sufficient prima facie to authorize a warrant of arrest under the Fraudulent Debtors' Act where they set out in substance that the debtor had a stock of goods and sold it to his brother-in-law for $600, taking his promissory notes running for five years in payment, and that after plaintiff's execution was issued he was asked to apply such notes upon the debt, but refused to do so, since an inference of fraud or unjust refusal to apply the notes upon the judgment may be drawn from the facts so stated.—Wm. Barie Dry Goods Co. v. Casler, 131 Mich. 23.

§ 29. ——Averment as to debt.

¶ 103. An affidavit for commitment as a fraudulent debtor is insufficient if it does not set forth, except by way of recital, that the respondent is indebted to the parties instituting the proceeding.—In re Lee, 49 Mich. 629.

¶ 104. Affidavits for the arrest of defendant as a fraudulent debtor have a legal tendency to support the warrant therefor if they show that he is indebted to the plaintiff in a specified sum and that affiant has reason to believe and does believe that he has disposed of his property with intent to defraud his creditors, and further shows that he has executed a bill of sale of all his goods with the avowed purpose of preventing a creditor from enforcing his claim against him and received no consideration for the transfer. —Supe v. Francis, 49 Mich. 266.

¶ 105. An allegation in the affidavit for arrest that defendant is justly indebted to plaintiff in a specified sum upon two promissory notes sufficiently shows the character and amount of the indebtedness, within the requirement of How. St., chap. 304, § 4.—Dummer v. Nungesser, 107 Mich. 481.

§ 30. ——Averment as to judgment.

¶ 106. The affidavit is sufficient if it shows the demand on which it is issued to be in judgment, and that the defendant could not be arrested on it.—Willison v. Desenberg, 41 Mich. 156.

¶ 107. Where the claim for which a warrant under Comp. L. 1871, § 7176; How. St., § 8754, is issued is alleged to be in judgment, the affidavit for the warrant must set forth such a judgment as will authorize the proceeding, as well as such other facts as will convict respondent of such conduct as the statute makes sufficient ground for a warrant. The affidavit should give the date of the judgment, and is fatally defective if it does not show the form of the action in which it was rendered.—Badger v. Reade, 89 Mich. 771.

§ 31. ——Personal knowledge of affiant.

Under statutes relating to capias, see ante § 11.

Stating affiant's personal knowledge or means of knowledge in affidavit by agent, see post § 32.

¶ 108. The affidavit must state specific facts positively and not inferentially, on personal knowledge and not on belief; and if the complainant does not know the facts, affidavits must be obtained from those who do. —Proctor v. Prout, 17 Mich. 473; Badger v. Reade, 39 Mich. 771.

¶ 109. The affidavit for a warrant of arrest under the Fraudulent Debtors' Act must show affirmatively that the facts relied on are within affiant's knowledge.—Stensrud v. Delamater, 56 Mich. 144.

¶ 110. The affidavit under the Fraudulent Debtors' Act (How. St., § 8753, subd. 2) must show personal knowledge of the facts or state circumstances from which the jurisdictional facts must necessarily be deduced. —Marble v. Curran, 63 Mich. 283.

§ 32. ——Affidavit by attorney or agent.

¶ 111. It is no objection to the affidavit for arrest that it was made by plaintiff's attorney, and that it contains no showing that he had personal knowledge of the matters therein set forth, where the facts essential to the jurisdiction are stated positively and are not of such nature that they could not have been within affiant's knowledge.—Dummer v. Nungesser, 107 Mich. 481.

§ 33. Affidavits against proceedings.

¶ 112. In proceedings under the Fraudulent Debtors' Act, an affidavit that a levy sufficient to satisfy the demand had already been made upon the debtor's personal property is not in itself such a conclusive showing as to require the proceedings to be dismissed.—Willison v. Desenberg, 41 Mich. 156.

§ 34. Examination of defendant.

Statutes, see Jud. Act, Chap. XLIV, § 7 et seq.; Comp. L. 1915, § 13636 et seq.

¶ 113. Comp. L. 1871, § 7180; How. St. § 8756, allows a complainant to examine the defendant on oath and requires the examination to be taken down and signed by defendant. Held, that where defendant was examined on his own behalf, the want of his signature would not be considered error for the purpose of defeating the proceedings.—Willison v. Desenberg, 41 Mich. 156.

§ 35. Order and findings on hearing.

Levy outstanding as ground for dismissal, see ante ¶ 112.

Statutes, see Jud. Act, Chap. XLIV, § 9 et seq.; Comp. L. 1915, § 13638 et seq.

¶ 114. It is good practice for a circuit court commissioner to file a written statement of his conclusions on a complaint made to him under the Fraudulent Debtors' Act. —Watson v. Hinchman, 42 Mich. 27.

§ 36. Review of proceedings.

Reviewable error of fact, see ante ¶ 92.

¶ 115. Under How. St., § 8760, in proceedings under the Fraudulent Debtors' Act, appeal brings up the whole proceeding to the circuit court for review, and it has full jurisdiction.—Clark v. Mikesell, 81 Mich. 45.

¶ 116. The conclusions of a justice upon the sufficiency of evidence to sustain an affidavit for a warrant are not reviewable in the Supreme Court.—Willison v. Desenberg, 41 Mich. 156.

¶ 117. The sufficiency of evidence to sustain a warrant for the arrest of a fraudulent debtor is not open to investigation in reviewing an action on the bond given by the person arrested if it had any legal tendency to establish the case.—Supe v. Francis, 49 Mich. 266.

¶ 118. The Supreme Court, on affirming a conviction under the Fraudulent Debtors'

Act, may issue a warrant of commitment; the power to hear and dispose of the case finally involves the power to order such action as will make the judgment effective. —Smit v. People, 15 Mich. 516.

III. CAPIAS AD SATISFACIENDUM.

§ 37. In general; when allowable.

In what cases and on what grounds capias may issue or defendant be arrested, see ante §§ 4-6, 21, 22.
Alias writ, see post § 42.
Statute, see Jud. Act, Chap. XXIII, §§ 3, 4, 10; Comp. L. 1915, §§ 12818, 12819, 12825.

¶ 119. Executions against the body cannot issue upon circuit court judgments in replevin; though under the statutes such executions may issue upon justice's judgments, but an appeal avoids them.—Fuller v. Bowker, 11 Mich. 204; Tomlin v. Fisher, 27 Mich. 524.

¶ 120. By the common-law rule a capias ad satisfaciendum could issue only in those cases in which the suit might have been commenced by capias ad respondendum; except when the defendant was an attorney or officer of the court.—Fuller v. Bowker, 11 Mich. 204.

¶ 121. A capias ad satisfaciendum may issue in any action, although commenced by summons, which might have been commenced by a capias ad respondendum.—Forsythe v. Washtenaw Circuit Judge, 180 Mich. 633.

¶ 121a. Where damages arising upon contract are by stipulation included in a judgment in trover, defendant cannot be imprisoned upon an execution under such judgment.—McArthur v. Oliver, 53 Mich. 305.

§ 38. When issuable.

Stay for tardiness in issuing, see post § 40.
Delay as releasing special bail, see post § 57.
Statutes, see Jud. Act, Chap. XXIII, §§ 23, 24; Comp. L. 1915, §§ 12838, 12839.
Where bail has been taken or filed, see Jud. Act, Chap. XXIII, § 26; Comp. L. 1915, § 12841.
Where defendant is imprisoned, see Jud. Act, Chap. XXIII, § 27; Comp. L. 1915, § 12842.

¶ 122. An execution issued against both the body and the property of a person is in fact two executions, and neither could issue while the other was issued and unreturned. —Sink v. Oceana Circuit Judge, 146 Mich. 121.

¶ 123. Respondent circuit judge granted a body execution against relator more than three months after the return day of the execution issued against the property. He found from the evidence that the delay in taking out the body execution on the part of the judgment creditor was occasioned by the assurances of settlement held out by relator's attorney. Held, the judge did not exceed his discretion in finding there was the good cause specified in Comp. L. 1897, §§ 10412, 10413, as a basis for extending the time for taking out a body execution beyond the three months' period.—Lapham v. Oakland Circuit Judge, 170 Mich. 564.

¶ 124. A body execution issued more than ninety days after the return of a property execution is, under § 10412, Comp. L. 1897, § 13126, How. St., 2nd Ed., a nullity.—In re Lauer's Estate, 184 Mich. 497.

§ 39. Form and sufficiency of writ.

Of capias ad respondendum, see ante §§ 12-14.
Execution of the writ, see post § 41.
Presumption on habeas corpus as to sufficiency, see Habeas Corpus.

¶ 125. How. St., § 6952, authorizing the issuance of body executions in certain cases upon justices' judgments, does not require that the execution shall recite that the suit was commenced by warrant, or that the judgment was rendered in an action of tort, and the omission of such recitals will not render the execution insufficient.—Township of Fruitport v. Muskegon Circuit Judge, 90 Mich. 20.

¶ 126. An execution issued against both the body and the property of a person without an order of the court is absolutely void and being incapable of amendment may be quashed on motion.—Sink v. Oceana Circuit Judge, 146 Mich. 121.

§ 40. Stay of execution.

Stay of execution, see Executions, II.
Statutes, see Jud. Act, Chap. XXIII, § 33 et seq.; Comp. L. 1915, § 12848 et seq.

¶ 127. Under Comp. L. 1897, § 10412, providing that a capias ad satisfaciendum must issue within three months of the return day of an execution against the property, a defendant is entitled to a supersedeas where the capias issued two years after the return day of a property execution although a second execution was out during practically the entire intervening time.—Metcalf v. Moore, 128 Mich. 138.

§ 41. Execution and return to writ.

Time after return for issuance of capias, see ante § 38.

Discharge from imprisonment, see post § 59.
Duration of imprisonment before prisoner can be discharged, see post § 59.
Sufficiency of return to sustain action against special bail, see post ¶ 193.
Pleading return as part of cause of action on special bail, see post § 62.
Keeping prisoner, see Jud. Act, Chap. XXIII, § 30; Comp. L. 1915, § 12845.
Execution and return before suit on special bail, see Jud. Act, Chap. XXV, § 15; Comp. L. 1915, § 12903.

¶ 128. The following return to a capias ad satisfaciendum is sufficient under Comp. L. 1871, § 5763; How. St., § 7332: "I hereby certify and return that after diligent search and inquiry I am unable to find the within-named defendant, Jacob Bettinger, within my bailiwick and cannot have his body as I am within commanded."—Lichfelt v. Kopp, 38 Mich. 312.

§ 42. Alias writs.

After escape, see Jud. Act, Chap. XXIII, § 29; Comp. L. 1915, § 12844.

¶ 129. In an action of trespass, where an original execution can issue against a body of a defendant, an alias may also issue against the body on the return of the first "not found."—People ex rel. Moore v. Kehl, 15 Mich. 330.

¶ 130. A plaintiff is not entitled to an alias capias satisfaciendum under Comp. L. 1897, § 10523, providing that a voluntary return of a prisoner before action on the bond shall be a complete defense, and sections 10306 and 10307, providing that no other execution shall issue except where the prisoner escapes, by showing that he dismissed a suit on the bond brought after affirming the defendant out of custody when in fact the defendant is residing within the limits of the county and has been for some time.—Grosslight v. Wayne Circuit Judge, 127 Mich. 414.

IV. BAIL AND RECOGNIZANCE, SURRENDER OR LIBERATION, AND DISCHARGE.

§ 43. In general.

Bail in criminal cases, see Arrest, Commitment and Bail.
Affidavit to hold to bail and holding to bail, see ante §§ 15, 16.
Giving bail as waiver of defects in capias, see ante § 18.
Discharge of debtor from imprisonment, see post § 59.
Discharge from bail, see post § 58.
Discharge of sureties, see post § 57.
Recognizance to appear in bastardy proceedings, see Bastards, § 6.
Bond in bastardy proceedings, see Bastards, § 14.
General provisions as to bail in civil actions, see Jud. Act, Chap. XXV; Comp. L. 1915, § 12979 et seq.

¶ 131. The history and original design of bail to the sheriff, and the statutory provisions of Michigan as to bail in civil cases, considered.—De Myer v. McGonegal, 32 Mich. 120.

§ 44. Time for bail and defaults.

Liabilities of appearance bail on default of principal to put in special bail, see post § 50.
Duration of right to surrender where default is not taken and plaintiff proceeds with action, see post ¶ 152.
Exoneration on surrender after time past for special bail, see post ¶ 163.
Proceedings against sheriff to require special bail on default, see Jud. Act, Chap. XXV, § 9 et seq.; Comp. L. 1915, § 12987 et seq.

¶ 132. If the twenty days within which a person arrested on a capias is entitled to file special bail expired on Sunday, he has the whole of the following day in which to file it.—Clink v. Muskegon Circuit Judge, 58 Mich. 242.

¶ 133. A default for failing to file special bail may be disregarded if prematurely entered; and if an attempt in good faith to file such bail has been made, but the bail turns out to be a nullity, defendant should be allowed a further reasonable opportunity to file it and to perfect it if excepted to.—Clink v. Muskegon Circuit Judge, 58 Mich. 242.

¶ 134. Entry of default in the condition of a bail bond is only the formal expression of a plaintiff's determination to rely upon the breach; the beginning of suit would be as effectual. And where the condition is to put in special bail within a fixed time such bail cannot be put in after suit upon the bond is actually begun, even if default was not entered.—Pease v. Pendell, 57 Mich. 315.

§ 45. Perfecting bail.

In absence of court rules for perfecting bail, see post ¶ 185.
Statutory provisions, see Jud. Act, Chap. XXV, §§ 4, 5; Comp. L. 1915, §§ 12982, 12983.

¶ 135. In capias ad respondendum, bail is not perfected when the sureties justify under Comp. L. 1897, § 10032, but it is necessary under §§ 10000 and 10033 to follow the rules and practices of the court and, in the absence of general court rules, a notifica-

tion by the court that the defendant could not perfect his bail until it approved the sureties is reasonable and binding.—Ludwick v. Kent Circuit Judge, 138 Mich. 106.

¶ 136. Under Comp. L. 1897, § 10032, providing that in capias ad respondendum, special bail may justify by affidavit before any officer authorized to take a recognizance, a defendant is not entitled to discharge upon justification by sureties but it is his duty to perfect his bail as provided in section 10031.—Ludwick v. Kent Circuit Judge, 138 Mich. 106.

§ 46. Requisites of bond or recognizance.

Perfecting the bail, see ante § 45.
Entry of record, see post § 47.
Copies of bail piece in surrendering and exonerating sureties, see post §§ 51-53.
Omission to give bail pieces as discharging sureties, see post § 57.
Disproving genuineness of bond in action thereon, see post § 63.
Statutory form of special bail and bail piece, see Jud. Act, Chap. XXV, §§ 2, 3; Comp. L. 1915, §§ 12980, 12981.

¶ 137. Under Comp. L. 1871, § 5738; How. St., § 7306, which requires bail bonds for appearance to be executed to the officer making the arrest, a bond running to the undersheriff is not invalid if that officer made the arrest.—Wilcox v. Ismon, 34 Mich. 268.

¶ 138. A recognizance of special bail acknowledged before a notary public is void; notaries have no power to take such acknowledgments.—Clink v. Muskegon Circuit Judge, 58 Mich. 242.

§ 47. Entry of record.

¶ 139. Where a circuit court commissioner acts upon cause, such as the surrender of the party by his sureties, the fact should in some way be made to appear, in order to show that he had jurisdiction. In the absence of any showing of cause the taking of recognizance is without authority.—Townsend v. People, 14 Mich. 388.

§ 48. Amendments and further bond or recognizance.

Record to sustain further recognizance, see post ¶ 155.
Additional bond when jail limits bond is deficient, see post ¶¶ 168, 169.

¶ 140. Where a recognizance of special bail was lost from the files of the court, and plaintiff moved to substitute a copy to stand in lieu of the original, it was held that the court had no jurisdiction to order the substitution to be made without notice to the sureties.—Montgomery v. Henry, 10 Mich. 19.

§ 49. Obligation and liabilities of bail.

Necessity of notice of judgment, see post ¶ 192.
Pleading breach and liability, see post § 62.
Evidence of breach and damages, see post § 63.
Matters operating to discharge sureties, see post § 57.
Suit on bond for escape as barring right to alias capias, see ante ¶ 130.
On bond for appearance, see post § 50.
On jail limits bond, see post § 56.

¶ 141. Where special bail is not put in, a plaintiff may, if he choose, abide by the bail to the sheriff, and go on with his action to final judgment, and afterwards, if needful, may recur to the bond to the sheriff, as he might have done when default happened.—De Myer v. McGonegal, 32 Mich. 120.

¶ 142. The renewal of jurisdiction by waiving the right to a discontinuance given by plaintiffs' neglect to follow the statutory procedure in suits by capias, cannot at common law bind the sureties on the defendants' recognizance of special bail.—Fish v. Barbour, 43 Mich. 19.

¶ 143. Special bail to a capias are not held to a case not made by the affidavit for the writ, unless, perhaps, where the record shows that the recovery was limited to the matters in the affidavit.—Fish v. Barbour, 43 Mich. 19.

¶ 144. The special bail for defendant in a suit by capias are not bound to indemnify against charges in the declaration that are materially different from those in the affidavit on which the writ issued.—Fish v. Barbour, 43 Mich. 19.

¶ 145. Under a strict construction of a bail bond there can be no judgment against a surety in a proceeding by capias brought against an alleged fraudulent debtor unless a judgment is procured in an action against the principal.—Bryant v. Kinyon, 127 Mich. 152.

¶ 146. Plaintiff on a bond for the jail limits given under a capias ad respondendum is entitled to recover only the actual damages sustained by him, while in the case of a ca. sa. the damage is the amount directed to be collected by the execution.—Gunn v. Geary, 44 Mich. 615.

§ 50. ——On appearance bail.

Default for failure to file special bail, see ante § 44.
Matters working discharge of sureties, see post § 57.
Pleading breach and liability, see post § 62.

Force and effect of recognizance to answer to complaint in bastardy proceedings, see Bastards, § 6.

¶ 147. Sureties on appearance bail become liable on failure to put in special bail to the same extent that sureties on special bail would if special bail had been put in.—Wilcox v. Ismon, 34 Mich. 268.

¶ 148. Appearance bail, where no special bail is entered, remain liable in the same manner and entitled to the same defenses as special bail, and cannot be sued until execution against the body is issued and returned "not found."—Fisher v. Drewa, 63 Mich. 655.

¶ 149. Comp. L. 1897, § 10085, providing that where plaintiff has lost a trial by reason of the failure of an arrested defendant to put in special bail he shall be entitled to judgment on the bail bond, applies only to proceedings where no surrender of the principal defendant has been attempted and no exoneration of the bail has been applied for.—Schwarzschild & Sulzberger Co. v. Cryan, 167 Mich. 377.

§ 51. Surrender by bail.

Surrender as cutting off statutory right to judgment for failure to put in special bail, see ante ¶ 149.
Directing payment of costs as part of judgment where not made at time of surrender, see post § 65.
Statutory provisions generally, see Jud. Act, Chap. XXV, § 19 et seq.; Comp. L. 1915, § 12997 et seq.
Surrender by sureties for jail limits, see Jud. Act, Chap. XXV, § 27 et seq.; Comp. L. 1915, § 13005 et seq.
Keeping of defendant, see Jud. Act, Chap. XXIII, § 31; Comp. L. 1915, § 12846.

¶ 150. Sureties on a bail bond are presumed, for their own benefit, to have the custody of their principal; and they may surrender him to exonerate themselves.—Koch v. Coots, 43 Mich. 30.

¶ 151. How. St., § 7338, relative to the surrender of a judgment debtor by his bail and requiring that two copies of the bail piece be produced before the officer does not require certified copies.—Morgan v. Jones, 117 Mich. 59.

¶ 152. Where plaintiff abides by the appearance bail and goes on to final judgment, the right of such bail to surrender their principal in their own exoneration continues to run with the plaintiff's right to insist on their continued liability for the defendant's appearance, and does not terminate until, in regular course, an execution against the defendant's body has failed.—De Myer v. McGowal 32 Mich. 120.

¶ 153. Exoneration of special bail cannot be demanded as matter of strict right unless the principal surrenders himself or is surrendered within eight days after return day of the writ or declaration on the recognizance.—Begole v. Stimson, 39 Mich. 288.

¶ 154. Special bail's right to surrender principal expires eight days from commencement of suit upon recognizance after timely and regular issue and return "not found" of body execution; hence an offer three years afterwards by the substituted executor of the bail does not bring the case within How. St., § 7334, providing that if plaintiff or his attorney give directions preventing service the bail shall be entitled to a verdict in their favor.—Lyman v. Giddey, 96 Mich. 401.

¶ 155. The fact of the surrender and discharge by the commissioner should be made to appear in such way as to show jurisdiction.—Townsend v. People, 14 Mich. 388.

§ 52. Certificate of surrender.

Uncertified copies of bail piece, see also ante ¶ 151.
Indorsement of exoneration on copy of bail piece, see also post ¶ 162.

¶ 156. A certificate made by the sheriff, attached to a copy of the bail piece, and duly acknowledged before the commissioner, that defendant has been committed to and remains in his custody, etc., suffices to show that such defendant is in the sheriff's custody by virtue of a committitur of him in exoneration of bail.—Morgan v. Jones, 117 Mich. 59.

§ 53. Exoneration of bail.

See also post ¶ 180.
As cutting off right to judgment on default of special bail, see ante ¶ 149.
Right of sureties to surrender principal, see ante § 51.
Time for surrender in order to be exonerated, see ante § 51.
Certificate of surrender and exoneration, see ante § 52.

¶ 157. Exoneration of bail is within the authority of circuit court commissioners.—De Myer v. McGonegal, 32 Mich. 120.

¶ 158. A circuit court judge has no jurisdiction of proceedings for the commitment of a defendant, in exoneration of special bail, unless copies of the bail piece are presented to him as the basis of his action, as required by the statute. It is not sufficient that copies of the recognizance of special bail are presented instead of the bail piece.—Elliott v. Dudley, 8 Mich. 62.

¶ 159. Proceedings in exoneration of bail after action brought on the bail bond cannot be held to be void merely because bail, when they undertook to surrender their principal, did not pay or tender the costs incurred by plaintiff up to that date; plaintiff not having appeared before the commissioner or objected to his order upon the ground that the costs had not been paid.—Morgan v. Jones, 117 Mich. 59.

¶ 160. Comp. L. 1897, §§ 10047-10049, provide for the discharge of bail upon surrender as a matter of right, when the statute is complied with, and regardless of the wishes or convenience of the plaintiff, and when a defendant is surrendered to the sheriff, who is authorized to keep him until discharged, and the order exonerating bail is duly made, the question of what disposition shall be made of the defendant is between the plaintiff and the sheriff, and it is immaterial that the plaintiff is not entitled to an execution against the body until the return of a fieri facias (Comp. L. 1897, § 10305).—Umphrey v. Emery, 121 Mich. 184.

¶ 161. Under Comp. L. 1897, § 10049, providing that when a bail bond shall be taken on arrest of a defendant, the bail may surrender their principal and be exonerated, this may be done even though the plaintiff has sued upon the bond after forfeiture has been declared.—McNeal v. Van Duser, 142 Mich. 593.

¶ 162. While Comp. L. 1897, § 10048, subsection 3, provides that an order liberating bail shall be indorsed on the second copy of the bail piece an order indorsed on a piece of paper attached to the bail piece is sufficient.—McNeal v. Van Duser, 142 Mich. 593.

¶ 163. Defendant sureties upon the arrest by capias of their principal gave a bail bond conditioned that said principal should appear in the action by putting in special bail within fifteen days. The principal defendant failed to put in the special bail within the stipulated time. Plaintiff started suit against defendant sureties on the bail bond. Five days thereafter defendants surrendered their principal into the custody of the sheriff. From the failure of the principal defendant to put in special bail, plaintiff lost a trial in the next term of court. Held, under Comp. L. 1897, §§ 10034, 10035, 10047-10049, the trial court properly exonerated the defendant sureties from liability on the bail bond upon the said surrender of their principal to the sheriff.—Schwarzschild & Sulzberger Co. v. Cryan, 167 Mich. 377.

§ 54. Keeping and jail liberties.

Keeping of prisoner when surrendered, see also ante ¶ 160.
Discharge of sureties on release of prisoner for failure of plaintiff to pay for keeping, see post ¶ 178.
Bond for jail limits and liability on bond, see post §§ 55, 56.
Time of imprisonment before discharge can be granted, see post § 59.
General provisions, see Jud. Act. Chap. XXV, § 22 et seq.; Comp. L. 1915, § 13000 et seq.
Mode and expense of keeping, see Jud. Act, Chap. XXIII, § 30, Comp. L. 1915, § 12845.
Provisions as to jails and keeping of civil prisoners, see Comp. L. 1915, chap. 242.

¶ 164. Under Comp. L. 1897, § 1117, which provides that all officers of the several courts of record shall be liable to arrest, and may be held to bail, in the same manner as other persons, except during the actual sitting of any court of which they are officers, an assistant corporation counsel who has been arrested and has given a bond for jail limits, cannot go beyond the limits of the county to attend the Supreme Court on official business without violating his bond.—Hughes v. Hally, 137 Mich. 433.

¶ 165. On certiorari to review the denial of mandamus to compel the sheriff to relieve the relator, imprisoned on civil process, from solitary confinement; to permit him to have reasonable exercise; to have the daily papers furnished by his relatives; to receive his wife or other relatives and friends at the jail—held, by a divided court, that the evidence sustained the conclusions of the circuit judge that the sheriff had not abused his discretion.—Leach v. Whitbeck, 151 Mich. 327.

§ 55. Bond for jail limits or release.

Misnomer of writ in the bond as affecting liability of sureties, see post ¶ 184.
Measure of liability on bond, see post § 56.
Statutory provisions, see Jud. Act. Chap. XXV. § 23 et seq.; Comp. L. 1915, § 13001 et seq.

¶ 166. A bond for the jail limits, executed under How. St., § 8913, is given to the sheriff in his individual capacity, and stands as indemnity to his successor in office without any written assignment; and during its lifetime it may be assigned by the sheriff in office to the person for whose benefit it was given, whenever a breach occurs.—Kruse v. Kingsbury, 102 Mich. 100.

¶ 167. A jail limits bond is, in effect, a substitute for the custody of the sheriff; and, after admitting the prisoner to the liberty of the jail limits, the sheriff has no longer any power over him, either to restrain or to discharge him.—Kruse v. Kingsbury, 102 Mich. 100.

¶ 168. Under the statute (How. St., § 8016), which authorizes a sheriff, who, having taken a bond for the jail limits, discovers that any surety in such bond is insufficient, to commit the prisoner to close confinement in jail until other good and sufficient sureties shall be offered, the validity of the bond is not affected by the prisoner's not being in actual confinement when the other sureties are obtained.—Kruse v. Kingsbury, 102 Mich. 100.

¶ 169. A judgment debtor, on being arrested on a body execution, gave a jail-limits bond. He was afterwards notified by the successor in office of the sheriff to whom the bond had been given that one of the sureties was insufficient, and that it would be necessary for him to procure a new bondsman. He thereupon took the bond, and secured the signature thereto of an additional surety, and returned the bond to the sheriff. Held, that the contention that the additional surety did not sign the bond under such circumstances as to bind him is without force. —Kruse v. Kingsbury, 102 Mich. 100.

¶ 170. Where one is arrested under a warrant issued upon a fraudulent debtor affidavit that does not conform to the statute, a bond given for his release is void.—Marble v. Curran, 63 Mich. 283.

§ 56. ——Liability on bond.

Extent of liability on jail-limits bond, see also ante ¶ 146.
Pleading breach and liability, see post § 62.

¶ 171. Under Comp. L. 1897, § 10521, one who is arrested under a capias ad satisfaciendum and gives a bond for liberty of jail limits, and is surrendered in exoneration of bail and subsequently gives another bond for jail limits and is arrested upon its breach, is liable on the bond for the amount of the attachment with interest to the time of such recovery.—Hughes v. Hally, 137 Mich. 433.

¶ 172. Nothing but the act of God or the enemies of the country will excuse the sheriff for an escape, and the same rule is applicable as against the sureties on a bond to the jail limits, and therefore the leaving of the county by the principal to submit to an examination in a criminal case in justice court, is a breach of the bond.—Smith, Sturgeon & Co. v. Grosslight, 123 Mich. 57.

§ 57. Discharge of sureties.

Effect of failure to insist on discontinuance, see ante ¶ 142.
Proper mode of expunging void recognizance from record, see Records.

¶ 173. The obligations of special bail are in the nature of those of sureties, always and properly recognized as being strictissimi juris, and discharged by anything that so affects the nature and extent of their contract as, by any reasonable probability, to increase risk or liability.—Campau v. Seeley, 30 Mich. 57.

¶ 174. A recognizance should be discharged as to the surety on payment of the sum for which the principal was held, though such surety was bound for more.—People v. Morrison, 75 Mich. 30.

¶ 175. The omission to give bail pieces to the sureties on a bail bond will not invalidate the bond or prejudice the plaintiff in an action thereon if the sureties have waived their rights by not demanding them.—Wilcox v. Ismon, 34 Mich. 268.

¶ 176. Neglect to proceed against the sheriff or his bail does not, in an action on the bail bond, discharge appearance bail, as the plaintiff can either proceed against the sheriff or take an assignment of the bond for appearance.—Wilcox v. Ismon, 34 Mich. 268.

¶ 177. Accepting a plea and proceeding in the suit does not waive the right to proceed against the appearance bail.—Wilcox v. Ismon, 34 Mich. 268.

¶ 178. Bail are discharged where the sheriff has released defendant from custody on plaintiff's refusal to pay the expenses of his board and keeping in advance, as required by How. St., § 8960, after he has been taken on execution.—Prior v. Bodrie, 49 Mich. 200.

¶ 179. Eight months' delay in issuing execution on a judgment does not release the judgment debtor's special bail unless it has done them some special injury.—Vandergazelle v. Rodgers, 57 Mich. 132.

¶ 180. Debt by B. against N., on a recognizance of special bail entered into in 1837, in an action upon contract brought by B. against one C., wherein judgment was rendered against C. in 1842, upon which ca. sa. was afterwards issued and returned non est inventus. N. moved that an exoneretur be entered upon the recognizance. Held, that the motion should be granted, for the act of 1839 operated to prohibit the arrest or imprisonment of C. upon any process issued upon the judgment against him, and thereby rendered the recognizance void.—Bronson v. Newberry, 2 D. 38.

¶ 181. It is immaterial to the liability of the surety in the recognizance that the principal ever since action brought has been a nonresident of the state and without prop-

erty within it, but has property elsewhere which he refuses to apply to the satisfaction of the demand.—Bronson v. Newberry, 2 D. 38.

¶ 182. Under Laws 1873, Act No. 59, § 21, establishing the superior court of Detroit, a plaintiff transferring his cause thereto from the Wayne circuit court, where it has been pending, is held to have released the special bail given by recognizance in the usual form to the action in the circuit court. The general provision that "any bail that shall originally have been taken shall be discharged" was meant for all cases, whether transferred on the plaintiff's application or the defendant's.—Campau v. Seeley, 30 Mich. 57.

¶ 183. Where an action for fraud by a chattel mortgagee against a chattel mortgagor for fraudulently inducing plaintiff not to record the mortgage is commenced by a capias, and the declaration avers that defendant sold the property to a partnership, an amendment that the property was sold to an individual does not create a variance between the declaration and the affidavit for the writ of capias ad respondendum that will operate to release the sureties on the bail bond.—Priebisch v. Ottenwess, 176 Mich. 476.

§ 58. Discharge of principal from bail.

¶ 184. A defect in a bond given by one arrested on a capias ad satisfaciendum, in stating that the principal was in custody by virtue of a "capias ad respondendum," does not entitle the principal to a discharge from custody when surrendered by his bondsmen, where the mistake was due to the attorney of such principal, and was corrected, with the consent of all parties interested, as soon as it was discovered, the bond being treated as valid.—In re Friedrich, 113 Mich. 468.

¶ 185. The omission of the court to make general rules governing the perfection of bail in capias ad respondendum does not entitle the defendant to liberty upon the justification of his sureties, as the court may still make rules to govern such cases before the expiration of the statutory period for perfecting bail.—Ludwick v. Kent Circuit Judge, 138 Mich. 106.

¶ 186. A motion to discharge defendant from bail and to dismiss the action because the plaintiff after beginning it sued in assumpsit on the same cause of action and had a judgment which is res adjudicata, and also thereby waived the tort on which the issuance of the capias is founded, is an improper means of raising those questions; and they should be determined on the issues made by appropriate pleadings at the trial.—Polasky v. Kalamazoo Circuit Judge, 147 Mich. 197.

§ 59. Discharge from imprisonment.

Perfection of bail as essential, see also ante ¶ 136.
Effect of outstanding levy on warrant for arrest, see ante ¶ 87.
Keeping of prisoner after surrender and pending time for body execution, see ante ¶ 160.
Jail-limits bond as substitute for imprisonment, see ante ¶ 167.
Habeas corpus for release of prisoner, see Habeas Corpus.
For failure to take out execution on judgment, see Jud. Act, Chap. XXIII, § 25; Comp. L. 1915, § 12840.
Application grounds and conditions under Poor Debtors' Act, see Jud. Act, Chap. XLIII, § 1 et seq.; Comp. L. 1915, § 13617 et seq.
Under Fraudulent Debtors' Act, see Jud. Act. Chap. XLIV, § 11; Comp. L. 1915, § 13640.

¶ 187. A person imprisoned on a body execution issued more than ninety days after the return of a property execution, may, under § 10413, Comp. L. 1897 § 13126, How. St., 2nd Ed., be discharged from custody.—In re Lauer's Estate, 184 Mich. 497.

¶ 188. As Comp. L. 1897, § 9701 et seq., contemplates that before the debtor shall be entitled to his discharge he must have been imprisoned in the county jail for the period fixed by the statute, merely showing that the debtor was actually in the custody of the sheriff at the date of the application, and had prior thereto been in nominal custody for the statutory period; i. e., under bonds for the jail limits, was not a sufficient compliance with the statute.—Rusiewski v. Michalski, 135 Mich. 530.

¶ 189. A defendant in custody under a capias ad respondendum cannot anticipate exceptions by having special bail justify and obtain an immediate release; Comp. L. 1897, § 10031, shows that many days must ordinarily elapse before such bail shall become effective; such a bond is intended to be used in conjunction with the bond to the sheriff provided for in section 10000.—Ludwick v. Kent Circuit Judge, 138 Mich. 106.

¶ 190. A debtor arrested under a capias ad satisfaciendum pursuant to a conviction for fraud in a civil action, was improperly discharged by a circuit court commissioner who permitted him to make an assignment for the benefit of creditors; as under How. St., chap. 309, § 2, the judgment in question having exceeded $500 in amount, application for discharge could not be made before the expiration of nine months from the time of imprisonment.—Funke v. Hurst, 119 Mich. 182.

¶ 191. A petition for discharge of an arrested debtor as an insolvent which only professes to set forth in the schedule such property as is not exempt from execution, and the affidavit verifying which omits the clause required by the statute to be contained therein, "that I have in no instance created or acknowledged a debt for a greater sum than I honestly owed," is so defective as to give the officer to whom it is presented no jurisdiction.—Young v. Stephens, 9 Mich. 500.

V. ACTIONS AND PROCEDURE ON BOND OR RECOGNIZANCE.

§ 60. Right of action in general.

See also ante ¶ 176.
Suing on bond as bar to alias capias, see ante § 42.
Nature and requisites of actionable breach of bond, see also ante §§ 49, 50.
Right to proceed with action on default and sue afterwards on appearance bail, see ante ¶ 141.
Suing on bond as cutting off right to put in special bail, see ante ¶ 134.
Right to surrender principal after suit begun on bond, see ante ¶ 161.
Effect of accepting plea and proceeding in action on liability of sureties for appearance, see ante ¶ 177.
Necessity of execution and return before suit on special bail, see Jud. Act, Chap. XXV, § 15; Comp. L. 1915, § 12903.
Statutory stay to try main action, see Jud. Act, Chap. XXV, § 7 et seq.; Comp. L. 1915, § 12985 et seq.

¶ 192. Special bail are not entitled to notice of a judgment against their principal, or to a demand thereunder, before being sued on it.—Vandergazelle v. Rodgers, 57 Mich. 132.

¶ 193. Recognizance of bail cannot be sued on upon the return of an execution against the body merely as "unsatisfied"; it must show that defendant could not be found within the county (Comp. L. 1871, § 5763, How. St., § 7332).—Barnum v. Waterbury, 38 Mich. 280.

§ 61. ——Assignment of bond.

Assignment of jail-limits bond, see also ante ¶ 166.
Validity of assignment by deputy sheriff, see Sheriffs, V.
Statutes, see Jud. Act, Chap. XXV, § 6; Comp. L. 1915, § 12984; Jud. Act, Chap. XXV, § 37; Comp. L. 1915, § 13015.

¶ 194. An assignment of a bail bond need not be made in the official character of the officer to whom the bond ran if such character appears in the bond itself; any assignment purporting to transfer the bond is sufficient.—Wilcox v. Ismon, 34 Mich. 268.

¶ 195. An assignment of a bail bond need not be under seal unless the statutes require.—Wilcox v. Ismon, 34 Mich. 268.

§ 62. Pleading.

Issues on the pleadings, see post § 63.
General law of pleading, see Pleading.

¶ 196. In an action upon a recognizance of special bail, the omission to allege in the declaration that a fi. fa. has been issued and returned unsatisfied will not, it seems, defeat a judgment if the objection has not been seasonably interposed.—Heymes v. Champlin, 52 Mich. 25.

¶ 197. In an action on a bail bond the ordinary count against bail to the arrest, wherein the plaintiff, without waiving anything, relies on defendant's failure to appear by giving special bail, is inapplicable if the plaintiff allowed such failure to pass and waited until a fieri facias and an execution against the body had proved ineffectual before suing the bail; to this extent he elected to treat the bail to the arrest as substituted for special bail.—Prior v. Bodrie, 49 Mich. 200.

¶ 198. A count in a declaration against bail to the arrest states no cause of action if, on alleging the issue of execution against the body, it contains no averment of return or of anything done under the writ. It should set up a due return under the sheriff's certificate that defendant could not be found within the county, or other facts showing the failure of the execution under circumstances prima facie holding the sureties.—Prior v. Bodrie, 49 Mich. 200.

¶ 199. Where, in a suit against special bail, the declaration does not depart from the language of the affidavit in matter of substance, the declaration is not defective.—Wilkinson v. Nichols, 48 Mich. 354.

¶ 200. The declaration on a recognizance of special bail was held not to depart from the affidavit to hold to bail; where the fuller language was used merely to meet the rules of pleading.—Wilkinson v. Nichols, 48 Mich. 354.

¶ 201. It is error to refuse defendant sureties, in an action on a bond to the jail limits, leave to amend their plea to show the fact, learned for the first time by their attorney at the trial, that the principal was within the jail limits when the suit was

commenced, although under Comp. L. 1897, § 10513, a defendant was required to give notice of his reliance on the return of the principal in bar of the action.—Smith, Sturgeon & Co. v. Grosslight, 123 Mich. 87.

§ 63. Issues and evidence.

Questions of the sufficiency of the showing for the warrant, see also ante ¶ 117.
General law of evidence, see Evidence.

¶ 202. The genuineness of a recognizance of special bail may be disproved by defendants in an action brought thereon.—Elliott v. Green, 10 Mich. 113.

¶ 203. Circuit Court Rule 70, in regard to proof of the execution of written instruments sued on, is not applicable to recognizances of special bail.—Elliott v. Green, 10 Mich. 113.

¶ 204. In an action on a bail bond the judgment in the original suit is admissible in evidence as fixing the measure of damages.—Wilcox v. Ismon, 34 Mich. 268.

¶ 205. The files and record in a case are admissible in a suit upon a recognizance of special bail taken therein.—Heymes v. Champlin, 52 Mich. 25.

¶ 206. Evidence of the proceedings against a person arrested as a fraudulent debtor were properly admitted in an action upon the bond given by him in the course of such proceedings.—Butts v. Davis, 50 Mich. 310.

¶ 207. The certificate of the county clerk to the acknowledgment of a recognizance of bail is not a record made in open court and may be impeached by testimony in denial of the execution of the bond; and it is error to charge as matter of law that the certificate is entitled to more weight than the unsupported oath of the defendant in an action against the bail.—Spencer v. Fish, 43 Mich. 226.

§ 64. Questions of fact and law.

General law, see Trial, VI.

¶ 208. In an action against special bail it is for the court to determine whether the declaration in the original suit set up grounds of action not covered by the affidavit for bail.—Wilkinson v. Nichols, 48 Mich. 354.

§ 65. Judgment.

Mode and form of entry of judgment on bonds or on criminal bail, see Bonds, § 8; Arrest, § 56.
Judgments in general, see Judgments.

¶ 209. Where, in an action upon a bail-bond the bail gave notice to plaintiff of the surrender of their principal, but made no tender of costs, it was not error for the trial court after the proofs were in to direct that defendants pay the costs incurred by plaintiff to the date of the notice.—Morgan v. Jones, 117 Mich. 59.

CIVIL CONTEMPTS to CIVIL REMEDIES.

Cross-References.

Civil Contempts—
See Contempt.
Civil Damage Act—
See Intoxicating Liquors, VII; Damages.
Civil Death—
See Convicts.
Civil Engineers—
As expert witnesses, see Evidence, VI, B.
Civil Law—
See Common and Civil Law.
Civil Liberty—
See Constitutional Law, V, VII; Civil Rights.
Civil Remedies—
See generally topics treating of the various actions and suits and of the proceedings in actions and incidents of trial.
Remedies appropriate to particular rights and wrongs, see specific topics like Contracts, X; Sales, VIII, IX; Conversion; Trespass, etc.
Elective and cumulative remedies, see Election and Waiver.
Constitutional rights in or to remedies, see Constitutional Law.

CIVIL RIGHTS.

TREATS of the rights of persons to equality and freedom from discrimination because of race, as guaranteed by law.

Analysis.

§ 1. In general; discriminations.
§ 2. Actions.

§ 1. In general; discriminations.

Operation of constitutional guaranties of equality in privileges and immunities of citizens, see Constitutional Law, X.

Equality in common schools, see Schools, VI.

¶ 1. A rule by which the keeper of a public restaurant discriminates against negroes as to the part of the room in which they are served with refreshments is in violation of the common law, whereof Laws 1885, Act No. 130 (How. St., §§ 9074a-9074c), is declaratory, and an action lies.—Ferguson v. Gies, 82 Mich. 358.

¶ 2. Private institutions of learning, though incorporated, may select those whom they will receive for instruction, and may discriminate by sex, age, proficiency in learning, and otherwise, without infringing any privilege or immunity guaranteed by the federal or state constitutions.—Booker v. Grand Rapids Medical College, 156 Mich. 95.

§ 2. Actions.

See also ante ¶ 1.

¶ 3. In a suit to recover damages for a violation of Laws 1885, Act No. 130, providing that all persons shall be entitled to full and equal accommodations at restaurants, etc., the statute need not be declared upon or referred to.—Ferguson v. Gies, 82 Mich. 358.

CIVIL SERVICE to COMBAT.

Cross-References.

Civil Service—
See Officers; Municipal Corporations, XV; Schools, V.

Claim of Right and Title—
Element in adverse possession, see Adverse Possession, III, B.
Element in prescription, see Easements; Highways, II, A.
To real property as affecting jurisdiction, see Justices of the Peace, III, IV; Forcible Entry; Courts, V.
As affecting right to compensation for improvements, see Ejectment, VI; Quieting Title, III.
Actions for trial of conflicting claims to land, see Ejectment; Quieting Title; Trespass; Forcible Entry.
Actions for trial of claims to chattels, see Replevin.

Claims—
See generally the particular topic treating of the officer or body to which the claim is presented or of the estate or subject matter about which it is made.
Against the public, see Counties, VI; Municipal Corporations, XIV; State of Michigan, IV; Townships, VI.
For injuries on highways, see Highways, XII.
Against estates of decedents, see Estates of Decedents, VII.
Against insolvent or liquidating estates, see Assignments for Creditors: Bankruptcy; Corporations, XXIII; Joint Stock Companies; Partnership, VII; Receivers, IV; Trusts.
Against carriers, telegraph lines, etc., see Carriers, II, J, III, IV, E, 8; Telegraphs and Telephones.
Against insurance, see Insurance, XV, XX.
For damage or taking for public use, see Eminent Domain; Highways, II.
Interpleader of claimants, see Interpleader.
Intervention by claimant, see Parties; and see also Attachment, XI; Executions, XI; Garnishment, XI.
Cross bill by claimant, see Equity, VII, D.
Recoupment of claim, see Setoff and Recoupment.
Waiver, forbearance or transfer of claim as consideration for contract, see Contracts, V.
Assignments and transfers of claims, see Assignments; Champerty (dealing in litigious claims).
Release or compromise of claims, see Accord and Satisfaction; Releases; Compositions with Creditors.
Estoppel of claims, see Estoppel; Former Adjudication (estoppel by judgment).
Fraud upon claims, see Fraudulent Conveyances; Fraud.

Class Distinctions—
Liability under Civil Rights Act, see Civil Rights.

Class Legislation—
See Constitutional Law, X.
Clean Hands—
See Equity, I; Maxims; and see also Contracts, IV, D.
Cleaning Streets—
Duty to make streets fit for travel, see Highways, XII.
Municipal functions and powers, see Municipal Corporations, IX, D.
Clearing House—
See Banking, VI.
Clergy—
Relation to churches, see Religious Societies.
As witnesses to privileged communications, see Witnesses, V, C.
Defamation of or by, and doctrine of privilege, see Libel.
Undue influence by clergyman on testator or donor, see Wills, III; Gifts, IV; Fraud, II.
Clerical Errors—
See generally topic treating of the instrument or proceeding in which the error occurs.
Correction on appeal or error, see Appeal, § 527.
As harmless error not warranting reversal, see Harmless Error; Indictment, XV.
Amendments to cure, see Pleading, VI; Judgments, V; and like topics treating of the thing amended.
In tax or assessment proceedings, see Taxes; Local Improvements.
Clerks—
Of cities and counties, see Counties; Municipal Corporations; Officers.
Of courts, see Courts, I.
As public employees, see Officers.
As agents or servants of private persons and corporations, see Agency; Corporations, XVII; Master and Servant; Process, II, B (person to serve for corporation).
Embezzlement by, see Crimes, II; Indictment.
Admissions binding principal, see Evidence, VII, C; Indictment, VIII, B.
Admissibility of book entries by clerk, see Evidence, VIII.
Clients—
See Attorneys.
Privilege of communications by, see Witnesses, V.
Climatic Conditions—
Subject of opinion and expert evidence, see Evidence, VI; Indictment, VIII, B.
Liability of carrier of goods for injuries due to, see Carriers, II, E.
Climbing on Moving Cars—
As contributory negligence, see Carriers, IV, E; Master and Servant, III; Railroads, VIII; Street Railways, IV.
Close—
Trespass by breaking, see Trespass.
Closed Shop Agreements—
See Contracts, IV; Combinations; Trade Unions.
Closing Highways—
See Highways, VI, XI.
Closing Polls—
See Elections, V.
Closing the Bargain—
See Contracts, III; Vendors, I; Brokers, § 18 et seq.
Clothing—
Exemptions, see Exemptions.
As baggage, see Carriers, V.
As objective evidence, see Evidence, IX; Indictment, VIII, B.
Cloud on Title—
Bill to quiet title, see Quieting Title.
As rendering offered title unmarketable, see Vendors, III.
Defense to specific enforcement, see Specific Performance.
Validity of tax sales and relief against invalid sales, see Taxes, XII.
Clubs—
See Associations; Corporations.
C. O. D. Shipments—
See Carriers, II.
Coadministrators—
See Estates of Decedents.
Coagents—
See Agency; Brokers; Partnership; Master and Servant.
Coal Holes—
Liability for injury from openings in sidewalks, see Highways, XII.
Coal Oil—
See Explosives and Combustibles.
Coasting—
Liability for injuries on streets, see Highways, XII, XIII.
Power to appropriate streets for coasting, see Highways, XI.
Coconspirators—
See Conspiracy; Fraud; Crimes; Indictment, VIII, B.
Cocontractors—
See Contracts.
Codefendants—
See Parties; Pleading; and topics treating of specific remedies and procedure.
Codicils—
See Wills.
Coercion—
See Duress; Fraud; Gifts, IV (undue influence); Wills, III.
Destroying admissibility of confession, see Indictment, VIII.
Invalidating marriage, see Marriage.
Of verdict, see Trial, VIII; Verdicts; Indictment, IX.
Coexecutors—
See Estates of Decedents.

Cognovit—
See Confession of Judgment.

Cogs and Gears—
Dangers to and injuries to servants, see Master and Servant III.

Cohabitation—
Of sexes as crime, see Crimes, II; Indictment.
Adultery as ground for divorce, see Divorce.
As condonation of offense by spouse, see Divorce.
As element in common law marriage or in proof of marriage, see Marriage.
Under promise of marriage as seduction, see Seduction.

Coinsurers—
See Insurance, XIV, XVI.

Cold—
Liability of carrier for loss due to cold or freezing, see Carriers, § 45.

Collateral—
The number and variety of the subjects described by the word "collateral" is so great that to collect detailed references to them would produce a confusing mass of matter. See generally the topics treating of the thing described as collateral or of that to which it is collateral. For examples, see references following.

Collateral Attack—
On judgments generally, see Judgments, VII.
On other proceedings or orders, see topics treating of the act or proceeding, e. g., Acknowledgments, § 20; Estates of Decedents, III, B (letters); Corporations, II, B (on corporate existence); Local Improvements, VII, C; Taxes.

Collateral Contracts—
As consideration for each other, see Contracts, V.
Interpretation and effect on each other, see Contracts, VI; and see also topics treating of the various contracts.
Application of the parol and secondary evidence rules in proof, see Evidence, IV, V.

Collateral Issues and Facts—
Reference in arguments of counsel, see Argument of Counsel; Indictment, IX, C.
Mode and degree of proof, see Evidence, IV-X; Indictment, VIII; and see also specific topics.
Examination and cross-examination of witnesses, see Examination of Witnesses.
Bearing on impeachment or credibility of witnesses, see Witnesses, VI.
Scope of estoppel or adjudication, see Estoppel; Former Adjudication.

Collateral Kindred or Heirs—
See Descent and Distribution; Wills, VI; Estates of Decedents.
Taxation of inheritance, see Taxes, XIII.

Collateral Security—
See Pledges; and see also Assignments, § 23; Chattel Mortgages; Mortgages; Liens.

Collection—
By agents and attorneys, see Agency, IV; Attorneys, § 46 (lien).
By banks, see Banking, VI.
Of assets of estate, see Assignments for Creditors, § 20; Bankruptcy, § 4; Corporations, XXIII; Estates of Decedents, V; Guardianship, III; Partnership, VII; Receivers; Trusts.
Of assessments and taxes, see Local Improvements, VI, G; Taxes, X.
Agencies to collect, see Agency, § 36; Attorneys, § 24.
Guaranties of collection, see Guaranty; Frauds, Statute of.
Application of proceeds of collections, see Payment, III; and see also Banking, VI; Agency, IV; Attorneys, § 46; Building and Loan Associations; Mortgages.
Embezzlement of collections, see Crimes, II; Indictment.

Colleges—
See Schools, X; University of Michigan.

Collision—
Of vehicles on highways, see Highways, XIII.
Of vessels, see Shipping, V.
On railroads resulting in injury to passenger or goods, see Carriers.
On railroads resulting in injury to servants, see Master and Servant, III.
Of railroad car or street car with vehicles at crossings or in streets traversed by tracks, see Railroads, VIII; Street Railways, IV, C.

Colloquium—
Pleading in libel and slander, see Libel and Slander, VII.

Collusion—
See generally Fraud.
Defense in equity, see Equity, I, II; and see specific topics.
As reason for denying divorce, see Divorce, III.

Collusive Judgments—
As fraudulent conveyances, see Fraudulent Conveyances.
Collateral attack on, see Judgments, VII.
Effect and conclusiveness, see Former Adjudication.

Collusive Settlements—
Protection of attorney's lien against, see Attorneys, II, E.

Colonial Laws—
French law in Michigan territory, see Common and Civil Law.

Color—
Discrimination against persons because of, see Civil Rights.
Color of Office—
Element in de facto incumbency, see Officers, III, VI.
Color of Title—
Element in adverse possession, see Adverse Possession, III, B.
Coloring Matter—
Use as violation of food laws, see Adulteration; Food.
Validity of prohibiting laws, see Constitutional Law.
Comakers or Other Coparties to Paper—
See Negotiable Instruments.
Combat—
See Assault and Battery; Crimes, II; Indictment.

COMBINATIONS AND MONOPOLIES.

TREATS of the general law relating to monopolies and business combinations, excluding actionable conspiracy (see Conspiracy) and the effect on contracts of provisions therein restrictive of freedom in trade or competition or the construction of lawful contract restraints (see Contracts, IV, C, VI, VII).

Analysis.

§ 1. In general; what constitute.
§ 2. Corporate combinations or control.
§ 3. ——Foreign corporations.
§ 4. Under federal statutes; interstate trade.
§ 5. Exclusive contracts with the public.
§ 6. Uniting legal means for monopolistic object.
§ 7. Partial monopolies.
§ 8. Civil liabilities and consequences.
§ 9. Civil remedies and defenses.
§ 10. ——Evidence.
§ 11. ——Judgment and relief.
§ 12. Crimes and criminal procedure.

§ 1. In general; what constitute.

Combinations of corporations, see post §§ 2, 3.
Under federal statutes, see post § 4.
Incomplete monopolies, see post § 7.
Agreements operating to lower prices, see post ¶ 29.
Conspiracies to wrong, see Conspiracy.
Practices amounting to unfair trade, see Fraud, II; and see also Trade Marks and Trade Names.
Statutes defining contracts in restraint of trade, combinations, trusts and monopolies; prohibiting their creation; fixing both civil and criminal liability and the procedure thereupon; see Comp. L. 1915, chap. 253, §§ 15013-15042.

¶ 1. Monopoly in trade or in any kind of business in this country is odious to our form of government except when permitted in the public interest.—Richardson v. Buhl, 77 Mich. 632.

¶ 2. All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessaries of life, are monopolies, and intolerable; and ought to receive the condemnation of all courts.—Richardson v. Buhl, 77 Mich. 632.

¶ 3. Any kind of an agreement to enter into an unlawful combination is within the terms of the statute preventing such combinations, and a formal contract is unnecessary. Any arrangement, understanding, or agreement is sufficient.—Attorney General, ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 4. Pub. Acts 1899, No. 255, How. St., 2nd Ed., § 2949, entitled "An act to prevent trusts, monopolies and combinations of capital, skill and arts, and carrying out restraints in trade and commerce," is in terms prospective and cannot be invoked to defeat a contract lawful when made.—A. Booth & Co. v. Davis, 127 Fed. 875.

¶ 5. Pub. Acts 1899, No. 255, How. St., 2nd Ed., § 2949, an act to prevent trusts, monopolies and combinations of capital, skill and arts, and carrying out restraints in trade and commerce, is directed only against combinations of persons, firms, partnerships, corporations, or associations of persons conspiring to co-operate in violation of its pro-

visions, and it contains nothing prohibitive of the acquisition by a person, persons, corporation, or association of the business or property of any person or association, natural or artificial.—A. Booth & Co. v. Davis, 127 Fed. 875.

¶ 6. Pub. Acts 1889, No. 225, How. St., § 9354 et seq., providing that "all contracts, agreements, understandings and combinations made, entered into, or knowingly assented to, by and between any parties capable of making a contract or agreement which would be valid at law or in equity, the purpose or object or intent of which shall be to limit, control, or in any manner to restrict or regulate the amount of production or the quantity of any article or commodity to be raised or produced by mining, manufacture, agriculture, or any other branch of business or labor, or to enhance, control or regulate the market price thereof, or in any manner to prevent or restrict free competition in the production or sale of any such article or commodity, shall be utterly illegal and void," is aimed at combinations between parties who, having each a separate business with no interest or concern in that of the other, join together to restrict the output or enhance the prices of goods, and a contract by one selling a site suitable for a lumber business and dock to a lumber dealer whereby the purchaser agrees not to engage in the coal and fish business in competition with the seller for a term of years, is not invalid thereunder.—Hitchcock v. Anthony, 83 Fed. 779.

¶ 7. A decree under the anti-trust law enjoining defendants from fixing and regulating, or attempting to fix and regulate, the price of labor in installing plumbing supplies and goods in the City of Detroit and vicinity, was vacated on appeal, since an agreement to regulate the price of labor is not forbidden by the common law or by the anti-trust law (Pub. Acts, 1899, No. 255).—Hunt v. Riverside Co-operative Club, 140 Mich. 538.

¶ 8. The claim that agreements restricting competition for contract work, i. e., in which work is done and materials furnished for a lump sum, are not within the anti-trust law (Pub. Acts 1899, No. 255), was untenable, in an action to restrain members of a club so agreeing, since such restriction of competition in contract work was for the effect and intent of keeping the price of supplies of such members at a fixed or graduated figure, and so was in violation of such statute.—Hunt v. Riverside Co-operative Club, 140 Mich. 538.

§ 2. Corporate combinations or control.

Consolidation of corporations, see Corporations, XXII.

¶ 9. A contract by which a domestic corporation conveys substantially its entire assets to a foreign corporation for the consideration of shares of stock in the latter, abandons its business as proprietor thereof, and becomes practically a mere employee of the foreign corporation, is obnoxious to the provisions of Pub. Acts 1889, No. 225, How. St., § 9354j, entitled an act "declaring certain contracts, agreements, undertakings and combinations unlawful, and to provide punishment for those who shall enter into the same or do any act in performance thereof."—Davis v. A. Booth & Co., 131 Fed. 31; writ of certiorari denied in 195 U. S. 636, 49 L. ed, 355, 25 Sup. Ct. Rep. 793.

¶ 10. The creation of a monopoly by a mining corporation through the purchase of stock in another corporation and control over the election of the board of directors by obtaining enough proxies to enable it, with the use of its own stock, to elect such a board as it deems fit, offends against Pub. Acts 1899, No. 255, § 1, How. St., 2nd. Ed., § 2949, defining a trust as a "combination of capital, skill or arts by two or more persons, firms, partnerships, corporations or associations of persons * * * to prevent competition in manufacturing, making, transportation, sale or purchase of merchandise, produce or any commodity," and declaring it to be unlawful, against public policy, and void for two or more persons or corporations to "pool, combine, or directly or indirectly unite any interests that they may have connected with the sale or transportation of any such article or commodity, that its price might in any manner be affected," and section 2 of the Amendatory Act of 1905, Pub. Acts 1905, No. 329, How. St., 2nd Ed., § 2943, providing that all "combinations of persons, copartnerships, or corporations made and entered into for the purpose and with the intent of establishing and maintaining, or of attempting to establish and maintain, a monopoly of any trade, pursuit, avocation, profession or business, are hereby declared to be against public policy and illegal and void," even though by Pub. Acts 1905, No. 105, § 21, How. St., 2nd. Ed., § 7800, corporations organized under the Michigan Mining Law were empowered to subscribe for, purchase, own and dispose of stock in any company organized under the act or under any other laws, foreign or domestic, for the purpose of mining, refining, smelting or manufacturing any or all kinds of ores or minerals.—Bigelow v. Calumet & Hecla Mining Co., 155 Fed. 869.

§ 3. ——Foreign corporations.

Evidence of intent, see post § 10.
Remedies, see post ¶ 24.
Proceedings against foreign corporation for violation, see Comp. L. 1915, § 15015.

¶ 11. A foreign corporation which, for the purpose of obtaining a monopoly of the sale

of cash registers in the whole country, harasses and interferes with the business of its rivals in order to ruin them financially and to drive them from business by bringing a multitude of suits against them, without intending to prosecute them to judgment, in bad faith threatening their customers with suits for infringement of patents, interfering with rival agents and salesmen and harassing them in every conceivable way, inducing prospective customers not to purchase rival's goods, and those who have already purchased to break their contracts, etc., is guilty of a violation of § 4, Act. No. 329, Pub. Acts 1905, How. Ann. St., 2nd Ed., § 2945, prohibiting any foreign corporation doing business within the state when organized for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly.—Attorney General ex rel. James v. National Cash Register Co., 182 Mich. 99.

§ 4. Under federal statutes; interstate trade.

¶ 12. An agreement unlimited as to territory by which for an annual consideration a party agrees for a period of one year with the right to renew yearly for five years not to manufacture or sell one of the usual and customary products of his factory except to one party alone is clearly within the inhibition of 26 U. S. Stat. 209, chap. 647 and Comp. L. 1897, § 11377.—Clark v. Needham, 125 Mich 84.

¶ 13. A pooling agreement for the operation of several steamer lines as one under one traffic manager with a division of earnings on routes between Toledo, Ohio, and Port Huron, Michigan, is in violation of the Sherman Act against unlawful restraint on and monopolies in interstate trade (26 U. S. Stat. 209, chap. 647).—White Star Line v. Star Line of Steamers, 141 Mich. 604.

¶ 14. An agreement illegal in so far as it applies to interstate traffic by steamer lines because obnoxious to the Sherman Act (26 U. S. Stat. 209, chap. 647), will not be sustained because as to another portion of the routes traversed wholly within Michigan it might not be obnoxious to the laws of Michigan.—White Star Line v. Star Line of Steamers, 141 Mich. 604.

§ 5. Exclusive contracts with the public.

¶ 15. A contract by a city with a water supply company to take its supply of water from such company and pay for it, was to the extent that it gave such company an advantage over others desiring to do business of a like nature, a necessary and legitimate result of the right of contract, and did not create a monopoly.—Ludington Water Supply Co. v. City of Ludington, 119 Mich. 480.

¶ 16. It is not the creation of a monopoly when a city from year to year licenses one or more persons to cart the garbage from and out of the city, specifying the manner in which it shall be done.—City of Grand Rapids v. DeVries, 123 Mich. 570.

§ 6. Uniting legal means for monopolistic object.

Conspiracies to work wrong by legal means, see Conspiracy.

¶ 17. The fact that some of the specific agreements contained in the rules of a club considered by themselves are legal is immaterial, where, in an action to restrain a combination in restraint of trade, it appears that such agreements are merely steps to accomplishment of an illegal object; since for that reason they are also illegal.—Hunt v. Riverside Co-operative Club, 140 Mich. 538.

¶ 18. A club consisting of the majority of the master plumbers and all of the wholesale dealers and manufacturers in plumbers' supplies, doing business in the City of Detroit and vicinity, according to the rules of which, such manufacturers and wholesalers agreed to sell supplies to the master plumbers without discrimination, and the master plumbers agreed to buy their entire supplies from the wholesale dealers, distributing their trade equitably, paying the price of such supplies to be fixed by a committee representing both plumbers and dealers; it being agreed that nonmembers should be charged a price from 15 to 30 per cent more than members, and that no work should be done for or supplies sold to any one failing to make a satisfactory settlement with any member of the club, and the members agreeing to submit to the secretary of the club all estimates on jobs, and that such estimates should be governed by the price list supplied by the club, was a combination in restraint of trade under the anti-trust law, and as such was rightly restrained from further violation of such law (Pub. Acts 1899, No. 255).—Hunt v. Riverside Co-operative Club, 140 Mich. 538.

§ 7. Partial monopolies.

Partial restraint of trade, see Contracts, IV.
Doctrine of partial validity of Contracts, see Contracts, IV, D.

¶ 19. A monopoly, in order to be unlawful, need not be complete, and it may exist although limited to a narrow territory, but a combination must, in order to violate the law against monopolies, directly, necessarily, and substantially tend towards monopoly.—Bigelow v. Calumet & Hecla Mining Co., 167 Fed. 704, affirmed 167 Fed. 721.

¶ 20. A company dealing in fish is not a trust and monopoly within Pub. Acts 1899, No. 255, How. St., 2nd Ed., § 2949, where its business in this line is but a small fraction of that done by other dealers in the same commodity in the same territory, and it is but one of several hundred dealers in such territory.—A. Booth & Co. v. Davis, 127 Fed. 875.

¶ 21. The fact that a combination of master plumbers and wholesalers in plumbers' supplies for the restraint of trade, did not include all the members of that trade so as to create a complete monopoly, was not a defense in an action for the violation of the anti-trust law.—Hunt v. Riverside Co-operative Club, 140 Mich. 538.

¶ 22. A combination of master plumbers and dealers in plumbers' supplies to create a monopoly in the business of selling plumbers' supplies in the city of Detroit was illegal, although it did not entirely restrict competition.—Hunt v. Riverside Co-operative Club, 140 Mich. 538.

§ 8. Civil liabilities and consequences.

Effect on prior contracts, see ante ¶ 4.
Illegality of contracts in restraint of trade, see Contracts, IV.
Effect of invalidity on rights of parties to illegal contract, see Contracts, IV, D.
Civil liability, see Comp. L. 1915, § 15023.

¶ 23. A combination of rival dealers for the purpose of creating and carrying out restrictions in trade and commerce, and for the purpose of destroying the credit, reputation and business of a business rival, is actionable both at common law and under the Michigan Anti-trust Act (Act No. 255, Pub. Acts 1899, How. Ann. St., 2nd Ed., ch. 41).—Frohlich v. Deacon, 181 Mich. 255.

§ 9. Civil remedies and defenses.

See also ante ¶ 21.
Evidence and judgment, see post §§ 10, 11.
Defense of illegality of contract, see Contracts, IV.
Quo warranto, see Quo Warranto.
Civil action for violation, see Comp. L. 1915, §§ 15023-15026.
Quo warranto proceedings for violation, see Comp. L. 1915, § 15014.

¶ 24. Quære, whether Pub. Acts 1899, No. 255, limits the remedy against unlawful combinations under it, against foreign corporations, to a denial of their leave to do business in this state, and a revocation of their license.—Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 25. The death of one person who has entered into an unlawful combination does not relieve the other from his responsibility. —Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 26. Amending the rules of a club, on the eve of suit to restrain such club from the violation of the anti-trust law, by abrogating the provision which obligated wholesalers to discriminate against nonmember plumbers, and the provision which obligated master plumbers not to sell labor and material below a schedule rate, was ineffectual as a defense in such suit; since the public has a right to some other security than defendants' statement that they would thereafter desist from their illegal undertaking; and since their object remained the same; and such eliminated provisions may be considered as evidence of their purpose.—Hunt v. Riverside Co-operative Club, 140 Mich. 538.

§ 10. ——Evidence.

¶ 27. The purpose and intent of a foreign corporation to violate § 4 of Act. No. 329, Pub. Acts 1905, How. Ann. St., 2nd Ed., § 2945, prohibiting any such corporation doing business within the state, and revoking any permission previously granted, if organized for the purpose and with the intent of establishing and maintaining a monopoly, may be shown by its acts and policy pursued after organization. It is not necessary to show that the organizers expressly bound themselves to establish and maintain a monopoly of a business; it is sufficient to show that they acted together in pursuance of a common object, which while presupposing agreement between them in a broad sense, does not require that an agreement or contract in a technical sense be shown.—Attorney General ex rel. James v. National Cash Register Co., 182 Mich. 99.

¶ 28. Notwithstanding that it must be shown that a foreign corporation has, since its admission to the state, been organized or maintained for the purpose and with the intent of establishing and maintaining a monopoly, in order to bring it within § 4 of Act No. 329, Pub. Acts 1905, How. Ann. St., 2nd Ed., § 2945, it is competent to show acts done or committed prior to such time by its predecessors in the claimed conspiracy, for the sole purpose of characterizing and explaining its conduct since coming into the state, where its corporate predecessors were composed of the same stockholders, officers and agents, and were identical in mind and body with the respondent corporation.—Attorney General ex rel. James v. National Cash Register Co., 182 Mich. 99.

¶ 29. Testimony of defendants in an action for violation of the anti-trust law that their combination resulted in the lowering, instead of raising of prices, was disregarded,

the combination being in restraint of trade. —Hunt v. Riverside Co-operative Club, 140 Mich. 538.

¶ 30. Evidence held insufficient to show that a mining company buying and voting stock in other mining companies in the same mining region, in which copper of a particular kind was mined, violated the provisions of Pub. Acts 1899, Act No. 255, How. St., 2nd Ed., § 2949 et seq., denouncing all combinations for the purpose of preventing competition in "manufacturing, making, transportation, sale or purchase of merchandise, produce, or any commodity," and Pub. Acts 1905, No. 329, § 2, How. 2nd Ed., § 2943, declaring illegal all combinations entered into "for the purpose and with the intent of establishing and maintaining or of attempting to establish and maintain a monopoly" of any pursuit or business.—Bigelow v. Calumet & Hecla Mining Co., 167 Fed. 721, affirming 167 Fed. 704.

§ 11. ——Judgment and relief.

¶ 31. Whether a judgment of ouster or a fine shall be imposed on a corporation under § 9961, Comp. L. 1897, How. Ann. St., 2nd Ed., § 14076, for establishing and maintaining or attempting to establish and maintain a monopoly in violation of § 4, Act No. 329, Pub. Acts, How. Ann. St., 2nd Ed., § 2945, rests in the sound discretion of the court.—Attorney General ex rel. James v. National Cash Register Co., 182 Mich. 99.

§ 12. Crimes and criminal procedure.

General criminal procedure, see Indictment.
Statutory crimes and procedure, see Comp. L. 1915, §§ 15013-15042.
Form of indictment, see Comp. L. 1915, § 15017.
Sufficient proof of violation, see Comp. L. 1915, § 15018.

COMBUSTIBLES to COMMENT.
Cross-References.

Combustibles—
See Explosives and Combustibles.
Liability in tort for fires, see Fires.
Crimes with or about, see Crimes, II; Indictment.
Storage and handling as nuisance, see Nuisances.
Comity—
See generally Conflict of Laws; Courts, V.
Full faith and credit to judgments, see Foreign Judgments.
Recognition of foreign corporations, see Foreign Corporations, I.
Recognition of foreign executor, receiver, etc., see Estates of Decedents; Guardianship; Receivers; Assignments for Creditors; Bankruptcy; Trusts.
Foreign divorces and marriages, see Divorce, XI; Marriage.
Command of Superior—
As excuse for assuming risk or rebutting contributory negligence, see Master and Servant, III; Negligence, IV.
Commencement of Action—
See Actions, § 6; Limitations, V.
Commencement of Sentence—
See Crimes, I; Indictment, XI; Pardons and Paroles.
Commencement of Time—
In computations generally, see Time.
Construction of writings respecting, see Contracts, VI; Landlord and Tenant, II; Statutes, V; Wills, VI.
Comment—
By counsel in argument, see Argument of Counsel; Indictment, IX, C.
By court on trial or in giving of charge, see Instructions; Trial, II; Indictment, IX, C.
Right of privileged comment in slander, see Libel, III.

COMMERCE.

TREATS of regulations of commerce either within the state or with other states and foreign countries, and the relative powers of the state and nation under the Commerce Clause of the United States Constitution, excluding to appropriate topics the administration of police regulations and license laws (see Carriers; Health; Licenses; etc.).

Analysis.

§ 1. In general; what constitutes.
§ 2. Interstate and intrastate; state and federal powers.
§ 3. Supersession of state laws by federal exercise.
§ 4. What sales or contracts are interstate.
§ 5. ——Sale in original packages.
§ 6. What transportation or communication is interstate.
§ 7. License, tax and inspection laws.

§ 8. ——Blue Sky Law.
§ 9. ——Peddling and hawking.
§ 10. ——Intoxicating liquors.
§ 11. ——Fish and game laws and regulations.
§ 12. Regulation of corporations.
§ 13. Railroad and transportation laws and regulations.
§ 14. ——Rates and charges.
§ 15. ——Taxation.
§ 16. Shipping and water traffic regulations.
§ 17. ——Ferries.

§ 1. In general; what constitutes.

¶ 1. "Commerce," as a term, comprehends intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between citizens of one country and the citizens or subjects of other countries, and between citizens of different states.—Imperial Curtain Co. v. Jacob, 163 Mich. 72.

¶ 2. Commerce among the states is a practical and not a technical conception.—Power Specialty Co. v. Michigan Power Co., 190 Mich. 699.

§ 2. Interstate and intrastate; state and federal powers.

Definition, see ante § 1.
Federal laws as superseding state laws, see post § 3.
Sales, contracts or transportation affected with interstate character, see post §§ 4-6.
Fish and game laws, see post § 11.
Power of Congress, see also post § 13.
Applicability of Limitation of Liability Act to state vessels, see post § 16.
Federal decisions on commerce questions as binding on state courts, see Courts, IV.
Construction against unconstitutionality and presumption of validity, see Constitutional Law, I.
Estoppel or waiver of constitutional objection, see Constitutional Law, I.
Regulative powers of Railroad Commission, see Public Service.

¶ 3. The federal power over interstate commerce is exclusive.—Michigan Cent. R Co. v. Michigan Railroad Commission, 183 Mich. 6.

¶ 4. The power given Congress by the United States Constitution to regulate commerce among the several states is exclusive and the decisions of the United States Supreme Court upon that question are controlling.—People v. White, 197 Mich. 283.

¶ 4a. The Initial Carrier's Act, 34 Stat. L. 595, chap. 3591, § 7, making the initial carrier liable for loss or damage to goods caused by the connecting carrier, is constitutional.—Sturges v. Detroit, G. H. & M. Ry. Co., 166 Mich. 231.

¶ 5. Without congressional permission a state cannot exclude, directly or indirectly, the subjects of interstate commerce, or, by the imposition of burdens thereon, regulate such commerce.—Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 10 Sup. Ct. Rep. 725; reversing 74 Mich. 579.

¶ 6. No state has the right to lay a tax on interstate commerce in any form, whether by way of duties laid on the transportation of the subjects of that commerce or on the receipts derived from that transportation, or on the occupation or business of carrying it on, for the reason that such taxation is a burden on that commerce and amounts to a regulation of it, which belongs solely to Congress.—Lyng v. People, 135 U. S. 161, 34 L. ed. 150, 10 Sup. Ct. 725, reversing 74 Mich. 579.

¶ 7. A state cannot be permitted, under the guise of a tax upon business transacted within its borders, to impose a burden upon commerce among the states, when the business so taxed is itself interstate commerce.—Fargo v. Stevens, 121 U. S. 230, 30 L. ed. 888, 7 Sup. Ct. Rep. 857; reversing Fargo v. Auditor General, 57 Mich. 598.

¶ 8. Commerce which is carried on entirely within the limits of a state, and does not extend to or affect other states, is excluded from federal control.—The Daniel Ball, 10 Wall. (77 U. S.) 557, 19 L. ed. 999, affirming Fed. Cas. No. 3,564.

§ 3. Supersession of state laws by federal exercise.

Supersession of state law as to bills of lading by Carmack Amendment, see also Bills of Lading, ¶ 8.

¶ 9. Since Congress by the Act of June 29, 1906, acted in relation to terminal and storage charges on interstate traffic, and the Interstate Commerce Commission has acted thereunder by approving the demurrage rate adopted by the American Railway Association, so much of Act No. 173, Pub. Acts 1911

(How. St., 2nd Ed., §§ 6526, 6531), giving the Michigan State Railway Commission power to fix car service and demurrage charges over interstate shipments, is void.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 183 Mich. 6.

§ 4. What sales or contracts are interstate.

What transportation is interstate, see post § 6.

Licenses as improper regulation, see post §§ 7-10.

Combinations in restraint of interstate trade, see Combinations, § 4.

What constitutes business within state by foreign corporation, see Foreign Corporations, I.

Evidence that installation was essential part of sale by foreign corporation and therefore interstate, see also Foreign Corporations, I.

¶ 9a. Because of the operation of the interstate commerce law, Laws 1893, Act No. 79, requiring payment of a franchise fee, must be held not to apply to a foreign corporation the business of which in Michigan consists merely of selling through itinerant agents and delivering commodities manufactured outside of the state.—Colt & Co. v. Sutton, 102 Mich. 324; Moline Plow Co. v. Wilkinson, 105 Mich. 57; M. I. Wilcox Cordage & Supply Co. v. Mosher, 114 Mich. 64.

¶ 10. An agent of a foreign corporation who travels about with a horse and wagon soliciting orders for tea, coffee, and spices, going from house to house, and delivering goods previously ordered, who is paid in commissions, and in taking orders makes a memorandum thereof on a card furnished by the company, but no memorandum is given to the person ordering and no money collected until the goods are delivered, some orders being filled from stock kept at his place of business and part from goods ordered from the corporation without the state, is not engaged in interstate commerce, but is engaged in peddling goods for a corporation which has the status of a domestic corporation when admitted to do business in the state.—People v. Smith, 147 Mich. 391.

¶ 11. An Illinois corporation sent its salesmen into Michigan, who carried goods with them and sold them to buyers. Held, this was not interstate commerce.—Despres, Bridges & Noel v. Zierleyn, 163 Mich. 399.

¶ 12. Defendant owned a general stock of goods located in a general store in Chicago. He for several years traveled in Michigan soliciting orders for said goods. His course of business was to have a car of goods consigned to him in Michigan, and the goods were thus shipped to him in bulk. When the car arrived he would fill his orders therefrom. Held, defendant's business was not interstate commerce.—People v. Stewart, 167 Mich. 417; reversed in 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

¶ 13. An agent of a grocery company which maintains its headquarters in a foreign state, but also maintains a solicitor's department in a building within the state where a stock of goods is kept, and takes orders from customers from wagons, is, in so far as an order taken within the state is for goods that are in stock in such department at the time the order is taken, engaged in intrastate commerce so as to be guilty of peddling within Ordinance No. 14 of the City of Munising.—People v. Watters, 192 Mich. 462.

¶ 14. One who sells goods on commission by soliciting orders from house to house for future delivery and fills such orders by delivering goods shipped him by his employer from another state is engaged in interstate commerce.—People v. White, 197 Mich. 283.

¶ 15. A foreign corporation which ships goods to an agent within the state to be stored by him until sold, is not engaged in interstate commerce.—E. A. Lange Medical Co. v. Brace, 186 Mich. 453.

¶ 16. A nonresident corporation which contracts to sell and deliver goods to a resident f. o. b. at certain cities in other states and to take back unused goods at the expiration of the contract is engaged in interstate commerce.—Standard Fashion Co. v. Cummings, 187 Mich. 196.

¶ 17. The agent of plaintiff, a foreign corporation, took an order from defendant, a resident of Michigan, by which plaintiff agreed to place and maintain defendant's advertisement on a theater curtain in Detroit for a space of three years. The order was accepted by plaintiff and the advertisement prepared outside the state. Plaintiff had not complied with the statute governing the doing of business in Michigan by foreign corporations. Held, the transaction was not interstate commerce so as to be outside the statute, but was of a purely local character, and plaintiff could not, under Act No. 206, Pub. Acts 1901, as amended by Act No. 34, Pub. Acts 1903, recover the contract price in a suit in assumpsit.—Imperial Curtain Co. v. Jacob, 163 Mich. 72.

¶ 18. Where mechanical appliances are to be manufactured and shipped from one state to another and there installed by the seller such act of installation constitutes intrastate commerce in absence of proof that the process of installation is so complex as to necessitate the work being done by the seller's employees, and thus to constitute an essen-

tial requisite to the sale.—Power Specialty Co. v. Michigan Power Co., 190 Mich. 699; E. F. Sturtevant Co. v. Adolph Leitelt Iron Works, 196 Mich. 552.

§ 5. ——Sale in original packages.

¶ 19. A sale of liquors to be shipped in the original packages from another state where it is manufactured, and delivered to a purchaser in this state, is interstate commerce and not subject to local regulation, though both parties to the contract are residents of Michigan and the contract was made within the state.—Sloman v. William D. C. Moebs Co., 139 Mich. 334.

¶ 20. The right to importation of ardent spirits, distilled liquors, ale and beer from one state into another includes the right of sale in the original packages at the place where the importation terminates.—Lyng v. Michigan, 135 U. S. 161, 34 L. ed. 150, 10 Sup. Ct. Rep. 725, reversing 74 Mich. 579.

§ 6. What transportation or communication is interstate.

Validity of regulations, see post §§ 13-15.
What constitutes injury in course of interstate transportation by common carrier within Federal Employers' Liability Acts, see Master and Servant, III.

¶ 21. Shipments for interstate commerce become impressed with the character of such commerce from the first receipt by a carrier, which continues until the final delivery to the consignee.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 183 Mich. 6.

¶ 22. The act of floating rafts down a navigable river in a state used in interstate commerce to points where the logs are to be manufactured into lumber does not constitute interstate commerce.—Tittabawasee Boom Co. v. Cunning, How. N. P. 82.

¶ 23. A telephone company is engaged in interstate commerce when its business extends into other states.—Michigan Tel. Co. v. City of Benton Harbor, 121 Mich. 512.

§ 7. License, tax and inspection laws.

¶ 24. It is not an interference with interstate commerce to require a license of one who distributes articles of merchandise shipped into the state in bulk, such articles to be returned or paid for at a later date to an associate of the distributor.—City of Muskegon v. Hanes, 149 Mich. 460.

¶ 25. A state law that does not purport to be a mere regulation of commerce, but assumes to impose a tax upon a particular kind of business, aiming to apportion such tax according to the subject-matter on which it is imposed and ordaining the means for ascertaining that amount, does not contravene the federal constitution.—Walcott v. People, 17 Mich. 68.

¶ 26. A specific tax obliging mining companies to pay more upon mineral obtained in the state, and exported before it is smelted, than on that which is smelted within the state, is a tax on interstate and foreign commerce, and is an application of the doctrine of protection, and is void.—Jackson Min. Co. v. Auditor General, 32 Mich. 488.

¶ 27. A state statute imposing an occupation tax so specialized as to operate as a discriminative burden against the introduction and sale of the products of another state, or against the citizens of another state, is an attempt to regulate interstate commerce, and is invalid. So held of Laws 1875, Act No. 226 (How. St., §§ 1277-1280), taxing the wholesale importation of liquors from other states.—Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, reversing 53 Mich. 264.

§ 8. ——Blue Sky Law.

¶ 28. The Blue Sky Law, Pub. Acts 1915, No. 46 (Comp. L. 1915, § 11945 et seq.), providing for the regulation of the sale and disposition of bonds, stocks or other securities within the state by the Michigan Securities Commission and the issuance of licenses, is not unconstitutional as an interference with interstate commerce within the prohibition of U. S. Const., art. 1, § 8, in the absence of federal legislation, although foreign corporations must give certain information to, and obtain a license from the commission, before they can do business within the state, since interstate commerce is only incidentally regulated.—Merrick v. N. W. Halsey Co., 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct Rep. 227, reversing 228 Fed. 805.

¶ 29. The Blue Sky Law, Pub. Acts 1913, No. 143, providing for the regulation and supervision of domestic and foreign investment companies, their agents and other persons selling their securities, constitutes a direct burden on interstate commerce in stocks and bonds and is invalid within the commerce clause of the federal constitution.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

§ 9. ——Peddling and hawking.

¶ 29a. Pub. Acts 1897, No. 248, making it unlawful to peddle without a license in the several townships of the state, is unconstitutional, in that section 8 discriminates against nonresidents by permitting manufacturers, farmers and mechanics "residing in this state" to sell their work or production, by sample or otherwise, without procuring the license provided for.—Rodgers v. Kent Circuit Judge, 115 Mich. 441.

¶ 30. A municipal ordinance imposing a license fee upon peddlers will not be held invalid, as contravening the federal interstate commerce provisions in the case of one who is a resident of this state, and who does not sell goods in the original package, but from a general stock kept within the state. —People v. Sawyer, 106 Mich. 428.

¶ 31. A municipal ordinance requiring a license fee of peddlers, etc., is invalid as an interference with interstate commerce in so far as it applies to one selling by sample goods to be furnished by a foreign concern upon receipt of the orders taken.—People v. Bunker, 128 Mich. 160.

¶ 32. A municipal council cannot make a municipal ordinance providing for a license fee on hawkers and peddlers which will apply to persons who are in good faith engaged in interstate commerce, because such a license fee would be in effect a tax on such business.—People v. Smith, 147 Mich. 391.

¶ 33. A license tax upon a peddler engaged in interstate commerce is a discriminating tax upon the goods themselves, the imposition of which by a municipality constitutes an illegal interference with interstate commerce.—People v. White, 197 Mich. 283.

¶ 34. A foreign merchant who solicits orders within the state for groceries and other merchandise, which are shipped in carload lots to the state consigned to the seller, and fills the orders from the cars is engaged in interstate commerce so as to render Comp. L. 1897, § 5324 (How. St., 2nd Ed., § 2126), providing that no person shall be authorized to travel from place to place within the state for the purpose of selling goods or soliciting orders therefor without a license as a hawker or peddler repugnant to the commerce clause of the federal constitution.—Stewart v. Michigan, 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476, reversing 167 Mich. 417.

§ 10. ——Intoxicating liquors.

Original package doctrine, see ante § 5.

¶ 35. A discrimination in state legislation against the products of another state is none the less unlawful because it applies to sellers of intoxicating liquors.—Walling v. People, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, reversing 53 Mich. 264.

¶ 36. The commerce clause of the federal constitution is violated by Session Laws 1875, Act No. 226, imposing a specific license fee upon persons who shall engage in the business of selling intoxicating liquor to citizens or residents of the state at wholesale or solicit orders for liquor at wholesale, to be shipped from without the state, while not having his, their or its principal place of business in the state.—Walling v. People, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, reversing 53 Mich. 264.

¶ 37. The objection to the validity of Session Laws 1875, No. 226, imposing a specific license fee upon persons who shall engage in the business of selling intoxicating liquor to citizens or residents of the state at wholesale or solicit orders for liquor at wholesale to be shipped from without the state, while not having his, their or its place of business within the state, as offending the commerce clause to the federal constitution, was not removed by the enactment of a later act (How. St., § 1281) imposing a higher tax upon the business of manufacturing or selling liquor, since the classes of persons taxed are different, the principal being taxed under the latter act, and drummers or agents of the foreign manufacturer being subject of the tax under the former law.—Walling v. People, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454, reversing 53 Mich. 264.

¶ 38. The liquor law of 1887 so far as it affects the right of a manufacturer residing in another state to sell in this state in the original packages liquors manufactured in another state without having paid the tax imposed by said act upon wholesale dealers is void as an attempt by the state to regulate interstate commerce.—Lyng v. People, 135 U. S. 161, 34 L. ed. 150, 10 Sup. St. Rep. 725, reversing 74 Mich. 579.

¶ 39. Pub. Acts of 1887, No. 313, 3 How. St., § 2283c4 et seq., providing for the levying of an annual tax of $300 "upon the business of selling only brewed or malt liquors at wholesale or retail, or at wholesale and retail" and "upon the business of manufacturing brewed or malt liquors for sale, sixty-five dollars per annum," and exempting the manufacturer from the tax imposed on the wholesale dealer, is invalid as an interference with interstate commerce by foreign manufacturers desiring to sell, from a warehouse operated by an agent within the state, beer in the original casks as brought into the state.—Lyng v. People, 135 U. S. 161, 34 L. ed. 150, 10 Sup. Ct. Rep. 725, reversing 74 Mich. 579.

§ 11. ——Fish and game laws and regulations.

¶ 40. The regulation of the taking of game and fish within the confines of the state is not an interference with interstate commerce. —People v. Setunsky, 161 Mich. 624.

¶ 40a. Pub. Acts 1907, No. 153, makes it unlawful for any kind of boat, tug, or launch to be used for commercial fishing without registering it and taking out a license, and prescribes license fees varying with the dif-

ferent classes of boats. Held, such statute is not open to the objection that it is an interstate regulation of the use of boats and not a regulation of fishing.—People v. Setunsky, 161 Mich. 624.

¶ 41. Pub. Acts 1899, No. 88, prohibiting any person from having in his possession certain kinds of fish weighing less than one pound is not repugnant to U. S. Const., art. 1, § 8, being the interstate commerce clause of the constitution, even though applying to fish caught in waters outside the jurisdiction of this state.—People v. Lassen, 142 Mich. 597.

¶ 42. It being competent for the state, in order to enforce its game laws, absolutely to prohibit the importation and sale of game and fish during a closed season, or during the entire year, Pub. Acts 1893, No. 196, prohibiting the sale, exposing for sale, or having in possession for the purpose of sale, any kind of bird, game, or fish during a closed season, and Pub. Acts. 1895, No. 223, prohibiting specifically the sale of quail, woodcock, and partridge at any season of the year, are not invalid as unlawfully restricting interstate commerce.—People v. O'Neil, 110 Mich. 324.

§ 12. Regulation of corporations.

Application to interstate business, see also ante §§ 4, 5.

¶ 43. Comp. L. 1897, § 8574, imposes a tax upon corporations, both domestic and foreign, doing a retail mercantile business within the state, and avoids all contracts made by them until the tax is paid, and is construed not to be applicable in cases where a foreign corporation does business in the state merely by selling through itinerant agents and delivering commodities manufactured outside the state.—People v. Smith, 147 Mich. 391.

§ 13. Railroad and transportation laws and regulations.

State and federal powers, see also ante § 2.
Restriction of Railroad Commission's functions to intrastate trade, see Public Service.

¶ 44. The power of Congress to legislate on the liability of common carriers within the state discussed.—American Transp. Co. v. Moore, 5 Mich. 368, affirmed 24 How. U. S. 1, 16 L. ed. 674.

¶ 45. The commerce clause of the federal constitution was not violated by the Railroad Commission Act, Pub. Acts 1909, No. 300, § 7, as amended by Pub. Acts 1911, No. 139, How. St., 2nd Ed., § 6530, providing that every common carrier operating within the state shall receive and transport at reasonable rates all car load traffic offered for transportation under the usual conditions locally consigned between points in the same city or town and shall receive and transport at reasonable rates from any junction point or transfer point or intersection with another railroad in such city or town all such car load freight destined to team tracks or other sidings on any line operated by the delivering carrier, and shall deliver such cars upon such team tracks or sidings in the city or town where such cars are received from any such connecting line, when required so to do, on the ground that the enforcement of the statute will necessarily result in congesting the terminal facilities of the railroads, and thus make it impossible for them to carry on interstate business without seriously delaying and interfering with such commerce, since the statute is confined purely to intrastate business, and to interfere with interstate commerce such must be its direct, immediate and necessary effect, and whether such effect results is a question of fact which must be proved.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 198 Fed. 1009, affirmed in 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

¶ 46. An order of the Michigan Railroad Commission made pursuant to Act 312, Pub. Acts 1907, ordering the Michigan Central Railroad Company to install a physical connection with an interurban railway running between points within the state, and to provide for the interchange of cars with said railway, is an order relating to intrastate traffic, and does not violate the commerce clause of the Constitution of the United States. (Separate opinion by Ostrander, C. J.)—Michigan Railroad Commission v. Michigan Cent. R. Co., 168 Mich. 230, affirmed in 236 U. S. 615, 59 L. ed. 750, 35 Sup. Ct. Rep. 422.

¶ 47. P. A. 1909, Act No. 104, How. 2nd. Ed., § 4110, regulating employers' liability of common carriers, is not unconstitutional as a regulation of interstate commerce.—Fernette v. Pere Marquette R. Co., 175 Mich. 653.

§ 14. ——Rates and charges.

Validity of rate legislation as delegating legislative powers, see Constitutional Law, II.
Injunctions against enforcement of rates, see Injunctions; Public Service.

¶ 48. Pub. Acts 1891, No. 90, § 9, requiring railroad companies in this state to keep for sale 1,000-mile tickets "at a price not exceeding $20 in the lower peninsula and $25 in the upper peninsula," to be issued in the names of the purchaser, his wife and children, and to be valid for two years after date of purchase, does not contemplate a sale of mileage which shall be good outside of the

state—the reference to locality being designed, not to fix the place where the tickets are to be placed on sale, but to indicate the respective regions of travel and the price of 1,000 miles of transportation in the respective peninsulas; and it is, therefore, not unconstitutional as an attempted regulation of interstate commerce.—Smith v. Lake Shore & M. S. R. Co., 114 Mich. 460, reversed on other grounds in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

¶ 49. Pub. Acts 1891, No. 90, regulating fares of railroads within the state, based upon the gross earnings of their passenger trains, includes only domestic commerce and is therefore not a state regulation of interstate commerce.—Commissioner of Railroads v. Wabash R. Co., 123 Mich. 669.

§ 15. ——Taxation.

¶ 50. Laws 1867, Act No. 140, How. St., § 3719, requiring express companies to pay a specific tax of one per cent on the gross amount of business within the state, is not void as infringing on the power of congress over commerce.—Walcott v. People, 17 Mich. 68.

¶ 51. Mich. Laws 1883, Act No. 152, which levies a tax upon the gross receipts of railroads for the carriage of freights and passengers into, out of, or through the state, is a tax upon commerce between the states, and is therefore void.—Fargo v. Stevens, 121 U. S. 230, 30 L. ed. 888, 77 Sup. Ct. Rep. 857, reversing Fargo v. Auditor General, 57 Mich. 598.

¶ 52. A tax upon the gross receipts of a foreign merchant's dispatch transportation company for freight carried from points without the state to points within the state and from points within the state to points without the state, under the Act of June 5, 1883, providing for the imposition of an annual tax of 2½ per cent of the gross receipts of their receipts for freight earned within the limits of the state from all persons and corporations running railroads into the state, is invalid as an interference with interstate commerce, within the prohibition of the federal constitution.—Fargo v. Stevens, 121 U. S. 230, 30 L. ed. 888, 7 Sup. Ct. Rep. 857; reversing Fargo v. Auditor General, 57 Mich. 598.

¶ 53. The Act of June 4, 1897 (How. St., 2nd Ed., § 6631), amending the Act of May 27, 1893, § 3, and levying a specific tax upon the property and business of every railroad corporation operated within the state, and providing that "when the railroad lies partly within and partly without this state, prima facie, the gross income of said company from such road for the purposes of taxation shall be on the actual earnings of the road in Michigan, computed by adding to the income derived from the business transacted by said company entirely within this state, such proportion of the income of said company arising from the interstate business as the length of the road over which said interstate business is carried in this state bears to the entire length of the road over which said interstate business is carried," is not an unconstitutional interference with interstate commerce.—Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. ed. 229, 24 Sup. Ct. Rep. 107.

¶ 54. No state has the right to lay a tax on interstate commerce by way of duties laid on the transportation of the subjects of that commerce, or on the receipts derived from that transportation, or on the occupation or business of carrying it on.—Lyng v. People, 135 U. S. 161, 34 L. ed. 150, 10 Sup. Ct. Rep. 725, reversing 74 Mich. 579.

§ 16. Shipping and water traffic regulations.

As to ferries, see post § 17.
Regulation of fishing boats, see ante § 11.
Maritime causes and state jurisdiction, see Admiralty; Courts, V.

¶ 55. The enrollment and license of a vessel for interstate and foreign commerce does not make her exclusively an interstate or foreign carrier or withdraw her entirely from state regulations of an intrastate character.—Chilvers v. People, 11 Mich. 43; Delaney Forge & Iron Co. v. The Winnebago, 142 Mich. 84, affirmed in 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509.

¶ 56. The "limited liability" act of congress of March 3, 1851, can apply to vessels only which are engaged in foreign commerce and commerce between the states. The purely internal commerce and navigation of a state is exclusively under state regulation.—Moore v. American Transp. Co., 24 How. (65 U. S.) 1, 16 L. ed. 674, affirming 5 Mich. 368.

¶ 57. The state may enact laws for the protection of the health, lives and property of its people in respect to those subjects over which congress has the power to legislate, and such laws are valid and may be enforced so long as they do not conflict with federal legislation. A vessel engaged in interstate commerce, therefore, is subject to the provisions of How. St., § 2033, requiring steam vessels navigating the waters of this state to be provided with suitable fire screens, since said statute is not in conflict with the act of congress relating to the equipment of steam vessel (Rev. Stat. U. S. chaps. 1, 2, tit. 52) and the regulations adopted thereunder by the board of supervising inspectors.—Burrows v. Delta Transp. Co., 106 Mich. 582.

¶ 58. Comp. L. 1897, § 10789 (How. St., 2nd Ed., § 13625), relating to mechanics' liens for materials furnished or services rendered in building watercraft, was within the power of the state to enact laws and enforce liens concerning contracts not maritime in their nature and it is no valid objection that the enforcement of the statute may prevent or obstruct the prosecution of a voyage of interstate character.—Iroquois Transportation Co. v. Dalaney Forge & Iron Co., 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509, affirming 142 Mich. 84.

§ 17. ——Ferries.

¶ 59. A license fee for keeping a ferry between Detroit and the Canada shore is not a regulation of commerce within the meaning of the U. S. Const., art. 1, § 8, subd. 3.—Chilvers v. People, 11 Mich. 43.

COMMERCIAL AGENCY to COMMITTING MAGISTRATE.

Cross-References.

Commercial agency—
Representations to as fraud, see Fraud, I; Fraudulent Conveyances.
Commercial paper—
See Negotiable Instruments.
Commingling goods or money—
See Accession and Confusion; Conversion.
As breach of trust or duty, see Estates of Decedents, X; Agency, IV; Trusts.
Of funds in bank, see Banking, III, VI.
Commission merchants—
See Brokers and Factors.
Commissioners—
Of municipal departments, see Municipal Corporations.
As officers generally, see Officers.
Railroad commission, see Public Service.
Commissioners of courts—
See Courts, I, V.
Commissioners of deeds—
See Acknowledgments.
Commissioners of drains—
See Drains.
Commissioners of highways—
See Highways, VII; Townships.
Commissions—
As compensation for service reckoned on a basing sum by percentage, see Agency; Brokers; Estates of Decedents; Guardianship; Receivers; Trusts.
As cloak for usury, see Usury.
Commitment—
For crime, see Arrest, Commitment and Bail; Indictment, X.
On civil process, see Civil Arrest.
Of incompetents and delinquents, see Incompetents; Insane Persons.
Of witnesses, see Witnesses, I.
Remedy to liberate or review, see Habeas Corpus; Certiorari; Mandamus; Indictment, XVI.
Committee—
Of lunatic or incompetent, see Insane Persons; Guardianship.
Delegated subordinate body, see Corporations, XVII; Officers, VI; Municipal Corporations, IV; Counties, II.
Committing magistrates—
See Justices of the Peace; Municipal Courts; Arrest, Commitment and Bail; Courts, V; Officers.

COMMON AND CIVIL LAW.

TREATS of the Common Law of England and the Civil Law of France as adopted elements of the laws and legal customs of Michigan.

Analysis.

§ 1. Common law.
§ 2. ——Abrogation and revival.
§ 3. Civil law and custom of Paris.

§ 1. Common law.

Adaptation of common-law chancery practice, see Equity.
Common-law rules in pleading and practice, see Pleading, and see specific topics treating of procedure.
Adaptation to common-law practice in hearing of appeal or error, see Appeal and Error, §§ 139, 252, and generally see topic Appeal and Error.
Attachment acts as statutes in derogation and strictly construed, see Attachment, § 1.
Evidence as to common law of other states, see Evidence, III.

¶ 1. The common law is in force in this state except so far as it is repugnant to or inconsistent with our constitution and statutes.—Stout v. Keyes, 2 D. 184.

¶ 2. The common law has prevailed here in ordinary matters ever since the United States took possession. Questions of property not clearly excepted from it are governed

by it, modified only by such circumstances as render it inapplicable to our local affairs. —Lorman v. Benson, 8 Mich. 18.

¶ 3. Only such portions of the common law have been adopted here as are applicable to our situation.—Perrin v. Lepper, 34 Mich. 292.

¶ 4. The common law recognized as adopted into Michigan jurisprudence is the English common law unaffected by statute.—In re Lamphere's Case, 61 Mich. 105.

§ 2. ——Abrogation and revival.

Construction of statutes in derogation, see Statutes, V.

¶ 5. Where there is a plain conflict between the common law and the statute, the latter must control.—Smith v. Martin, 124 Mich. 34.

¶ 6. A statute (Laws 1841, ——) dispensing with the necessity of proof of emission in sodomy is a legislative recognition of the common-law rule on the subject, and the repeal of such statute (Rev. St. 1846, p. 730) revives the common law and should be given force in determining what that rule was prior to the enactment.—People v. Hodgkin, 94 Mich. 27.

¶ 7. Where the reason of the common-law rule requiring a particular averment to be made has been abrogated by statute, the rule itself is done away with.—Newton v. Gordon, 72 Mich. 642.

¶ 7a. The declaration in the ordinance of 1787 that "the navigable waters leading into the Mississippi and St. Lawrence shall be common highways, and remain forever free," supersedes the common-law doctrine of the necessity of usage or custom to establish a public right, even if that rule would otherwise prevail in the region over which the ordinance extended.—Moore v. Sanborne, 2 Mich. 519.

§ 3. Civil law and custom of Paris.

¶ 8. Prior to the taking effect of the ordinance of 1787 and to the negotiations of Jay's Treaty, the region afterwards embraced in the territory of Michigan was governed in civil matters by the French law, including the custom of Paris as modified by royal edicts.—Crane v. Reeder, 21 Mich. 24.

¶ 9. The custom of Paris in 1810 probably applied to few cases if to any, and was in that year expressly abrogated by the territorial legislature.—Lorman v. Benson, 8 Mich. 18.

COMMON to COMPLETION.

Cross-References.

Common—
See generally topics treating of the thing described by the word "common"; and see the following.
Common bail—
See Civil Arrest and Bail, IV.
Common carriers—
See Carriers.
Common counts—
See Assumpsit.
Common council—
See Municipal Corporations; and see Constitutional Law, II, C (constitutional powers).
Common disaster—
Presumption as to survivor, see Death and Survivorship.
Common directors—
Effect on dealings between corporations, see Corporations, XVII.
Common knowledge—
Judicial notice of, see Evidence, I; Indictment, VIII, A.
Matters for opinions, see Evidence, VI; Indictment, VIII, B.
Common law—
See Common and Civil Law.
Common law assignments—
See Assignments for Creditors.
Common nuisance—
See Nuisances.
Common repute—
Admissibility of evidence regarding, see Evidence, VII; Indictment, VIII, B.
Common schools—
See Schools.
Common stock—
See Corporations, XXIV.
Common tenants—
See Tenants in Common.
Common usage—
See Customs and Usages.
Common words and meanings—
See generally Contracts, VI; Statutes, V; Wills, VI; and other topics treating of instruments construed.
Communications—
With jury during trial, see Trial, II, VIII; Indictment, IX; and see also Justices of the Peace, IV, F.
Privilege against testimony of confidential communications, see Witnesses, V.
Privileged in law of libel and slander, see Libel, III.
Commutation—
Of sentence for crime, see Pardons and Paroles.
Payment of earnings or gross tax in lieu of all taxes, see Taxes, III.
Tickets on railroads, see Carriers, IV, B.
Companies—
See Corporations; Joint Stock Companies (partnership associations).
Comparative negligence—
See Negligence, IV.

Comparisons—
In evidence, see Evidence, VI, B, IX; Indictment, VIII, B.
Of other values to prove particular value, see Eminent Domain, V, D; Values.
Compatible offices—
See Officers, II.
Compelling action or decision—
Remedy by mandamus, see Mandamus.
Compelling disclosure—
See Discovery and Inspection; Creditors' Suits.
Privilege of witnesses, see Examination of Witnesses, IV.
Compelling marriage or defilement—
See Crimes, II (abduction); Indictment.
Compensation—
In the sense of consideration or agreed price for contract, see Contracts, V, VI; and the specific contract topics, such as Agency; Brokers; Master and Servant, II.
For property taken for public use, see Eminent Domain; Highways, II, B.
By way of damages for tort or breach of contract, see Damages.
Implied promises to compensate, see Implied Contracts.
Of officers, see Officers, VIII; and see Constitutional Law, XII.
Fees of particular officers or for particular services, see specific topics treating of the officer or of the subject-matter of the services, e. g., Estates of Decedents, X, D; Sheriffs, III.
Compensatory damages—
See Damages.
Competition—
Of architects, see Building Contracts, § 44.
In bidding for public contracts, see Public Contracts, II.
Contracts suppressive of competition, see Contracts, IV; Combinations.
Unfair competition in trade, see Fraud, II; Trade Marks; Injunctions, II, F.
Of officer or agent against principal, see Agency, §§ 25, 46, 75, 91; Corporations, XVII, XXIV.
Complaint—
For crime, see Arrest; Indictment, XVIII; and as to the indictment itself, see Indictment, I.
In statutory proceedings, see topics treating of the particular proceedings.
Bill of complaint, see Equity, VII.
Completion—
Of contract, see Contracts, VII; Building Contracts, II; and other contract topics.
Of contract for purpose of mechanics' lien, see Mechanics' Liens.

COMPOSITION WITH CREDITORS.

TREATS of agreements by a debtor with all of his creditors, or with two or more of them, by which the debts are to be discharged by mutual compromise at part of their face. It excludes discharge by agreement with a specific creditor or claimant by accord as to the amount to be paid and a satisfaction of the original claim thereby (see Accord and Satisfaction) and compositions by official intervention as an incident of bankruptcy (see Bankruptcy).

Analysis.

§ 1. In general; effect.
§ 2. Performance and breach.

§ 1. In general; effect.

Composition in bankruptcy, see Bankruptcy, § 12.

¶ 1. After the time for performance of a composition has expired without performance, the creditor may sue on his original claim. —Harrison v. Gamble, 69 Mich. 96.

¶ 2. Only the amount remaining unpaid under the composition agreement and not the full balance due on notes which represented the original debt is recoverable in assumpsit on such notes, where they, being put in evidence, show by indorsements that there was a compromise at half face and that payment had been made thereon and other evidence shows the same, but plaintiff, claiming breach of the composition by delay, fails to show what terms or times of payment were contained in the compromise. Under such circumstances a composition is established but no breach of it reinstating the original debt.—Browning v. Crouse, 43 Mich. 489.

¶ 3. A creditor, misled by the fraudulent representations of his debtor as to the terms upon which he had compromised with his other creditors, compromised with him. Afterwards, upon discovering the fraud, he brought suit. Held, that by retaining the money received he barred himself from suing in assumpsit, but could sue in case.—Walsh v. Sisson, 49 Mich. 423.

§ 2. Performance and breach.

¶ 4. Tender of a check is a sufficient performance of a promise to pay contained in a composition agreement, if no objection is made to the medium of payment and the only other objection, that of tardiness, is unavailing because of waiver.—Browning v. Crouse, 40 Mich. 339.

¶ 5. One of the creditors who has entered into a composition with the debtor cannot treat delay in final payment as a breach of the composition agreement and recover the entire debt, where previous delays in paying instalments at the time agreed were waived by accepting them without objection, and where the final payment was tendered by check, as the others were made, and the rejection of the check was not on the ground that it was not a legal medium of tender; since under the circumstances the delay did not amount to an abandonment of the composition.—Browning v. Crouse, 40 Mich. 339.

COMPOUND to CONFESSION AND AVOIDANCE.

Cross-References.

Compound interest—
- See generally Interest; Usury.
- Against administrators, trustees, etc., see Estates of Decedents, X, C; Trusts, VIII, XI; and like topics.
- Against joint adventurer or partner in accounting, see Joint Adventurers; Partnership, VII.

Compounding claims and debts—
- See generally Bankruptcy; Composition with Creditors; Accord and Satisfaction.
- Validity of contracts of composition, see Contracts, IV.

Compounding felony—
- See Crimes, II.

Compressed air or gas—
- As explosive, see Explosives.
- Injury to servants, see Master and Servant, III; Workmen's Compensation Law.

Compromise and Settlement—
- See Accord and Satisfaction; Releases; Composition with Creditors.
- Modification and merger of contracts, see Contracts, VIII.
- Novation, see Novation.
- Power of particular agents, persons or corporations, see Agency, II, A; Attorneys, II, C; Corporations, XII, XVII; Assignments for Creditors; Bankruptcy; Estates of Decedents, XI, A; Guardianship, III, A; Infants, IV; Partnership, IV, VII; Receivers; Trusts.
- Power of municipality or public officer, see Municipal Corporations, XIV; Townships, VI; Counties, VI.
- Of delinquent taxes, see Taxes, X-XII.
- Discontinuance or dismissal on compromise, see Discontinuance.
- Protection of attorney's lien against, see Attorneys, II, E.

Compromise verdicts—
- See Verdicts, I; New Trial, II.

Compulsory—
- Confessions, see Indictment, VIII, B.
- Testimony privilege of witnesses, see Examination of Witnesses, IV.
- Process of court, see Injunctions; Mandamus.
- See also references under Assent; Consent; Duress; Involuntary.

Computation—
- In accounting suits, see Accounting Suits, and cross-references there round.
- Of shares, claims and charges and credits in administration of estates, see Estates of Decedents; Guardianship; Trusts; Corporations, XXIII; and the like.
- Of interest, see Interest, II; Usury; Building Associations, III; Mortgages, VIII, IX.
- Of instalment payments, see Payment, III; and see preceding references.
- Of insurance, see Insurance, XIV, XVI.
- Of dower or partition, see Dower; Partition.
- Of time, see Time; and specific topics treating of time for particular things, e. g., Limitations, V.
- Of sentence, see Indictment, XI; Crimes, I.

Concealed weapons—
- See Crimes, II (carrying); Homicide; Indictment.

Concealing birth or death—
- See Crimes, II; Indictment.

Concealment—
- As element in crime or as evidence in criminal cases, see Crimes, II; Indictment.
- As element in fraud, see Fraud; Fraudulent Conveyances.
- Extension of time to sue, see Limitations, III.
- Ground for attachment, see Attachment, II.
- Ground for constructive service, see Process, II, C.
- Presumption from concealment or suppression of evidence, see Evidence, II.
- Of evidence or witnesses as contempt, see Contempt.
- Of evidence as ground for new trial, see New Trial, II.
- Of material facts affecting insurance, see Insurance; Fraternal Associations.

Concert of action—
- As participation in tort or crime, see Torts; Assault; Conspiracy; Conversion; Nuisances; Trespass; Crimes; Indictment.
- As mark of joint contract, see Contracts, II, VI.

Acts and admissions of coparties as evidence, see Evidence, VII; Indictment, VIII, B.

Concessions—
In the sense of admissions of fact or law, see Evidence, VII; Indictment, VIII, B.
By pleading or judicial admission, see Pleading; Equity, VII; Trial, V (admission in open court); Stipulations.
On appeal or error, see Appeal, XII, A; Indictment, XVI.
Of rights by contract, see Contracts; Licenses to Enter; Landlord and Tenant (leases).

Conclusions—
In evidence, see Evidence, VI; Indictment, VIII, B.
In pleading, see Pleading; Equity, VII; Indictment, I.
In affidavits, see Affidavits; and topics treating of affidavits for particular purposes, e. g., Attachment, IV, A; Civil Arrest, I, II.
Questions calling for conclusions, see Examination of Witnesses, I.
Of law in decision of court, see Verdicts and Findings, VII.

Conclusiveness—
See topics treating of the act or deed regarded as conclusive, e. g., Account Stated; Acknowledgments; Building Contracts, II (architects' certificates); Estoppel; Former Adjudication; Foreign Judgments; Certiorari (return to writ); Mandamus (return); Appeal, XII, C (of the record); Executions (return); Process (return); etc.
Of presumptions, see Evidence, II, X; Indictment, VIII, A, C.

Concurrent—
Remedies, see Election and Waiver; and see Contracts, VII, D; Sales, VIII, IX; Assumpsit, I (waiver of tort).
Jurisdiction, see Courts, V.
Negligence or causes of injury, see Negligence; and see topics treating of specific neglects, e. g., Carriers, IV, E; Master and Servant, III; Highways, XII; Railroads, VIII; etc.

Condemnation proceedings—
See Eminent Domain; Highways, II, B.

Conditional; Conditions—
In general, see topic treating of the thing qualified by the word "conditional" or which is the subject of conditions. An exhaustive collection of references is impracticable and would not be helpful, but for example see the following:
Contracts or sales, see Contracts; Sales.
Deeds or Wills or gifts, see Deeds; Wills; Gifts.
Relief, judgment or orders, see Judgments; Equity, X; Continuances; Discontinuances; Motions and Orders; Specific Performance; Rescission and Cancellation; etc.
Affirmance or reversal on conditions, see Appeal, XIII.
Breach of conditions, see Contracts, VI, VII; Sales; Vendors; and other contract topics.

Conditions precedent or subsequent—
See generally topics treating of the thing conditioned.
In contracts, see Contracts, VI, VII, X; Sales, VIII, IX.
In deeds, see Deeds, III, E.
In wills, see Wills, VI.
In statutes, see Statutes, V; and also particular topics affected by the statute in question.

Condonation—
Extinguishing ground for divorce, see Divorce, III.
Of servant's fault as preventing discharge, see Master and Servant, II.

Conduct—
Presumptions as to human conduct, see Evidence, II; Indictment, VIII, A.
As evidence of mental purpose or knowledge, see Fraud; Evidence, III, VII; Indictment, VIII, B.
As res gestae, see Evidence, VII; Indictment, VIII, B.
As impeaching evidence, see Witnesses, VI, B.
As implied representation of fact, see Fraud, I; Estoppel, III.

Conduct of trial—
See Trial, II; Indictment, IX.

Conduct of involuntary sales—
See Foreclosure; Estates of Decedents, VII, A; Judicial Sales; Partition; Taxes, XI, A.

Conductors—
Responsibility of the master, see Master and Servant, IV.
As fellow servants, see Master and Servant, III.

Conduits—
In streets, see Highways, XI, XII.
For waters, rights of owners, see Waters.

Confederating—
See Conspiracy; Combinations; Crimes; Indictment.

Confession and avoidance—
See Pleading, III; Equity, VII.

CONFESSION OF JUDGMENT.

TREATS of the acts and procedure whereby judgment is entered on confession without the previous pendency of an action (Jud. Act, Chap. XXII, § 3; Comp. L. 1915, § 12793).

Analysis.

§ 1. In general.
§ 2. Warrant of attorney and proof.
§ 3. Judgment and entry.

§ 1. In general.

Consent decrees or judgments in suits, see Equity, X; Judgments.
Effect of foreign judgments on confession, see Foreign Judgments.
Discharge in bankruptcy as ground for vacation of confessed judgment, see Bankruptcy, ¶ 61.

¶ 1. Since an infant cannot in his own name confess judgment, and a partner has no power implied to do so, a judgment confessed by an infant's partner in the name of the firm is void, and will not support an attachment as against a previous assignee of the goods attached.—Soper v. Fry, 37 Mich. 236.

§ 2. Warrant of attorney and proof.

Warrant in one state and confession in another, which law governs, see Conflict of Laws, § 43.
Sufficiency of warrant to sustain foreign confessed judgment, see Foreign Judgments.

¶ 2. It is no objection to a judgment entered up in the circuit court by confession that the warrant of attorney is upon the same piece of paper as the note it authorizes judgment to be taken upon. The warrant of attorney and note are still to be regarded as separate instruments (Comp. L. 1857, § 4441, How. St., § 7662), notwithstanding they are thus connected.—Trombly v. Parsons, 10 Mich. 272.

¶ 3. A warrant of attorney contained in the promissory note evidencing the debt is void under Comp. L. 1897, § 10299, which requires a separate instrument.—Acme Food Co. v. Kirsch, 166 Mich. 433.

¶ 4. The note and warrant of attorney bearing different dates are presumed to have been executed at the times they respectively bear date, notwithstanding they are upon the same paper.—Trombly v. Parsons, 10 Mich. 272.

¶ 5. It would not be a valid objection to a judgment taken by confession that they were both executed at the same time.—Trombly v. Parsons, 10 Mich. 272.

¶ 6. A warrant of attorney need not be proved to sustain a confession of judgment taken thereunder within a year and a day fter its execution.—Elliott v. Ives, 44 Mich. 190.

§ 3. Judgment and entry.

¶ 7. A judgment upon a bond and warrant of attorney as provided by the statute may be entered in vacation.—Watkins v. Wallace, 19 Mich. 57.

CONFESSIONS to CONFLICTING THEORIES.

Cross-References.

Confessions—
- Admissibility and sufficiency as evidence, see Indictment, VIII; Evidence, VII, X.
- Corroboration of, see Indictment, VIII; Witnesses, VI, D; Divorce, V.

Confidence game—
- As crime, see Crimes, II (false pretenses); Indictment.

Confidential communications—
- Privilege against testimony, see Witnesses, V.
- Privilege in law of libel and slander, see Libel, III.

Confidential relations—
- See Agency; Attorneys; Trusts; Estates of Decedents; Guardianship; Husband and Wife; Parent and Child.
- Fraud upon, see Fraud, II; Wills, III; Gifts, IV; and see preceding reference.

Confirmation—
- Of judicial sales or involuntary transfers, see Foreclosure; Judicial Sales; Taxes, XI, XII; Partition; Eminent Domain, V et seq.; Highways, II, B.
- Of referee's or master's report, see Reference, V, VI.
- Of assessments for drains or improvements, see Drains, II; Local Improvements, VI, E.
- In the sense of settling accounts, see Estates of Decedents, XII; Guardianship, V; Trusts, XI.

Confiscation—
- Of property, necessity of due process of law, see Constitutional Law, V.
- Of illegal nets or other appliances under fish and game laws, see Fish and Game.

Conflict of jurisdiction—
See Courts, V; and see also Indictment, III.
Conflicting claims—
To land, see Adverse Possession; Ejectment; Quieting Title.
To personalty, see Attachment, XI; Executions, XI; Chattel Mortgages, I, D; Replevin.
Boundary disputes, see Boundaries.
Conflicting evidence—
Weight and sufficiency, see generally Evidence, X; Indictment, VIII, C; and see particular civil topics in those portions dealing with evidence and proofs.
Consideration on review of verdicts or findings, see Appeal, XII, E; Indictment, XVI.
Grounds for new trial, see New Trial, II; Indictment, X.
Grounds for direction of verdict or binding charge, see Directing Verdict; Instructions, V; Indictment, IX.

Conflicting presumptions—
See Evidence, II; Indictment, VIII, A; and see also specific topics.

Conflicting theories—
Change of theory on review or second trial, see Appeal, XII, G, XV.
Duty to charge on theory of each side, see Instructions, IV; Indictment, IX, E; and see specific civil topics.
Election of counts or remedies, see Pleading, II; Election and Waiver.

CONFLICT OF LAWS.

TREATS of the rights of persons as affected by the difference in laws of the state wherein they are asserted from those of some other state or nation involved by the fact of the residence of one or both of the parties therein or the fact of the situs of the property or of the actionable facts having been foreign. It excludes so-called conflict between earlier and later statutes of the same state (see Statutes, VII, and see also specific topics affected by the statutes in question) and so-called conflict between federal and state laws and jurisdiction (see Constitutional Law, IV; Commerce; Bankruptcy; Courts, V).

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I. IN GENERAL; RECOGNITION AND EFFECT OF FOREIGN LAWS.

§ 1. Extraterritoriality in general.

Recognition by comity, see post § 2 et seq.
Territorial limits on jurisdiction, see Courts, V.
Letters of administration, see Estates of Decedents, II, IV.
Foreign usury laws, see Usury.

¶ 1. Lawful acts done in this state cannot be made unlawful by provisions of law having no authority beyond the territory of the state adopting them.—Watkins v. Wallace, 19 Mich. 57.

¶ 2. The laws of one state have no extraterritorial effect, except as given by the principles of comity, and no tribunal in the state can extend its powers beyond the territory of the state so as to subject either persons or property to its decisions.—Colvin v. Jones, 194 Mich. 670.

Extraterritorial effect of workingmen's compensation acts, see notes, 9 N. C. C. A. 918-932; 10 N. C. C. A. 888; 15 N. C. C. A. 919-927.

§ 2. Comity and recognition.

See also ante ¶ 2.
Domestic or foreign law as governing law, see post II-VII.
Of foreign personal representatives and guardians, see post, VI; and see also Estates of Decedents; Guardianship.
Cause of action barred in other states but not in forum, see also post § 41.
Foreign remedies, see post, VII.
Presumptions and proof as to existence of foreign laws, see Evidence, II, III, VI, VIII.
Necessity and mode of pleading foreign laws, see generally Pleading, I.

¶ 3. The power of determining whether, and how far, or with what modifications, or upon what conditions, the laws of one state, or any rights dependent upon them, shall be recognized in another, belongs to the legislature of the latter; the comity involved is that of the states and not of the courts, and the judiciary must be guided in deciding the question by the principle and policy adopted by the legislature.—Thompson v. Waters, 25 Mich. 214.

¶ 4. In ascertaining the legislative policy of a state as to the recognition of the laws of another state, or of rights dependent thereon, the courts of the former state are to be guided not only by the express provisions made by the legislature and the natural implication from them, but also by their silence, for if they have made no provision at all upon the question involved, it may reasonably be inferred that they intended to adopt the generally received principles of comity, and to that extent to recognize the rights dependent upon the foreign laws.—Thompson v. Waters, 25 Mich. 214.

¶ 5. The rule of comity is never allowed to operate when it will contravene the rights of a citizen of the state where the action is being taken.—Baldwin v. Wayne Circuit Judge, 101 Mich. 119.

¶ 6. The enforcement of a statute of another state or country is not contrary to the public policy of the state, though such statute differs from the law of the forum, unless it is against good morals or natural justice or unless its enforcement would be prejudicial to the general interests of the citizens of the state.—Rick v. Saginaw Bay Towing Co., 132 Mich. 237.

¶ 7. Where the law of another state applies and governs it must be accepted without question of the correctness of the rule of law there in force.—Douglass v. Paine, 141 Mich. 485.

§ 3. Effect of public policy.

Public policy of the state, see Contracts, IV; and see also other specific topics as to which the policy is questioned.

¶ 8. The doctrine of state comity will not be applied in behalf of a foreign corporation seeking to recover upon a claim or contract expressly prohibited by law, or one which is clearly at variance with the settled policy of the state.—Seamans v. Temple Co., 105 Mich. 400.

¶ 9. A contract made in a foreign state and there valid, is unenforceable in Michigan, when in violation of the public policy thereof.—Curtis v. Mueller, 184 Mich. 148.

¶ 10. A stipulation for an attorney fee in a mortgage executed in a foreign state and there valid, is not enforceable in Michigan, since against the public policy thereof.—Curtis v. Mueller, 184 Mich. 148.

§ 4. Statutory rights and liens.

Effect of foreign release, see post § 23.
Laws governing the remedy, see post VII.
Rights of nonresidents or aliens to avail of statutory rights and privileges, see specific topics treating of the right or privilege, e. g., Death by Wrongful Act; Homesteads; Exemptions; Aliens and Citizens.
Enforcement of liability of nonresident stockholder for debts of bank, see Banking, § 79.

¶ 11. It is the duty of courts to extend the principles of comity to sister states and to recognize generally the existence of liens under foreign statutes.—Corbett v. Littlefield, 84 Mich. 30.

¶ 12. Recognition of liens under laws of other states does not involve giving foreign liens priority over other liens justly acquired in Michigan merely because the former, in the state where they first attached, have by statute superiority or priority.—Corbett v. Littlefield, 84 Mich. 30.

§ 5. Property and exemption rights under foreign laws.

What law governs conveyances of personalty in another state, see post § 25.
What law governs rights in personalty, see post § 24.
What law governs realty, see post III.
Law governing devolution on death, see post IV.

¶ 13. Though, as a general rule, the matter of exemption is controlled by the lex fori and not by the lex loci contractus, yet when the person entitled to exemption keeps his person and property within the locus contractus, and is not brought, except by substituted service, within this state, he cannot be deprived of the exemption secured to him by the law of his domicile.—Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168.

¶ 14. A statute exempting a corporation from garnishment has no extraterritorial force; and the fact that a corporation organized under the laws of another state is by those laws exempt from garnishment does not render it so exempt when doing business in Michigan.—First Nat. Bank v. Burch, 80 Mich. 242.

¶ 15. The rule of comity will prevent recovery in Michigan upon a claim bought for the purpose of assisting the original creditor of the principal debtor in evading the exemption laws of a sister state.—Drake v. Lake Shore & M. S. Ry. Co., 69 Mich. 168.

§ 6. Filing or recording laws.

¶ 16. Laws for recording chattel mortgages can have no force beyond the jurisdiction of the sovereignty enacting them. The record of a chattel mortgage in Canada is there-

fore no notice to the creditors of the mortgagor who shall find the property in his possession in Michigan.—Montgomery v. Wight, 8 Mich. 143.

¶ 17. The filing of a chattel mortgage in another state has no extraterritorial force.—Corbett v. Littlefield, 84 Mich. 30.

¶ 18. Where a chattel mortgage given by a resident of Canada was properly put upon record as required by the Canadian law, but the mortgagor was left in possession of the mortgaged property, and brought the same into this state, where it was taken and sold on execution against the mortgagor, it was held that the title under the execution sale must prevail over that under the mortgage.—Montgomery v. Wight, 8 Mich. 143.

¶ 19. Where chattels are mortgaged in another state and left in the mortgagor's possession, and he brings them into Michigan, the record of the mortgage in the other state is not notice to purchasers.—Boydson v. Goodrich, 49 Mich. 65.

¶ 20. The recording of a chattel mortgage in another state followed by the removal of the property into this state is ineffectual to create a priority in Michigan, since the recording laws of the former state have no extraterritorial force.—Corbett v. Littlefield, 84 Mich. 30.

¶ 21. A chattel mortgage on horses, given in Canada by the owner of a half interest in them, and filed in Canada by the mortgagee, who takes possession of the horses, and puts them in the care of the keeper of a hotel at a race track, to hold possession for him, gives such mortgagee a better right to such interest in the horses after they have been taken without his consent from the custodian, and shipped to Michigan, by the owners of the other half interest in the horses, who did not know of his mortgage, than the latter can assert under another chattel mortgage from the same mortgagor, which they took in Michigan before the horses went to Canada, and filed in Michigan after their return.—Vining v. Millar, 109 Mich. 205.

§ 7. Bankruptcy or insolvency laws.

See also post § 8, "note."

What law governs voluntary assignments, see post § 26.

Stockholders' liability, see post § 35.

Right of foreign assignee to bring action for goods, see Assignments for Creditors, ¶ 236a.

¶ 22. A voluntary assignee under a foreign law may, if the title has passed to him, sue here for conversion against his assignor, who withholds the assets assigned.—Burrows v. Keays, 37 Mich. 430.

¶ 23. Proceedings by a Canadian court under the Canadian insolvent act had against a person while he was in this state cannot, by mere force or operation of the orders and decrees therein made, and in the absence of any transfer by the insolvent himself, vest the Canadian assignee with title to promissory notes in this state, which have never been within the territorial jurisdiction of the Canadian court or subjected by any process to its control; and the fact that the insolvent afterwards went to Canada and submitted himself to the jurisdiction of that court would not help the matter.—Wood v. Parsons, 27 Mich. 159.

¶ 24. Defendant, a citizen of New York, made a note in June, 1858, payable to the order of other citizens at a bank in that state, four months after date. Before maturity the note was indorsed for a valuable consideration to the plaintiffs, a Massachusetts corporation. In 1859 the defendant, still residing in New York, was discharged under the insolvent laws of that state. Whether this discharge is a bar to a suit brought on the note in Michigan by the indorsee, quære.—Brighton Market Bank v. Merrick, 11 Mich. 405.

§ 8. Foreign receiverships and administration.

Jurisdiction and place for administration, see Estates of Decedents, II.

[Note. By virtue of the rule that if title has passed to the assignee his right as title holder will be recognized (see ante ¶¶ 22, 23), the question will frequently depend on the existence of title in the foreign representative. Accordingly topics treating of the rights of representatives should be consulted, e. g., Assignments for Creditors; Bankruptcy; Estates of Decedent; Receivers; Corporations, XXIII; Foreign Corporations, I.

¶ 25. A receiver appointed in another state will be permitted to bring an action here for the purpose of collecting the insolvent's assets for distribution in accordance with the laws of the jurisdiction within which he has been appointed; but this rule of comity is not allowed to operate when it will contravene the rights of a citizen of this state.—Baldwin v. Wayne Circuit Judge, 101 Mich. 119.

§ 9. Service of process.

Force and territorial scope of process, see also Process.

¶ 26. No extraterritorial validity can be given to the process of a court without the consent of the sovereign of the territory.—People v. Tyler, 7 Mich. 161; Tyler v. People, 8 Mich. 320.

II. CONTRACTS AND PERSONAL PROPERTY.

§ 10. In general; which law governs.

When the foreign law should be recognized, if applicable, see ante, I.

Recognition of contracts contravening public policy, see ante § 8.

Valid foreign contracts opposed to domestic policy, see ante § 8.

Effect of invalidity in state of making, see also Contracts, IV, D.

Realty contracts, see post III.

Contract rights involved in membership in corporation, see also post ¶ 93.

What law governs form of remedy on contract, see post § 40.

Applicability of local law to foreign building association's rate of interest, see Building Associations, § 11, ¶ 27.

Usuriousness of contract with foreign building association variant from Michigan form of contract, see Building Associations, § 11.

¶ 27. The lex loci contractus determines the nature and legal quality of the act done; whether it constitutes a contract; the nature and validity, obligation and legal effect of such contract; and furnishes the rule of construction and interpretation.—Bissell v. Lewis, 4 Mich. 450.

¶ 28. The validity of a contract made in another state and payable there will be determined by the law of that state.—Collins Iron Co. v. Burkam, 10 Mich. 283.

¶ 29. Where a contract made in another state is usurious, but the law of that state does not avoid it on that ground, but only affects the remedy upon it, the courts of this state can enforce the contract, but only by those remedies afforded by our own law. —Collins Iron Co. v. Burkam, 10 Mich. 283.

¶ 30. A contract for the payment of money made and to be executed in a foreign country would be payable in the lawful money of that country, whether so expressed in the contract or not.—Comstock v. Smith, 20 Mich. 338.

¶ 31. New York business usages cannot apply to a foreign bill drawn and indorsed in Michigan and payable in Chicago.—Stringfield v. Vivian, 63 Mich. 681.

¶ 32. Questions as to the liability of the parties to Minnesota promissory notes are to be determined in accordance with the law of Minnesota.—Hitchcock v. Frackelton, 116 Mich. 487.

¶ 33. The validity of an assignment of a life insurance policy issued by a foreign company, is to be determined by the laws of Michigan, when it is made there and is to be enforced there.—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

¶ 34. A policy of insurance issued by a foreign insurance company to cover property in this state, which is valid as a contract in the state where made, is valid in this state even though it cannot be enforced in the courts of this state by such company because of its noncompliance with the laws of this state.—Swing v. Cameron, 145 Mich. 175.

§ 11. ——Foreign law not in evidence.

Presumptions and evidence as to foreign law, see Evidence, II, III, VI, VIII.

¶ 35. Where suit is brought upon a foreign contract, and no proof is made in regard to the foreign law, the court will test the validity of the contract by the laws of this state. —Jones v. Palmer, 1 D. 379.

§ 12. Stipulation as to controlling law.

Public policy of stipulations for other laws, see Contracts, IV.

¶ 36. An assignment for creditors executed in another state but with express reference to Michigan, and intended to have its first operation in Michigan, is to be treated in determining its validity as if made in Michigan.—Richardson v. Rogers, 45 Mich. 591.

¶ 37. An insurance policy cannot be regarded as a Michigan contract or as governed by the laws of this state, notwithstanding the application for insurance may have been made in Michigan, if it appears in the by-laws indorsed on the policy that the application would be of no force until approved at the insurance office in another state, and if the application provides that the contract should be considered as entered into in such other state and governed by the laws thereof. —Voorheis v. People's Mut. Ben. Soc., 91 Mich. 469.

¶ 38. A contract of a building and loan association dated in a foreign state, made payable in such state, and which expressly states that it is subject to the laws of such state, is clearly a contract of the foreign state, although the other party to the contract is a resident of this state and a loan on land in this state is involved.—Russell v. Pierce, 121 Mich. 208.

§ 13. Place of contract as criterion.

See also numerous paragraphs, post in § 13 et seq., wherein it is stated which law

governs, but in connection with descriptions of facts indicating the place of contract.
Various indicia as to place intended, see also post §§ 14-19.
Presumptions as to place, see Contracts, X; Evidence, II.
Presumption as to wrongful intent to evade statute, see also Contracts, IV, X.

¶ 39. Contracts must be construed and their validity determined by the law of the country where they were made, unless the contracting parties clearly appear to have had some other law in view.—John A. Tolman Co. v. Reed, 115 Mich. 71.

¶ 40. A foreign contract must be interpreted, and the contractual rights of the contending parties determined, according to the law of the place of the making of the contract, where there is nothing in the contract to indicate that the intention of the parties is otherwise.—Millar v. Hilton, 189 Mich. 635.

§ 14. ——Place of agreement or place of execution.

¶ 41. The place where the terms of a contract are agreed upon governs rather than the place where the evidences of agreement are executed.—Mott v. Rowland, 85 Mich. 561.

¶ 41a. A note and mortgage made in California in favor of parties in Michigan, payable at a bank in this state, and sent to such bank, such mortgage being upon real estate in this state, constituted a Michigan contract, and the mortgagee was entitled to the interest thereon computed according to the law of Michigan, notwithstanding the note called for the compounding of interest according to the rule in California; since no contract came into existence until such instruments were received and accepted by mortgagee.—Palmer v. Hill, 140 Mich. 468.

§ 15. ——Place for performance or payment.

As to bills and notes payable at agreed place, see post § 16.
Loans on real estate security, see post § 17.

¶ 42. Where a contract is made, and by its terms to be performed, in another state, the obligation created by it is primarily to be determined by the laws of that state.—Holdridge v. Farmers' & Mechanics' Bank, 16 Mich. 66.

¶ 43. A contract between a Michigan corporation and a citizen of this state for the sale of property here, to be here selected, weighed and delivered, is subject to our statute of frauds, and in construing it the residence of the corporation's agents or servants is immaterial.—Foster v. Lumbermen's Mining Co., 68 Mich. 188.

¶ 44. A contract for professional services between a citizen of this state and a foreign attorney will, in the absence of a special agreement as to compensation, be governed by the rate fixed by statute in the country in which the contract is made and is to be performed.—Dawson v. Peterson, 110 Mich. 431.

¶ 45. There is an Illinois contract of guaranty, where it is dated in Illinois, signed in Michigan, and mailed to the creditor in Illinois, in which latter state payments, if any, are to be made.—John A. Tolman Co. v. Reed, 115 Mich. 71.

¶ 46. A contract made in Massachusetts for the purchase of stock, and not showing any intention that it should be performed by the purchase of the stock in any other place, is to be regarded as having intended that it should be bought there, as it was in fact, and that it would be held there on margins secured by the principal's collateral held there.—Douglass v. Paine, 141 Mich. 485.

¶ 46a. A contract made in Massachusetts with a stockbroker there through a local agent in Michigan transmitting orders, and in all other respects performable in Massachusetts, is not to be regarded as performable in Michigan and governed by Michigan laws because of the fact that payment was receivable in Michigan through the local agent, where the principal had an equal right to pay in Massachusetts or elsewhere.—Douglass v. Paine, 141 Mich. 485.

§ 16. ——Place for payment of bills and notes.

Notes secured by land mortgage, see post § 17.
Payments on foreign building association stock as Michigan payments, see Building Associations ¶ 8.

¶ 47. A note, given and payable in a foreign state is governed by the laws thereof.—Finch v. Calkins, 183 Mich. 298.

¶ 48. The rights of the parties to a note executed in a foreign state by a resident of that state and payable to a bank in that state are governed by the laws of such foreign state.—City Bank & Trust Co. v. Atwood, 197 Mich. 116.

¶ 49. The negotiability of a note executed in one state and made payable in another is governed by the law of the latter.—Barger v. Farnham, 130 Mich. 487.

¶ 50. Notes executed and delivered in this state on Sunday, for goods sold and delivered here on that day, are governed by the laws of Michigan though dated on Monday and payable in Ohio where all the parties live, and they are void under How. St., § 2015. —Arbuckle v. Reaume, 96 Mich. 243.

¶ 51. Whether notes given elsewhere to be paid in Michigan may not bear such interest as is allowed by the laws of Michigan, quære.—Detroit Savings Bank v. Truesdail, 38 Mich. 430.

§ 17. ——Loans on real estate mortgages.

¶ 52. A resident of Michigan agreed with a resident of New York, in Michigan, upon the terms of a loan to be made to him by the latter, and executed and recorded a mortgage as security, which he took to New York, and on the objection of the mortgagee to receiving it without a note or bond, executed a note of even date with and conditioned the same as the mortgage as to payment, which note purported to have been made at the residence of the mortgagor, to whom the mortgagee paid the money in New York. Held, that the fact that the note was executed in New York did not invalidate the agreement, and in any event, the parties having agreed upon a rate of interest which was valid in the state where the borrower resided, in the absence of anything to the contrary, the parties must be presumed to have contracted with reference to the laws of that state.—Mott v. Rowland, 85 Mich. 561.

¶ 53. Where by the terms of a mortgage to a New York building and loan association on lands in Michigan, the loan was to be paid in New York but it was expected the money would be paid to the treasurer of the local branch at Muskegon, and most of it was paid to him, and though the association contended that the contract was a New York contract and must be governed by the laws of that state, the contract was not a New York contract.—National Mutual Bldg. & Loan Ass'n v. Burch, 124 Mich. 57.

¶ 54. A contract whereby money is loaned by a Minnesota building and loan association to a member who is a resident of Michigan, which loan is secured by a mortgage on Michigan property, but the contract to be performed in Minnesota is a Minnesota contract governed by the laws of that state.—Home Sav. & Loan Ass'n v. Mason, 127 Mich. 676.

¶ 55. Building and loan contracts, which are secured on Michigan lands and payable there are regarded as loans, classed as Michigan contracts, and subject to Michigan usury laws.—Hoskins v. Rochester Sav. & Loan Ass'n, 133 Mich. 505.

¶ 56. A building association loan contract is a Michigan contract when executed by residents to the local agents of a foreign association on local property and with payments to be made to the local agent, notwithstanding the articles make no provision for local representation.—Cobe v. Summers, 143 Mich. 117.

§ 18. ——Offer or order in one state and acceptance in another.

Place of accepting goods as test, see post § 19.

Sale in one state on orders taken in another as interstate commerce, see Commerce, §§ 4, 5.

Place where and when title passes, see Sales, IV.

¶ 57. The agent of a foreign liquor-selling establishment obtains an order which he sends to his employers for approval. Held, that there is no completed contract until the order is approved and accepted, and that if that is done outside of the state it is a foreign contract, and not void as in violation of the liquor law of Michigan.—Kling v. Fries, 33 Mich. 275; Monaghan v. Reid, 40 Mich. 665.

¶ 58. Where an order is sent by mail from Detroit to a city in another state in pursuance of which intoxicating liquors are there shipped to the person giving the order, and are afterwards received by him at Detroit, the contract is not a Michigan one and it is not affected by our statute.—Webber v. Donnelly, 33 Mich. 469.

¶ 59. Where a dealer in Ohio receives in Michigan an oral order for goods, above the value of $50, which he ships accordingly, the contract is not a Michigan one, and is governed by the law of the place of contract.—Sullivan v. Sullivan, 70 Mich. 583. [Note. An inaccuracy appears in this opinion. It does not appear thereby that any part of the contract was made in Ohio, and the court speaks of the place of "shipment," which was in Kentucky.—Editor.]

¶ 60. Where goods are orally ordered by sample in another state, to be shipped to Michigan, the fact that the purchaser is to have the privilege of examining the goods before paying for them, to see whether they are like the samples, does not make the transaction a Michigan contract, subject to the Michigan statute of frauds, but the sale is complete and title passes upon the delivery of the goods to the carrier.—Kuppenheimer v. Wertheimer, 107 Mich. 77.

¶ 61. A Massachusetts contract is shown by an order given in Michigan to the local agent of a Boston stockbroker for the sale of certain stock wherewith to purchase other

stock, and by evidence that the local agent lacked authority to bind his superiors at Boston in the agreement to make the purchase and that he merely forwarded an order to them which they executed.—Douglass v. Paine, 141 Mich. 485.

¶ 62. An oral sale of goods above the value of $50 to be shipped from another state, and so shipped according to agreement, is thereby completed according to the common law, which presumably is in force in such state.—Sullivan v. Sullivan, 70 Mich. 583.

¶ 63. Where an order for corporate stock was given in Michigan to an Illinois corporation and accepted in Illinois by telegraph, its validity is determinable by the laws of Illinois.—Dudley A. Tyng & Co. v. Converse, 180 Mich. 195.

§ 19. ——Orders completed by acceptance within state.

¶ 64. A bargain was made in New York for liquors which had been sent to Michigan, the purchaser to pay freight and be allowed "outage." The purchaser examined the liquors in Michigan, and took them; and it was held that the contract was to be regarded as made in, and subject to the laws of, Michigan.—Myers v. Carr, 12 Mich. 63.

¶ 65. Where an order for liquors is taken in Michigan by the vendor in person, and the goods are afterwards shipped from Ohio and delivered to the vendee in Michigan, the contract is a Michigan one; and whether the contract of sale be executory, or actually completed by delivery, it is equally invalid under the prohibitory liquor law.—Webber v. Howe, 36 Mich. 150.

¶ 66. An oral order for liquors was given in Michigan to the agent of a Wisconsin firm, subject to the approval of the firm, and to the acceptance or rejection of the goods on their arrival in Michigan. The Wisconsin statute of frauds avoids all oral contracts of sale involving more than $50 unless the buyer accepts and receives a part of the goods. Held that, under the agreement as to their acceptance, the delivery of the liquors to a carrier in Wisconsin did not complete the sale as a Wisconsin contract within the meaning of the statute, and that as a Michigan contract it was void under the prohibitory liquor law.—Rindskopf v. De Ruyter, 39 Mich. 1.

§ 20. Distinct or separate contracts and sales.

Assignments, indorsements and acceptances as separate contracts, see post §§ 21, 22.

¶ 67. Oral negotiations made in Michigan with the agent of a foreign liquor-selling company for the sale of liquor to a resident of the state are not sufficient under the statute of frauds to cover subsequent orders sent to the foreign firm, and such orders, therefore, are not within the provisions of the Michigan law avoiding liquor contracts.—Roethke v. Phillip Best Brewing Co., 33 Mich. 340.

§ 21. ——Contract and assignment of it.

¶ 68. The validity of an assignment of an insurance policy issued by a foreign company is to be determined by the laws of the state where made and attempted to be enforced.—Mutual Ben. Life Ins. Co. v. Wayne County Sav. Bank, 68 Mich. 116.

§ 22. ——Negotiable instruments and contracts of indorsement or acceptance.

Validity of note where consideration is valid in other state, see Contracts, IV.

¶ 69. The law of the place where a note is made payable determines the time and mode of presentment, and of proceedings on nonpayment; but the notice to the indorser must be according to the law of the place where the indorsement was made.—Snow v. Perkins, 2 Mich. 238.

¶ 70. Where authority was given in New York for drawing in Illinois bills of exchange payable in New York, it was held that the law of New York controlled the obligations of the persons giving such authority.—Bissell v. Lewis, 4 Mich. 450.

§ 23. Foreign releases.

¶ 71. A release given in another state, and having special effect under one of its statutes, must have the same effect here, unless this would conflict with our laws or the rights of our citizens. And there need be no reference in the release to the statute under which it is given; and if there should be an erroneous one it would be surplusage.—Holdridge v. Farmers' & Mechanics' Bank, 16 Mich. 66.

¶ 72. If by the statute of a state where a contract is made it is permitted to release one joint debtor without releasing the others, a release given there will have the same effect here, and recovery may be had against the others for the unpaid balance.—Holdridge v. Farmers' & Mechanics' Bank, 16 Mich. 66.

§ 24. Personal property in general.

Recognition of rights and exemptions under foreign laws, see ante I.

Law governing devolution on death, see post IV.

Conveyances of personalty, see post § 25.

¶ 73. Intangible property, like stock, always follows the domicile, unless separated from it by positive law.—Howell v. Village of Cassopolis, 35 Mich. 471.

¶ 74. The title to personalty under a foreign transaction of married parties domiciled in Michigan would, in a Michigan court, be governed by Michigan laws.—Worthington v. Hanna, 23 Mich. 530.

§ 25. Conveyances, transfers and liens of personalty.

Effect of foreign record or filing of chattel mortgage or lien, see ante § 6.

¶ 75. One may make conveyances in his own state, in accordance with its laws, of his personalty in another state, and the courts of the latter, where there are no statutes in the way, will accord the same respect to it which it would receive in the former state.—Palmer v. Mason, 42 Mich. 146.

§ 26. Voluntary assignments for creditors.

Of realty for creditors, see post § 30.

Recognition of foreign liquidator, see ante §§ 7, 8.

¶ 76. A voluntary assignment, under a foreign insolvent law, of all one's property, is sufficient to pass title to the assignee and enable him to enforce it against the assignor and wrong-doer.—Burrows v. Keays, 37 Mich. 430.

¶ 77. A common-law assignment, with preferences, made in New York, by a debtor living there to a Michigan assignee, and valid in New York, is not made invalid for Michigan by How. St., § 8739, which forbids preferences, but which applies only to assignments made in Michigan, and has no extraterritorial force.—Butler v. Wendell, 57 Mich. 62.

III. REAL PROPERTY AND CONVEYANCES.

§ 27. Title and ownership in general.

Law governing devolution on death, see post IV.

¶ 78. The legal status of persons in relation to real estate is to be determined by the law of the place where the lands are situated though their rights are determined by a contract of another state.—Duffy v. White, 115 Mich. 264.

§ 28. Conveyances and transfers or liens.

Effect of stipulations in loan contract for law of given state, see ante § 12.

Place of the contract of loan on land security, see ante § 17.

Requisites and sufficiency of acknowledgments in other states and foreign lands, see Acknowledgments.

Interpretation of deed of foreign bankruptcy assignee according to foreign law, see also Bankruptcy, ¶ 30.

¶ 79. Conveyances of realty are governed by the laws which prevail where it lies.—Palmer v. Mason, 42 Mich. 146.

¶ 80. The lex rei sitae determines what covenants are customary in a deed to fulfil a land contract.—Gault v. Van Zile, 37 Mich. 22.

§ 29. Contracts relating to land.

Contracts relating to land, but not partaking of its fixity, see ante, II.

¶ 81. A contract relating to land lying within the state made between residents thereof is a Michigan contract, although executed by one of the parties in a foreign state while temporarily residing therein.—Barras v. Youngs, 185 Mich. 496.

§ 30. Voluntary assignments for creditors.

Assignments for creditors relating to personalty, see ante § 26.

¶ 82. A voluntary assignment by a foreign insolvent debtor of real property situated in this state will not be postponed to the rights of an attaching home creditor.—Palmer v. Mason, 42 Mich. 146.

IV. DESCENT, SUCCESSION AND WILLS.

§ 31. In general.

¶ 83. Where the owner of property dies intestate his real property devolves according to the law of the state in which it is situated, but his personal estate is distributed according to the law of his domicile.—Colvin v. Jones, 194 Mich. 670.

¶ 84. A will of personal property, regularly made according to the forms and solemnities required by the law of the testator's domicile, is sufficient to pass such property in every other country in which the same is situate.—In re High, 2 D. 515.

¶ 85. A foreign testator who orders his Michigan estate to be invested in lands in another state must be presumed to have intended to submit to the jurisdiction and laws of that state.—Ford v. Ford, 80 Mich. 42.

§ 32. Administration and probation of wills.

Jurisdiction and place for administration, and rights of domiciliary and ancillary

administrators, see Estates of Decedents.
Jurisdiction to construe will affecting land in another state, see Courts, V.
Following construction given by other court, see Courts, IV.
Conclusiveness of foreign judgments as to domicile, see Foreign Judgments.

¶ 86. The rights of executors in and control over lands in a state other than that of testator's domicile as given by a will must be determined by the law of the state in which the land is situated.—Fuller v. McKim, 187 Mich. 667.

V. TORTS, PENALTIES AND CRIMES.

§ 33. In general.

Contractual or penal nature of stockholders' liability by statute, see also post ¶ 94.
Penal nature of foreign statute giving cause of action, see also Actions, ¶ 36.
Jurisdiction over extraterritorial transitory causes, see Courts, V.
Jurisdiction and place for prosecution of crime committed on, near or partly on both sides of boundary, see Indictment, III.

¶ 87. The liability of a corporation engaged in constructing a tunnel under a river between Michigan and Ontario, and employing an overseer on each side, in an action for injuries to an employee alleged to have been due to its negligence in allowing him to enter upon work in compressed air on the Canadian side of the tunnel at a higher pressure than that to which he had been accustomed on the American side, without warning him of the increased danger, is to be determined by the laws of Canada, although the employee was sent to the Canadian side by direction of the American foreman.—Turner v. St. Clair Tunnel Co., 111 Mich. 578.

¶ 88. Under Comp. L. 1897, § 9518, providing that "no action shall be brought" on assurance or representation of credit unless in writing and signed by the party to be charged or his agent, no action will lie in Michigan for fraud and deceit in an unsigned financial statement used to secure a loan in New York.—Third Nat. Bank of New York v. Steel, 129 Mich. 434.

§ 34. Statutory causes of action; death by wrongful act.

Application of statute of limitations to action for death by wrongful act, see post ¶ 109.
Enforceability of foreign cause of action, see Death by Wrongful Act.

¶ 89. The liability of an employer for negligence causing the death of an employee, is governed by the law of the state or country where the injury took place.—Rick v. Saginaw Bay Towing Co., 132 Mich. 237.

¶ 90. A Canadian statute making an employer liable for injury caused by the negligence of a fellow servant "who has any superintendence entrusted to him whilst in the exercise of such superintendence," or caused by the negligence of a fellow servant "to whose orders or directions the workman at the time of the injury was bound to conform and did conform, where such injury resulted from his having so conformed," is not contrary to the public policy of this state and will govern an action for injury causing death which occurred in Canada.—Rick v. Saginaw Bay Towing Co., 132 Mich. 237.

¶ 91. The rule that where an accident causing injury occurred in a foreign state, the case will be ruled by the lex loci, applied in an action for the death of a passenger by being thrown through the door of a vestibule between Pullman cars, while the train was running in Illinois; the authorities of that state holding that the Pullman Company was liable, reviewed and distinguished from the case in question.—Robinson v. Chicago & A. R. Co., 135 Mich. 254.

Action for death where injury occurs in one state and death in another, see note, 9 N. C. C. A. 765-771.
Conflict of laws as affecting application of compensation acts, see note, 7 N. C. C. A. 144-152.
Conflict of laws and like questions arising in connection with workmen's compensation acts and the laws of other states, see note, 15 N. C. C. A. 870-878.
Extraterritorial effect of workmen's compensation acts, see notes, 9 N. C. C. A. 918-932; 10 N. C. C. A. 888; 15 N. C. C. A. 919-927.

VI. STATUS AND PERSONAL RELATIONS.

Privileges and immunities of citizens in the several states, see Constitutional Law, X.

§ 35. Corporations and their members.

Rights in stocks, see also ante § 24.
Recognition and admission of foreign corporations, see Foreign Corporations, I; Insurance, II.

¶ 92. Whatever advantages may exist in affiliation with other associations, the rights of Michigan corporations must be governed by the laws of Michigan, and corporate privileges cannot be destroyed in violation of them.—Allnutt v. Subsidiary High Court of A. O. F., 62 Mich. 110.

¶ 93. One who becomes a member of a foreign corporation subjects himself to such laws of the government of its situs as affect its powers and obligations; so, an assessment against a Michigan member of a Minnesota mutual fire insurance company may be enforced in our courts because legal under Minnesota laws as interpreted by Supreme Court of that state, although it includes an item that would invalidate it here if the contract were considered a Michigan one.—Warner v. Delbridge & Cameron Co., 110 Mich. 590.

¶ 94. The individual liability under Kansas laws of stockholders in Kansas corporations is enforceable in our courts, being contractual, not penal.—Western Nat. Bank v. Lawrence, 117 Mich. 669.

§ 36. Marriage and divorce.

Effect of coverture under other laws, see post § 37.
Validity and recognition of foreign marriages and divorces, see Marriage; Divorce, XI.
Jurisdictional domicile and status for purpose of divorce, see Divorce, I.

§ 37. Coverture; disabilities.

Marital rights in personalty, see also ante ¶ 74.

¶ 95. In attachment between residents of Kansas, where the subject matter was a note made in Kansas by a wife for a debt of her husband, the law of Kansas governed, and thereunder the action at law in this state was proper and recourse to equity was not essential.—State Bank of Eldorado v. Maxson, 123 Mich. 250.

¶ 96. Under section 17 of the Married Woman's Act of Kansas, providing that any woman who shall have married out of the state shall, if her husband afterwards becomes a resident of the state, enjoy all the rights as to property which she may have acquired by the laws of any other state, etc., a Kansas creditor may by attachment against a Kansas married woman enforce her liability in this state, on a Kansas note given for a debt of her husband, although she would not have been liable in this state had the note been made here.—State Bank of Eldorado v. Maxson, 123 Mich. 250.

§ 38. Infants and guardianship.

Bastardy proceeding to affiliate child born out of state, see Bastards, § 4, ¶ 17.
Ancillary guardianship and recognition of foreign guardians, see also Guardianship.

¶ 97. The laws of Michigan usually contemplate the appointment of a guardian, who shall have custody of the estate, whoever may have custody of the person, and do not provide for corporation guardianships. They contemplate that guardians may be appointed for infants who have property in Michigan, whatever may be their residence, and only recognize foreign guardians as a matter of comity.—Rice's Case, 42 Mich. 528.

¶ 98. If a guardian has been appointed for an infant at a foreign domicile, and has had personal custody of the infant, his claims as guardian should be respected elsewhere; but this is not necessarily the case if he has no control of the infant's estate, and was appointed in a jurisdiction from which the infant was personally absent.—Rice's Case, 42 Mich. 528.

¶ 99. The parents of an infant were killed, and the child was injured, in a railway collision in Michigan while on their way from their former home in Philadelphia to Kansas, where they meant to reside. The child's property consisted chiefly in his right to compensation, and was therefore in Michigan, where he remained. A guardian, who was nearly related to him, was appointed for him in Michigan, where the guardian had charge of the estate, and another guardian, who was to have charge of the person only, was appointed for him in Philadelphia, where a trust corporation was made guardian of the estate. The guardian appointed in Philadelphia sought to obtain the custody of the child on a writ of habeas corpus. Held, that the foreign guardian was not entitled to it as a matter of right, and the writ was refused.—Rice's Case, 42 Mich. 528.

¶ 100. There is no rule of comity requiring recognition of the right of testamentary guardians qualified in the District of Columbia to the custody of a child living in Michigan, and claimed by guardians appointed in Michigan and better qualified to serve the child's welfare.—71 Mich. 180.

§ 39. Poor persons and settlement.

¶ 101. An order of an Iowa court made pursuant to statute of that state directing the removal of a pauper, who has not gained a legal settlement in that state, to Michigan, her former place of residence, is no justification to the person who executes it, if such removal is in violation of the statutes of this state.—Superintendents of Poor of Newaygo County v. Nelson, 75 Mich. 154.

VII. REMEDIES AND PROCEDURE.

§ 40. In general.

Statutory rights and causes of action under foreign laws, see ante §§ 4, 34.
Territorial operation of garnishment laws, see also ante ¶ 14.

Remedies for enforcement of contract usurious but not void where made, see ante ¶ 29.
Jurisdiction of courts over foreign causes or persons, see Courts, V.
Jurisdictional domicile and situs of estates, see Estates of Decedents, II.
Evtrastate fraud as ground for arrest of fraudulent debtor, see Civil Arrest, § 22.
Conclusiveness and effect of foreign judgment, see Foreign Judgments, II; Former Adjudication.
Domestic law of procedure, see specific topics, e. g., Pleading; Trial; etc.

¶ 102. The form of action is governed by the law of the country where the action is brought.—Galloway v. Holmes, 1 D. 330.

¶ 103. The law of the place where the remedy is sought to be enforced must govern as to the nature and form of that remedy.—Moses v. The Missouri, 1 Mich. 507.

¶ 104. Remedies are governed and applied according to the law of the place where the action is instituted, rather than by the law of the place of contract.—Millar v. Hilton, 189 Mich. 635.

¶ 104a. Matters respecting the remedy, such as the beginning of suits, admissibility of evidence, and statutes of limitation, depend upon the law of the place where the suit is brought.—Stack v. Detroit Lumber & Cedar Co. 151 Mich. 21.

¶ 105. Where a contract made and payable in another state is usurious, but the law of that state does not avoid it on that ground, but only affects the remedy upon it, the courts of this state can enforce the contract, but by no other remedies than those provided by our own law.—Collins Iron Co. v. Burkam, 10 Mich. 283.

¶ 106. A law of another state, if it had such a law, which would enable a vendor, of whom goods have been purchased fraudulently on credit, to maintain assumpsit for the price of the goods before the credit had expired, would be a law affecting the remedy only, and would not apply so as to enable the vendor to maintain a similar action in this state for the price of goods sold in New York.—Galloway v. Holmes, 1 D. 330.

§ 41. Limitations.

General law of limitations, see Limitations of Actions.

¶ 107. The law of limitation of actions is a part of the lex fori.—Home L. Ins. Co. v. Elwell, 111 Mich. 689.

¶ 108. The fact that notes are barred by the statute of limitations of a foreign state, does not constitute a bar to an action in this state.—Blackburn v. Blackburn's Estate, 124 Mich. 190.

¶ 109. Where action is brought against a Michigan corporation for its negligence in Canadian waters whereby death was caused there, the liability being established and the remedy being provided by Canadian statute, the right of action if barred in Canada is barred here.—Wingert v. Wayne Circuit Judge, 101 Mich. 395.

Conflict of laws with respect to application of statute of limitations in action for injury to passenger on interstate train, see note, 10 N. C. C. A. 107-118.

§ 42. Evidence.

Presumption and proof of law of other state, see Evidence, II, III, X.
General law of evidence, see Evidence.

¶ 110. The law of the forum applies as to the admissibility of evidence by defendant, in action on a foreign contract, as to the making of a supplemental contract with a now deceased representative of plaintiff.—Rockford Malleable Iron Works v. Tilden, 188 Mich. 80.

§ 43. Judgments and confession of judgment.

General law of judgments, see Judgments.

¶ 111. An Ohio note with warrant of attorney in unlimited terms to confess judgment thereon will support an Ohio judgment confessed thereon in Ohio, though the warrant might be insufficient extraterritorially.—First Nat. Bank of Athens v. Garland, 109 Mich. 515.

¶ 112. A Michigan note with a warrant to confess judgment contained within it, and therefore invalid as a warrant because of Comp. L. 1897, § 10299, which requires a separate instrument, cannot support a judgment confessed in Illinois where both parties were nonresidents and where no process was issued.—Acme Food Co. v. Kirsch, 166 Mich. 433.

CONFORMITY to CONSOLIDATION.

Cross-References.

Conformity—
Of pleadings to proofs, see Pleading, X; Indictment, I.
Of judgments and decrees to pleadings and findings, see Judgments, II, B; Equity, X, B.
Of verdicts and findings to pleadings and evidence, see Verdicts and Findings; Indictment, IX, G.

Of sentence to indictment and verdict, see Indictment, XI.
Of process to pleadings, see Process.
Of judgments to process, see Judgments, II, B.
Of executions to judgment, see Executions, III; Civil Arrest, III.

Confrontation of Witnesses—
Constitutional right, see Constitutional Law, IX; Indictment, IX, B.

Confusion of Boundaries—
See Boundaries.

Confusion of Goods—
See Accession and Confusion.

Congress—
Constitutional powers, see Constitutional Law, III et seq., Commerce.

Conjunctive Averments and Denials—
See Pleading; Indictment, I; and see various specific topics in those parts treating of pleading.
In affidavits, see specific topics, e. g., Attachment, IV, A; Civil Arrest, I, II.

Connecting Carriers—
See Carriers, II, G, III, IV, F, V.
Railroad crossings and intersections, matters not directly involved in carriage, see Railroads, IV; Street Railways, III.
Regulative powers of Railroad Commission, see Public Service.

Connivance—
At fraud, see Fraud; Fraudulent Conveyances.
In crime, see Crimes; Indictment.
Defense to divorce, see Divorce, III.

Consanguinity—
As disqualifying fact, see Judges, III; Jury, III; Justices of the Peace, II.
Line of descent or kinship, see Descent and Distribution; Wills, VI.
Effect on credibility of witness, see Witnesses, VI, C.
Element in crime of incest, see Crimes, II; Indictment.

Consent—
See generally topics treating of that to which consent is given or withheld, e. g., Account Stated; Acknowledgments; Adoption; Arbitration and Award; Assignments for Creditors; Bailments; Boundaries; Breach of Promise; Brokers; Contracts, III; Dedication; Deeds; Duress; Easements; Election and Waiver; Execution of Instruments; Fraud and Deceit; Gifts, IV; Implied Contracts; Judgments; Landlord and Tenant; Licenses to Enter; Marriage; Mistake; Rape; Rescission; Seduction; Stipulations; Submission of Controversy; Trusts; Wills, III.
Formation of contract by assent, see Contracts, III.
As element in or defense to crime, see Crimes; Rape; Seduction; Assault and Battery.
As element in torts, see torts; Conversion; Trespass; Assault and Battery.
To jurisdiction, see Courts, V.
To appeal, error or consideration of questions therein, see Appeal.
To various matters of practice and procedure, see specific topics, e. g., Continuances; Discontinuance, etc.; Indictment, IX.
Waiver or cure of errors by consent, see Harmless Error; Saving Questions for Review; Indictment, XIV, XV.

Consent Judgments—
Review on error or appeal, see Appeal, III.
Reviewableness on certiorari, see Certiorari, § 9.

Consequential Damages—
See Damages; Eminent Domain, V; Highways, II, B.
Damages covered by indemnity contracts, see Indemnity, I, II.

Conservators of the Peace—
See Sheriffs; Justices of the Peace; Judges.
Functions in arresting and committing for crime, see Arrest, Commitment and Bail.

Consideration—
See Contracts, V.

Consignments—
See Brokers and Factors.
As interstate commerce, see Commerce.
Distinction from sales, see Sales, I.
Contracts of carriage, see Carriers, II.

Consolidation—
Of actions, see Consolidation of Actions.
Of appeals or writs of error or certiorari, see Appeal, § 141; Certiorari, § 31.
Of trials, see Trial, II; Indictment, IX, A.
Of corporations, see Corporations, XXII; Railroads, VII.
Of cities and villages, see Municipal Corporations, I, II.

CONSOLIDATION AND SEVERANCE OF ACTIONS.

TREATS of the procedure and occasion for consolidating several actions into one or for severing one into several (Jud. Act, Chap. VIII; Comp. L. 1915, §§ 12309, 12310). It excludes the hearing together of several distinct causes in one trial or hearing (see

Equity, VIII; Trial, II) and the setting out of issues of fact to be tried separately before or after the main issues in the case (see Equity, VIII, B; Trial, II).

Analysis.

§ 1. Consolidation.
§ 2. ——Compatibility of the actions.
§ 3. ——Procedure; amendments.
§ 4. Severance.

[The New Federal Equity Rule 27, providing for the joinder in one bill of diverse causes of action in equity and for separate trials of issues on grounds of convenience, is somewhat similar to the provisions of Comp. L. 1915, § 12309, and the federal equity decisions upon that rule may afford persuasive precedents on the applicability and effect of the state statute.—Editor.]

§ 1. Consolidation.

Of appeals or writs of error, see Appeal, § 141.
Presumption on appeal as to consolidation or severance, see Appeal, § 866.

¶ 1. The court should of its own motion order consolidation of proceedings that are between the same parties and include parts of the same account, and which, under the statute, cannot be made the subjects of cross-actions.—Wisner v. Mabley's Estate, 70 Mich. 271.

¶ 2. A consolidation of a foreclosure suit with one to enforce a trust for security of a guaranty of the mortgage is not erroneous because the effect of it will be to deprive the defendant guarantor of the right to file a cross-bill against a coguarantor for contribution, where the right to an action at law for contribution will remain and it appears that the defendant might by moving in time have interposed a cross-bill in each of the suits which were consolidated.—Miller v. Walker, 141 Mich. 433.

§ 2. ——Compatibility of the actions.

¶ 3. Whether actions upon various promissory notes to which defendants' names are attached in different relations to each other and to the other parties can be consolidated, quære.—Stroh v. Hinchman, 37 Mich. 490.

¶ 4. The consolidation of cross-actions is not authorized at common law or by statute; nor are parties allowed to stipulate that the same jury shall hear in one case and decide by one verdict a series of incompatible issues which cannot be tried together without violating the fundamental principles of procedure.—Harris v. Sweetland, 48 Mich. 110.

§ 3. ——Procedure; amendments.

¶ 5. Defendants to a bill for the enforcement of a trust to secure the guaranty of payment of a mortgage, consolidated with one for the foreclosure of the mortgage, need not be made parties to the foreclosure suit by amendment, where their rights are fully protected by the consolidation except that by proceeding to amend and bring them in they would have gained more time.—Miller v. Walker, 141 Mich. 433.

§ 4. Severance.

Splitting causes in general, see Actions; Former Adjudication.
Combining and splitting causes by assignment, see Assignments, §§ 25, 26, 29.
Entitling affidavits after severance as to one party, see Affidavits, ¶ 26.

¶ 6. Where a man and his wife were jointly sued on a note, and it appeared from the finding of facts that the wife signed as surety only and that the statute of limitations had run against her, a formal discontinuance as to her was held unnecessary, and a severance and the entry of separate judgments were sustained.—Reading v. Beardsley, 41 Mich. 123.

CONSPIRACY.

TREATS of combinations of two or more persons acting in concert to do a wrong, and of the civil and criminal responsibility for such conspiracy, excluding the law of particular torts and crimes which are the object of the conspiracy.

Analysis.

§ 1. Elements and nature.
§ 2. Manner or means of conspiracy.

§ 3. ——Combinations, boycotts and the like.
§ 4. Persons liable.
§ 5. Actions, pleading and variance.
§ 6. Evidence.
§ 7. Jury questions and instructions.
§ 8. Criminal conspiracy.

§ 1. Elements and nature.

Form of instruction defining conspiracy, see post ¶ 28.
Manner and means of conspiring, see post §§ 2, 3.
Persons liable or participating, see post § 4.
Combinations and monopolies obnoxious to the statutes, see Combinations.
Contracts obnoxious to public policy or law, see Contracts, IV.

¶ 1. A combination of persons formed for the purpose of injuring the business of another is illegal, and many acts committed by the combination are illegal which would not be illegal if committed by an individual.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 2. A civil action for conspiracy will not lie unless the illegal purpose is so far carried out as to damage plaintiff unlawfully.—Schwab v. Mabley, 47 Mich. 572.

§ 2. Manner or means of conspiracy.

Pleading the means, see post § 5.

¶ 3. Threats in language are not the only threats recognizable in law as a means of conspiracy to intimidate or oppress in trade, but covert and unspoken threats may be just as effective as spoken threats.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 4. The law recognizes and gives full force to threats pursuant to a conspiracy to intimidate and destroy trade though they are not spoken and are not accompanied by violence.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

§ 3. ——Combinations, boycotts and the like.

Illegal combinations, see Combinations.
Actionable statutory or common law combinations, see Combinations, ¶ 23.

¶ 5. Persons may organize, and persuade and induce others to join them, but when they resort to unlawful means to cause injury to others with whom they have no relation, contractual or otherwise, the limit permitted by the law is passed, and they may be restrained.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 6. A boycott is a combination of persons to cause a loss to a third person by causing others against their will to withdraw from him their beneficial business intercourse, through threats that unless a compliance with their demands be made, the persons forming the combination will cause loss or injury to him; or an organization formed to exclude a person from business relations with others by persuasion, intimidation, and other acts which tend to violence, and thereby cause him, through fear of resulting injury, to submit to dictation in the management of his affairs.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 7. A combination formed for the purpose of injuring a person in his trade or occupation is an indictable offense.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 8. A combination to do injurious acts, expressly directed to another by way of intimidation or constraint, either of himself or of persons employed or seeking to be employed by him, is outside of allowable competition and unlawful.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 9. Intimidation, within the meaning of the law, is not necessarily limited to threats of violence to person or property.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 10. The boycott condemned by law is not alone that accompanied by violence and threats of violence, but that where the means used are threatening in their nature and intended, and naturally tend to overcome, by fear of loss of property, the will of others, and compel them to do things which they would not otherwise do.—Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

¶ 11. The picketing of an employer's premises in order to intercept employees and customers, is unlawful, an act of intimidation, and an unwarranted interference with the right of free trade.—Beck v. Railway Teamsters' Protective Union, 118 Mich. 497.

§ 4. Persons liable.

Evidence of participation, see post § 6.
Instruction as to complicity and liability, see post ¶ 30.

¶ 12. When a person is shown to have become a party to an illegal combination or conspiracy, he is liable for all the acts performed by any of his coconspirators in furtherance of the object of the conspiracy.—Baldwin v. Escanaba Liquor Dealers' Ass'n, 165 Mich. 98.

¶ 13. Defendants who have conspired to perpetrate a fraud on plaintiff are responsible for false representations made in furtherance of that scheme though such representations were not authorized by all the defendants.—McDonald v. Smith, 139 Mich. 211.

§ 5. Actions, pleading and variance.

Elements of the actionable wrong, see ante § 1.
General law of pleading, see Pleading.
Actions for tort or other wrong independent of the conspiracy, see specific topics treating of such tort or wrong.
Remedies for fraud accomplished by conspiracy, see Fraud, III.
Injunctions against conspiracies and boycotts, see also Injunctions, II.

¶ 14. A declaration in a suit for conspiracy to prevent the enforcement of a judgment is insufficient in merely alleging that the defendant "did knowingly and wilfully and unlawfully oppose and obstruct the said sheriff in attempting to execute said writ," if the record does not show the manner and circumstances under which he did so; and an allegation of injury which merely declares that defendant "delayed and obstructed plaintiff in the collection of the judgment," and put him to great expense in removing the obstructions, is fatally defective in presenting no issuable facts, and is open to the inference that the judgment may have been collected, and is also consistent with methods of obstruction and delay, some of which would not be actionable.—Schwab v. Mabley, 47 Mich. 572.

¶ 15. In a declaration in case for a conspiracy to prevent the trial of pending suits it is insufficient to aver merely that, by "divers false pretenses, subtle means and devices," defendants have "prevented and defeated the trial of said cause"; nor is it sufficient to refer to threats, as a means employed, without showing their tenor; a mere averment that they are unlawful is not enough.—Schwab v. Mabley, 47 Mich. 572.

¶ 16. In an action for damages for obtaining a settlement by means of a fraudulent assignment for benefit of creditors and certain fraudulent mortgages, the declaration should, as against the mortgagees, allege that the assignment and the mortgages were made with the mortgagee's knowledge, and should aver a conspiracy and enumerate the false statements, and if the statements were not made by all the defendants it should aver that they were authorized by all, and in furtherance of a common design, that they were believed and acted upon by plaintiffs, and that they induced the action taken by plaintiffs which resulted in damage to them.—Pforzheimer v. Selkirk, 71 Mich. 600.

¶ 17. Where plaintiff in a suit for damages for a fraudulent conspiracy, alleges that the organization of a certain corporation was a necessary step in the scheme of fraud by which she was victimized, and further alleges that a false statement was made by defendants in the articles of incorporation, said articles are admissible in evidence, and their admission is not open to the objection that plaintiff had no right to rely on statements in them, since they were not intended for the public. The reason for this is that plaintiff does not base her rights of action upon a false statement in the articles; she merely claims that the execution of the articles was a preliminary, but necessary, step in a scheme of fraud consummated by other steps subsequently taken.—Roy v. Bordas, 150 Mich. 242.

¶ 18. A variance does not exist in an action for conspiracy to defraud against an attorney and another person, where the affidavit for the capias and the declaration charges that a client of the attorney loaned money and received property as security, which was to be free from all incumbrances, on the ground that the evidence shows that the client knew of incumbrances, where the testimony in fact is that the client was unfamiliar with land transactions, and that she was induced to take a deed to property as security for a loan, on the assurance that the deed was better than a first mortgage, whereas a first mortgage on the premises was subsequently foreclosed depriving her of her security.—Hardy v. Trick, 121 Mich. 251.

¶ 19. In an action for damages for a fraudulent conspiracy, the declaration alleged that the formation of the corporation in which plaintiff was induced to invest was a necessary step in the scheme of fraud by which she was victimized, and further alleged that the corporation was organized under Act No. 232, Pub. Acts 1903, and that the articles of incorporation were executed under oath. As a matter of fact said articles were not executed under oath, and the statute does not require them to be so executed. Plaintiff on the trial offered in evidence said articles of incorporation, which were acknowledged before a notary public, as required by the statute. The trial judge struck them from the record on the ground that, as they were not executed under oath, there was a variance between them and their description in the declaration. Held, that this was error, for the legal effect of the articles conformed precisely to their descrip-

tion, and therefore there was no variance.—Roy v. Bordas, 150 Mich. 242.

§ 6. Evidence.

Variance from allegations, see ante § 5.
Sufficiency to go to the jury, see post § 7.
Instruction as to amount of proof, see post ¶ 29.
General law of evidence, see Evidence.
Admissibility of acts of coconspirators against each other, see Evidence, VII, C.

¶ 20. In cases of conspiracies or combinations to commit a fraud all evidence must be held admissible which has any tendency to prove the conspiracy or combination, and its nature and objects, so far as these can have any bearing upon the issue on trial.—Beebe v. Knapp, 28 Mich. 53.

¶ 21. In an action against the election inspectors of a village charging conspiracy on the part of the defendants to deprive the plaintiff of the office of village trustee to which he claimed to have been elected, by miscounting the ballots and by depriving him of a recount by failing to seal the ballot boxes, evidence held insufficient to show concerted action on the part of defendants to injure plaintiff as alleged.—Veriden v. McLeod, 180 Mich. 182.

¶ 22. An inference of conspiracy ought not be drawn lightly nor without a fair support of testimony.—Lyon v. Clark, 132 Mich. 521.

¶ 23. In an action for fraud where the declaration alleges a conspiracy by which plaintiff was induced to invest his money in the stock of a company, evidence that one of the defendants was on intimate terms with the defendants actively engaged in the fraud and that he represented to plaintiff that he would buy the stock at more than its face value, and that he profited financially by the fraud, justified the jury in finding that he was a party to the conspiracy.—McDonald v. Smith, 139 Mich. 211.

¶ 24. In an action by a wife against her husband's parents and another for conspiring to prevent her husband from living with her until she should recover certain property deeded to her in settlement of a former suit against defendants for alienation of her husband's affections, the court erred in refusing to permit plaintiff to give testimony as to the relationship of defendants to each other, and of acts of the defendant before the settlement wherein such testimony was offered, not to show that plaintiff had any cause of action for what occurred prior to and including the settlement, nor for the purpose of adding to the damages which plaintiff would be entitled to recover, but for the purpose of showing whether, in fact, the defendants were acting jointly in what was done subsequently to the settlement.—Rosenthal v. Rosenthal, 151 Mich. 493.

¶ 25. In an action for malicious prosecution against a city and numerous merchants the facts are held not to show a conspiracy on the part of the merchants in the prosecution of a transient trader for the violation of an ordinance requiring licenses.—James v. Sweet, 125 Mich. 132.

§ 7. Jury questions and instructions.

General law as to instructions and jury province, see Instructions; Trial, VI.

¶ 26. A question of fact as to whether an attorney and another person entered into a conspiracy to defraud a client of the attorney is presented by evidence showing that the client was induced to loan money to the person designated by the attorney believing that she would have security better than a first mortgage, and that the attorney subsequently foreclosed a mortgage on the property and deprived the client of her security, she being unacquainted with land transactions.—Hardy v. Trick, 121 Mich. 251.

¶ 27. In an action on the case for conspiracy to prevent plaintiff's husband from living with her, there was evidence that defendant Jacobs aided and abetted the other defendants in an attempt to compel plaintiff to accept a divorce or else deed back certain property, and that the other defendants made it uncomfortable for plaintiff to live with her husband. Held, there was evidence to go to the jury, of the alleged conspiracy.—Rosenthal v. Rosenthal, 154 Mich. 533.

¶ 28. Upon the question of conspiracy, in an action for criminal conversation, the law is correctly stated by an instruction that: "A common design or purpose by two or more persons is the essence of the charge of conspiracy, and this common design must be proved either by direct evidence or by proof of such circumstances as naturally tend to prove it, and sufficient in themselves to satisfy you of the existence of such common design, before you can find a conspiracy."—Brown v. Evans, 149 Mich. 429.

¶ 29. It is not error to refuse a request to charge that "it takes the same amount of proof to establish complicity of plaintiff" in an alleged fraud "that it would take to establish fraud against him if he were alone charged with it," where the jury was instructed that his complicity in the fraud must be established by a preponderance of the testimony.—Smith v. McDonald, 139 Mich. 225.

¶ 30. Where there is evidence tending to show a conspiracy or common purpose between two defendants to withhold from plaintiff the goods for the conversion of which suit is brought, an instruction that if they conspired or united in such common purpose both would be responsible for what each said and did in furtherance of that purpose is correct.—Cadwell v. Pray, 86 Mich. 266.

§ 8. Criminal conspiracy.

Conspiracy as a fact implicating several persons in a specific crime, such as embezzlement, is treated as a part of the objective crime, see Crimes, II.
Evidence of conspiracy to implicate as parties or to characterize the objective crime is treated in Indictment, VIII.
Allegations of conspiracy in indictments or informations, see Indictment, I.
Criminal combinations and monopolies, see Combinations.
Acts and admissions of coconspirators as evidence in prosecutions for crime, see Indictment, VIII, B.

CONSTABLES to CONSTITUTIONAL CONVENTION.

Cross-References.

Constables—
See Sheriffs and Constables.
Constitution—
Of the state or nation, see Constitutional Law.
Of associations and corporations, see Associations, § 3; Corporations, IV.
Constitutional Convention—
See Constitutional Law, I.

CONSTITUTIONAL LAW.

TREATS of the state and federal constitutions and of the limitations and guaranties contained in them and of the validity of laws questioned as offending one or more provisions of the constitutions. For convenience some matters embraced within the general scope of the topic, as above defined, have been excluded. For example, the enactment and titles of statutes, which are treated in Statutes. All excluded matter will be fully covered by cross-references in the body of the topic below.

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§ 3. Constitutional conventions and delegates.
§ 4. Proposal and submission of amendments.
§ 5. ——Time for submission.
§ 6. Construction and interpretation of constitution.
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§ 37. Executive encroachment on legislative.
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§ 43. ——Power to declare statutes invalid.
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§ 297. Provisions of the schedule.

I. CONSTITUTIONS AND AMENDMENTS IN GENERAL.

[Note. Cross-references to the various provisions of the Constitution of 1908 are placed throughout the body of this topic. No references except those contained within the paragraphs themselves are made to earlier constitutions, but the corresponding sections of the earlier constitutions are all identified and can be readily found from the annotations to the Constitution of 1908 in volume 1, Compiled Laws of 1915.]

§ 1. Nature and object.

Temporary office of the Schedule, see post § 14.

¶ 1. Our present constitution was not the formation of a new government, but the continuation of a government formed under a previous constitution, whose supposed or real defects it was intended to correct.—Streeter v. Paton, 7 Mich. 341.

§ 2. Supersession of Ordinance of 1787.

Construction, operation and effect of the Ordinance in general, see State of Michigan, I.

Rights in public lands under the Ordinance, see Public Lands, I, IX.

¶ 2. The Ordinance of 1787, for the government of the territory northwest of the Ohio river, is no part of the fundamental law of the state since its admission into the Union. It was then superseded by the state constitution; and such parts of it as are not to be found in the federal or state constitution were then annulled.—La Plaisance Bay Harbor Co. v. City of Monroe, W. 155; Sands v. Manistee River Imp. Co., 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113, affirming 53 Mich. 593.

§ 3. Constitutional conventions and delegates.

Resort to debates in construing constitution, see post § 8.

Provisions for voting on constitutional convention at stated times, see Const., Art. XVII, § 4.

¶ 3. That provision of the Act No. 272, Pub. Acts 1907, providing for the constitutional convention of 1907, which directs a submission of a revision of the Constitution to the people at the spring election, is invalid.—Carton v. Secretary of State, 151 Mich. 337. (Grant, C. J., Blair, Carpenter, Moore and Ostrander, JJ., concurring. Montgomery, Hooker and McAlvay, JJ., dissenting, on the ground that the legislature had power to fix the date of submission.)

¶ 4. A member of the legislature which proposed the constitutional convention of 1907 is ineligible as a delegate to such convention, since his election is a "civil appointment" to another office during his term and obnoxious to Const. Art. IV, § 18.—Fyfe v. Kent County Clerk, 140 Mich. 349.

§ 4. Proposal and submission of amendments.

Construction of amendments, see post § 15.

Provisions as to proposal and adoption of amendments, see Const. Art. XVII, §§ 1-3.

¶ 5. Const., art. 20, § 1, relating to the submission of proposed amendments to the voters, being silent as to the method of submission, it was therefore subject to legislative control and direction.—People ex rel. Kent County Sup'rs v. Loomis, 135 Mich. 556.

¶ 6. A house journal entry of a resolution to amend Const., art. 10, § 10, providing a board of auditors for Wayne County, taken in connection with a subsequent entry reciting a two-thirds vote on concurrence in the amendment made by the senate, and that the title of the joint resolution as amended by the senate was agreed to; and the senate journal entry showing the resolution as passed by that body, constituted a full compliance with Const., art. 20, § 1, providing for the entry on the respective house journals, of amendments agreed to by both houses; it being apparent from the house journal that the house by its action first and last passed the identical resolution which passed the senate and appeared on its journal.—People ex rel. Kent County Sup'rs v. Loomis, 135 Mich. 556.

¶ 7. The power conferred upon the two houses of the legislature by the Constitution, art. 20, sec. 1, to submit a constitutional amendment to the electors and prescribe the manner of doing so cannot be restricted by any previous legislation.—Murphy Chair Co. v. Attorney General, 148 Mich. 563.

¶ 7a. Where the legislature regularly adopts by a two-thirds vote an amendment to the constitution and determines upon its submission to the people and prescribes the manner, it is exercising a constitutional function which cannot be restricted by previous legislation.—Murphy Chair Co. v. Attorney General, 148 Mich. 563.

¶ 8. The constitutional amendment striking out section 3 of article 18 was legally submitted to the electors and adopted by them in accordance with the joint resolution of March 6, 1907, although the procedure prescribed by Pub. Acts 1905, No. 23, was not followed.—Murphy Chair Co. v. Attorney General, 148 Mich. 563.

¶ 9. The joint resolution agreed to March 6, 1907, providing for a form of ballot for a constitutional amendment to be submitted to the people covered the same ground attempted to be covered by Pub. Acts 1905, No. 23, and operated to substitute the notice prescribed in the resolution itself for that provided by the previous act.—Murphy Chair Co. v. Attorney General, 148 Mich. 563.

¶ 10. Section 3 of Article XVII of the Constitution, providing that amendments shall be printed "on a ballot or ballots," construed to require the use of separate ballots for each proposed amendment.—Livingstone v. Board Election Com'rs Wayne Co., 174 Mich. 485.

¶ 11. Under Const., art. 20, § 1, relating to the submission of proposed amendments to the voters, and Comp. L. 1897, § 3657, directing action by the election commissioners relating to the printing of ballots, it was not essential that an entire resolution be printed on the ballot and the following form was sufficient: "Amendment to the constitution providing a board of County Auditors for the counties of Saginaw, Jackson, Washtenaw and Kent."—People ex rel Kent County Sup'rs v. Loomis, 135 Mich. 556.

§ 5. ——Time for submission.

¶ 12. The requirement that constitutional amendments must be submitted at the "next general election" after they were proposed meant the biennial November election for state officers, until 1876, when the requirement was changed to permit submission at both spring and fall elections.—Westinghausen v. People, 44 Mich. 265.

¶ 13. The constitutional amendment of 1875-1876, abolishing the anti-license clause of the constitution was validly submitted and adopted at "the next general election."—Westinghausen v. People, 44 Mich. 265.

¶ 14. The Constitution providing that amendments proposed by the legislature be submitted at the "next spring or autumn election," it is the duty of the legislature to submit amendments proposed by it at one of the two general elections occurring during its term, and where the spring election of an odd year has passed, the amendment proposed by a joint resolution of the legislature must be submitted at the autumn election. —Chase v. Board Election Com'rs Wayne Co., 151 Mich. 407.

¶ 15. Properly construed, section 1, art. 20 of the Constitution implies that constitutional amendments must be submitted either at the spring election of the odd years or the fall election of the even years, and Joint Resolution No. 34, passed in 1907, proposing an amendment to section 10, art. 14 of the Constitution, and that the same be submitted to the people at the election to be held on the first Monday of April, 1908, is ineffective. —Chase v. Board Election Com'rs Wayne Co., 151 Mich. 407.

§ 6. Construction and interpretation of constitution.

Various rules of construction as applied, see post §§ 7-13.
Construction of the Schedule, see post § 14
Construction of the amendments, see post § 15.
Construction of statutes with respect to the constitution, see post §§ 25 et seq.
Natural meanings of words, see post § 13.
Operation and effect; retroaction, see post § 16.
Construction of the limitations, see also generally post IV-XVIII.
Strict or liberal construction of limitations on legislature, see also post IV et seq
Constitution as limitation rather than grant of power, see post § 92.
Provisions relating to power to alter or repeal charters, see post § 289.
State construction of state constitution as binding on federal courts, and federal construction of federal constitution as binding on state courts, see Courts, IV.

¶ 16. For a discussion of the rules that should govern in construing a constitution. see the separate opinions of the justices in People v. Blodgett, 13 Mich. 127.

¶ 17. The cardinal rule of construction concerning language is to apply to it that meaning which it would naturally convey to the popular mind in all cases where the propriety of such construction is not negatived by some settled rule of law.—People v. Dean, 14 Mich. 406.

¶ 18. The object of construction as applied to a written constitution is to ultimately ascertain and give effect to the intent of the people in adopting it.—Kearney v. State Board of Auditors, 189 Mich. 666.

¶ 19. Constitutions are to be construed strictly, especially in determining the restrictions which they place upon legislatures.—Brooks v. Hydorn, 76 Mich. 273.

¶ 20. In construing the state constitution it should be given the meaning the people intended it should have. It should be construed, if its language be appropriate, so that it will accomplish the purpose the people intended it should accomplish.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

¶ 21. A constitutional provision in contravention of the common law should not be extended by construction; so held of art. 16, § 5, as to the property rights of married women.—Brown v. Fifield, 4 Mich. 322.

¶ 22. A written constitution—e. g., that of the United States—is not subject to growth or modification except by the prescribed agencies and in the prescribed methods.—McPherson v. Secretary of State, 92 Mich. 377, affirmed 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

§ 7. ——As a whole.

See also post ¶ 1221.
Of amendments with instrument as a whole, see post § 15.
Of election provisions, see also post ¶ 1083.

¶ 23. Constitutional provisions must be construed with reference to each other when relating to the same subject-matter.—Root v. Mayor, 3 Mich. 433; Dullman v. Willson, 53 Mich. 392.

¶ 24. In construing a section of the constitution effect must be given to the section taken as a whole.—Vetter v. Fowler, 167 Mich. 499.

§ 8. ——Resort to extraneous matters; constitutional debates.

Contemporaneous and prior facts and laws, see post § 9.

¶ 25. The court may not limit the apparent scope of the prohibition contained in Const., art. 18, § 3, which forbids the practical as well as theoretical teaching of certain mechanical trades to convicts, by any evidence of limitation found only outside of the constitution.—Manthey v. Vincent, 145 Mich. 327.

¶ 26. For the purpose of ascertaining the intent of the people in adopting a constitution, resort may be had to the proceedings of the convention which framed it.—Kearney v. State Board of Auditors, 189 Mich. 666.

§ 9. ——Contemporaneous and precedent conditions and laws.

See also post ¶ 46.

Common law test as measuring right to arrest without warrant, see post ¶ 619.

¶ 27. Constitutions are to be construed as the people construed them in their adoption, if possible; and the public history of the times should be consulted, and should have weight in arriving at that construction.—People ex rel. Bay City v. State Treasurer, 23 Mich. 499.

¶ 28. Constitutions, as well as statutes, are to be construed in the light of previous history and surrounding circumstances; their language is not to be measured by mathematical rules merely, but is subject, in the nature of things, to numerous implied exceptions or qualifications.—People ex rel. Kennedy v. Gies, 25 Mich. 83.

¶ 29. Constitutional provisions must be interpreted with reference to the times and circumstances under which the constitution was formed, and the general spirit of the times and the sentiments prevailing among the people.—People v. Harding, 53 Mich. 481.

¶ 30. Our present constitution was not the formation of a new government, but the continuation of a government formed under a previous constitution, whose supposed or real defects it was intended to correct; and in construing it we are bound to look to the distribution of judicial powers under the old constitution, and to discover, if we can, the evil, if any, arising from that distribution, and intended to be corrected by the new constitution.—Streeter v. Paton, 7 Mich. 341.

¶ 31. The framers of a constitution are presumed to have a knowledge of existing laws, and to act in reference to that knowledge.—People ex rel. Hughes v. May, 3 Mich. 598.

¶ 32. A constitutional provision will be construed by reference to the state of the law or custom existing at the time of adoption.—Pfeiffer v. Board of Education of Detroit, 118 Mich. 560.

¶ 33. A constitutional provision cannot be construed to mean one thing at the time of its adoption and another thing subsequently when public sentiments have undergone a change.—Pfeiffer v. Board of Education of Detroit, 118 Mich. 560.

¶ 34. Contemporaneous history of the adoption of Const., art. 18, § 3, restricting convict manufactures, and the construction placed upon this provision by the state prison authorities, cannot be considered in interpreting such provision, when there is no doubt as to its true meaning.—Manthey v. Vincent, 145 Mich. 327.

¶ 35. A constitutional provision adopted from the constitution of another state cannot be said to have been adopted with the construction subsequently put upon it by the courts of that state.—Thibault v. Sessions, 101 Mich. 279.

§ 10. ——Practical construction by legislature and officers.

Practical construction of statutes, see Statutes, V.

¶ 36. Where the language designating an officer is the same in a new constitution as in the old one, which had received both a popular and legislative construction, it must continue to receive the same unless the contrary intention plainly appears.—People ex rel. Hughes v. May, 3 Mich. 598.

¶ 37. The doctrine that "long and continued usage furnishes a contemporaneous construction which must prevail over the more technical import of words" should be applied more cautiously to constitutions than to laws and should not be applied except in cases of doubt.—Pingree v. Auditor General, 120 Mich. 95.

¶ 38. In determining the question of the power of the state assessors provided for by the amendment of 1900 to Const., art. 14, to determine the actual value of the property of the state for the purpose of fixing the rate to be levied upon railroad property, the contemporaneous construction placed by the legislature itself upon the amendment is not to be ignored.—Board of Education of Detroit v. State Board of Assessors, 133 Mich. 116.

¶ 39. The practical contemporaneous construction by the several states of the provision of the federal constitution concerning the appointment of presidential electors may be resorted to in determining the correct construction.—McPherson v. Secretary of State, 92 Mich. 377, affirmed 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

§ 11. ——Consideration of results or possibilities.

See also post ¶ 47.

¶ 40. In ascertaining the intent of a constitutional provision, the object to be accomplished and the consequences that will follow a given construction, may be considered.—Bay County Sup'rs v. Edmunds, 139 Mich. 466.

¶ 41. The fear of disastrous consequences should not deter the court from an interpretation of Const., art. 18, § 3, prohibiting engagement of convict labor in certain trades, according to its obvious meaning, since the people can avert such consequences by amending the constitution.—Manthey v. Vincent, 145 Mich. 327.

§ 12. ——Implications and exceptions.

Statutes assailed as obnoxious to "principle," see post ¶ 60.

Implied exclusion of one department from field of others, see post II.

¶ 42. Expressio unius est exclusio alterius is not wholly inapplicable to the interpretation of constitutional provisions.—Smith v. Lake Shore & M. S. R. Co., 114 Mich. 460, reversed in 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565.

¶ 43. If a prohibitory constitutional provision, general in its character, is subject to exceptions, those exceptions must be found in the constitution for the courts cannot create them. Courts can only declare the exceptions which the constitution creates.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

§ 13. ——Meaning of words and language.

See also ante ¶ 36, post ¶¶ 1083, 1150.

Disability of legislature to change definitions in constitution, see post § 94.

¶ 44. The first resort in all cases where a constitutional provision is to be interpreted is to the natural signification of the words employed in the order and grammatical arrangement in which the framers of the instrument have placed them, and if thus regarded, the words used convey a definite meaning, which involves no absurdity and no contradiction between different parts of the same writing, then the meaning apparent on the face of the instrument is the one which alone was intended to be conveyed, and in such case there is no room for construction.—Attorney General v. State Board of Assessors, 143 Mich. 73.

¶ 45. In construing a section of the constitution words must be given their usual and ordinary meaning.—Vetter v. Fowler, 167 Mich. 499.

¶ 46. Words and phrases in a new constitution that have been adopted from an old one must be considered as used according to their universally received and established import.—People ex rel. Hughes v. May, 3 Mich. 598.

¶ 47. A word not having a well-defined and technical meaning must be construed with reference to the evils to be prevented and the purposes to be accomplished, and in view of the history and practical construction of the provision in which it is used.—Kent County Agric. Soc. v. Houseman, 81 Mich. 609.

§ 14. ——Construction of schedule.

¶ 48. The schedule to the constitution was meant to provide for temporary purposes only, and its provisions cannot be given permanent effect where any other interpretation is reasonable.—People ex rel. Douvielle v. Manistee County Sup'rs, 40 Mich. 585.

¶ 49. Local Acts 1895, No. 294, providing for the beginning of the term of office of the treasurer of Wayne County on July first next succeeding his election and to continue for two terms thereafter, was not forbidden by section 28 of the Schedule of the Constitution, providing that the terms of office of all state and county officers, etc., shall begin on the first day of January succeeding their election; as such Schedule was not intended as a permanent limitation of the power of the legislature to change the time for the terms of county officers to begin.—Hunt ex rel. Snow v. Buhrer, 133 Mich. 107.

¶ 50. Mandamus will not lie to compel the attorney general to file an information to enjoin a county board of auditors from approving warrants for the payment of their salary as increased by act of the legislature, where the petition is based on the theory that the act violates section 20 of the Schedule appended to the state constitution, providing that the legislature can not lawfully change the amount of compensation of any officer during the term for which he is elected or appointed. This section was adopted for temporary and not for permanent purposes.—Hudson v. Attorney General, 150 Mich. 67.

§ 15. ——Construction of amendments.

Provision relating to submission of amendments, see ante § 5.

Operation and effect of amendments, see post § 17.

Effect to alter relative functions of the three departments, see post § 33.

¶ 51. An amended section of the constitution must be construed with the whole of the instrument.—People ex rel. Attorney General v. Burch, 84 Mich. 408.

§ 16. Operation and effect of constitution; retroaction.

Construction and meaning, see ante §§ 6-15.

Of the Schedule, see ante § 14.

Provisions of the Schedule for preserving existing status, see Const. Schedule, §§ 1-7.

Provisions for submission and vote on present constitution and for time of taking effect, see Const. Schedule, §§ 10, 11.

¶ 52. Section 1, Art. XII, of the Constitution of 1909, relating to the formation of or the conferring of rights, privileges and franchises on corporations, is prospective only in its operation.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

¶ 53. Rights acquired by an electric light and power company in the public streets of a city under Act No. 264, Pub. Acts 1905, How. St., 2nd Ed., § 2941, were not abrogated or revoked by the adoption of section 28 of Art. VIII of the Constitution of 1909, prohibiting the granting of franchises, except by municipalities.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

§ 17. ——Of amendments.

Effect of Amendments XIV and XV of federal constitution on original provisions, see post ¶ 1158.

¶ 54. Under Const., art. 20, § 1, which provides for the submission of proposed constitutional amendments at the next spring or autumn election, such amendments take effect from the time of their ratification by the popular vote.—Seneca Mining Co. v. Osmun, 82 Mich. 573.

¶ 55. Laws of 1889, Act No. 120 (How. St., § 4161d2), authorizing mining and manufacturing corporations that are about to expire by limitation of law to continue for a period not exceeding thirty years, held valid, having been adopted after the amendment to Const., art. 15, § 10, took effect.—Seneca Mining Co. v. Osmun, 82 Mich. 573.

¶ 56. An amendment of the constitution does not enlarge statutes previously passed. —Dewar v. People, 40 Mich. 401.

¶ 57. An amendment to the constitution does not validate an unconstitutional statute or ordinance.—Dullman v. Willson, 53 Mich. 392; Mount Pleasant v. Vansice, 43 Mich. 361.

¶ 58. Power subsequently conferred upon a legislature by an amendment of the constitution does not validate a statute which was void when enacted.—Seneca Mining Co. v. Osmun, 82 Mich. 573.

§ 18. Self-executing effect.

See also post ¶ 397.

[Note. The meaning and operation of the self-executing provisions with respect to particular matters are treated in connection with such matters, when practicable. For example, see Jury, I (right to jury trial); Elections, III (right to vote); Foreign Judgments (full faith and credit); Examination of Witnesses, IV (privilege against self-crimination); Indictment, IX, B (right to confront witnesses). A few exceptions to this policy have been made, e. g., the provision against imprisonment for debt is treat post VIII. Generally the validity of particular statutes assailed as offending the self-executing provisions is treated in this topic at the appropriate place. See post III, IV, VIII, IX, XII.]

¶ 59. County boards of supervisors possess, generally, only such powers as are expressly given them by the legislature, therefore Const., art. 4, § 49, providing for county and township roads and authorizing legislation, cannot be held self-executing in Wayne County as to the powers necessary to carry the act into effect and not self-executing in all other counties.—Board of Road Com'rs of Wayne County v. Board of Auditors of Wayne County, 148 Mich. 255.

§ 19. Repugnancy and invalidity of statutes.

Effect of acts declared invalid, see also Bounties, ¶ 1.

Judicial power to declare repugnancy and invalidity, see post § 43.

Construction of the constitution in ascertaining its meaning and the repugnance of the statute, see ante §§ 6-15.

Doubt as to repugnancy, see post § 20.

Statutes unwise or impolitic but not obnoxious, see post § 21.

Improper action under valid statute, see post § 22.

Effect of good intent, where statute is obnoxious to constitution, see post § 26.

Effect of repugnancy, doctrine that invalid statute is total nullity, see post § 27.

Effect of amendment to validate statutes, see ante § 17.

Evasive statutes, see also post § 113.

Between federal and state laws on same subject, see post § 123.

¶ 60. A statute cannot be declared void on the ground of its violating sound political principles, when it does not come in conflict with constitutional provisions.—People v. Mahaney, 13 Mich. 481.

¶ 61. An act of the legislature is not to be declared void upon any general notion that it violates a great principle of right or of general jurisprudence.—Robinson v. The Red Jacket, 1 Mich. 171.

¶ 62. It is questionable whether the judiciary has power to pronounce an act void because it is repugnant to fundamental principles not expressly declared, but necessarily implied in a republican constitution.—People v. Gallagher, 4 Mich. 244.

¶ 63. A statute will not be declared unconstitutional and void solely on the ground

of unjust and oppressive provisions, or because it is supposed to violate the natural, social, or political rights of the citizen, unless it can be shown that such injustice is prohibited or such rights guaranteed or protected by the constitution.—Burrows v. Delta Transp. Co., 106 Mich. 582.

¶ 64. An act of congress that relates to a subject falling within the province of the national government cannot be declared invalid unless it conflicts with something found in the national constitution.—Gibson v. Hibbard, 13 Mich. 214.

¶ 65. A legislative act not violative of any constitutional provision or principle must, when assailed, be its own sufficient and conclusive evidence of the justice, propriety and policy of its passage.—Flint & F. Plank Road Co. v. Woodhull, 25 Mich. 99.

¶ 66. Whether the judiciary has the right to declare a statute unconstitutional as violating some great fundamental principle of natural right or justice when such statute violates no part of the written constitution, quære.—Feek v. Township Board of Bloomingdale, 82 Mich. 398.

¶ 67. The question of legislative violation of the constitution is not one of intent.—People ex rel. Estes v. Denahy, 20 Mich. 349.

§ 20. ——Doubtful cases.

Construction in harmony with constitution, see post § 25.

Doubt as to compliance with 50-day clause, see post ¶ 97.

Avoidance of invalidating construction in doubtful cases, see also post § 25.

¶ 68. The legislature has power to adopt a statute except as it is prohibited by the constitution, and a statute will not be declared in conflict with the constitution while a serious doubt exists as to a conflict.—Attorney General v. State Board of Assessors, 143 Mich. 73.

¶ 69. A statute should not be declared unconstitutional unless the conflict between the constitution and the statute is palpable and is free from reasonable doubt.—Green v. Graves, 1 D. 351; Scott v. Smart's Ex'rs, 1 Mich. 295; Southworth v. Palmyra & J. R. Co., 2 Mich. 287; People v. Gallagher, 4 Mich. 244; Sears v Cottrell, 5 Mich. 251; Tyler v. People, 8 Mich. 320; People ex rel. Twitchell v. Blodgett, 13 Mich. 127; People v. Mahaney, 13 Mich. 481; Inkster v. Carver, 16 Mich. 484.

¶ 70. A statute is not unconstitutional unless in plain violation of some provision in the constitution; and its constitutionality will be supported by all possible presumptions not clearly inconsistent with the language and subject-matter.—Attorney-General v. Preston, 56 Mich. 177.

¶ 71. In a case of doubt every possible presumption, not clearly inconsistent with the language and the subject-matter, is to be made in favor of the constitutionality of legislation.—Sears v. Cottrell, 5 Mich. 251; Walcott v. People, 17 Mich. 68.

¶ 72. The power of declaring laws unconstitutional should be exercised with extreme caution, and never where serious doubt exists as to the conflict. In cases of doubt, every possible presumption, not clearly inconsistent with the language and the subject-matter, is to be made in favor of the constitutionality of the act.—Rouse, Hazard & Co. v. Wayne Circuit Judge, 104 Mich. 234.

¶ 73. The court should not decide against the validity of a statute unless clearly convinced that it conflicts with the constitution.—Fifield v. Close, 15 Mich. 505.

¶ 74. A statute cannot be condemned as unconstitutional unless the conflict between it and the fundamental law is clear and substantial.—People v. Morris, 80 Mich. 634.

¶ 75. A statute must be presumed to be constitutional unless its repugnancy to the constitution clearly appears.—People v. Gansley, 191 Mich. 357.

¶ 76. Courts should be careful not to declare statutes unconstitutional upon agreed and general statements and without the fullest disclosure of all material facts.—Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, affirming 83 Mich. 592.

¶ 77. Pub. Acts 1889, No. 225 (How. St., § 9354j), entitled an "act declaring certain contracts, agreements, undertakings and combinations unlawful, and to provide punishment for those who shall enter into the same or do any act in performance thereof," is not so clearly invalid that a court of the first instance should declare it void.—Merz Capsule Co. v. United States Capsule Co., 67 Fed. 414.

¶ 78. The taxing power of a state is necessary to its existence, and, being one of its attributes of sovereignty, a statute passed for the levy and collection of its revenue must not be held void by a federal court unless it is so clearly an illegal encroachment upon private rights as to leave no doubt of its invalidity.—Michigan Railroad Tax Cases, 138 Fed. 223, affirmed in 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

¶ 79. A statute is not to be pronounced void upon the ground that it conflicts with a state constitution, unless the repugnancy to the constitution be clear, and the conclusion that it exists, inevitable.—Township of Pine Grove v. Talcott, 19 Wall. (86 U. S.) 666, 22 L. ed. 227.

§ 21. ——Impolitic or unwise legislation.

Presumption that legislative judgment was reasonable and sound, see post § 24.
Inquiry as to legislative intent or motive, see post § 26.

¶ 80. It is not for the courts to debate the policy and wisdom of legislative classification which is not on its face convincingly arbitrary, capricious and unreasonable.—Lundstrom v. Township of Ellsworth, 196 Mich. 502.

¶ 81. Considerations of mere expediency or policy cannot enter into the question of a statute's constitutionality.—Green v. Graves, 1 D. 351; Tyler v. People, 8 Mich. 320.

¶ 82. The courts have nothing to do with the economic wisdom of the Blue Sky Law, Pub. Acts 1913, No. 143, regulating the issuance and sale of securities, all such considerations being for the legislature.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

¶ 83. The Supreme Court will not question the wisdom of the legislature in the exercise of its lawful discretion.—Morton v. Detroit, B. C. & A. R. Co., 81 Mich. 423.

¶ 84. Mere inconvenience, however great, is not sufficient to defeat a law. That is a consideration for the legislature and not for the court.—Van Husan v. Heames, 96 Mich 504.

¶ 85. That provisions in the general statute for the incorporation of ecclesiastical bodies (Pub. Acts 1897, No. 209) are ill suited to the church polity of a particular religious body does not justify the courts in declaring the act unconstitutional.—Graham v. Muskegon County Clerk, 116 Mich. 571.

§ 22. ——Administrative and judicial acts done under statute.

Presumption that officials will administer law in legal manner, see also post § 23.

¶ 86. A tax statute cannot be declared invalid on the ground that the officers acting under it fail to perform their duty.—Michigan Railroad Tax Cases, 138 Fed. 223, affirmed in 201 U. S. 245 , 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

§ 23. Burden of proof, presumptions and evidence as to constitutionality.

See also post ¶ 107.
Effect of unwise or impolitic statutes, see ante § 21.
Doubts as to repugnancy of statutes, see also ante § 20.
Construction of statutes in favor of validity when possible, see post § 25.
Judicial notice of facts in aid of decision of constitutionality, see Evidence, I.
Presumptions respecting manner of enactment and germaneness of amendments, see Statutes, III, IV.

¶ 87. Where a legislative act may be construed in accordance with or in violation of a constitutional provision it will be construed so as to save the act; the legislature will be presumed to have intended the language of the act to be used in its constitutional sense.—Grand Rapids Booming Co. v. Jarvis, 30 Mich. 308.

¶ 88. There is always a presumption in favor of constitutionality, and this presumption justifies a construction that is rather against the natural interpretation of the language used, if necessary to sustain the law.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 655.

¶ 89. Every intendment is in favor of the due enactment of a statute, and to overcome this legal presumption it must conclusively appear from the legislative journals that constitutional requirements were lacking in its passage.—Hart v. McElroy, 72 Mich. 446; Common Council of Detroit v. Board of Assessors of Detroit, 91 Mich. 78.

¶ 90. The charter of Detroit (Laws 1857, Act No. 55), in establishing the Recorder's Court with exclusive jurisdiction to try crimes committed within the city, and to try such crimes on indictments found in the circuit court for Wayne county, is entitled to such presumptions as long practical construction and acquiescence create; and its constitutionality is sustained.—People v. Hurst, 41 Mich. 328.

¶ 91. In an action to compel a railroad to establish a residence crossing for the benefit of an individual, since it is not for public use, the burden of proof is on the plaintiff to show that such action would come under the police power of the state: so held where one sought to force construction of a private crossing under a statute enacted after the railroad was built.—People v. Detroit, G. H. & M. R. Co., 79 Mich. 471.

¶ 92. It must be presumed that the Michigan Securities Commission will not disregard its duty in the fair application of the provi-

sions of the Blue Sky Law, Pub. Acts 1915, No. 46 (Comp. Laws 1915, § 11945 et seq.) relating to the regulation of the sale and disposition of bonds, stocks or other securities within the state and the issuance of licenses therefor.—Merrick v. N. W. Halsey Co., 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227, reversing 228 Fed. 805.

¶ 93. How. St., § 799, which provides for an adjudication by fence viewers of the amount due from one owner of land to another for constructing or repairing a line fence between their grounds, is not invalid because it omits to provide expressly that notice shall be given to the interested parties of the viewers' meeting to assess the cost of the fence. The statute impliedly provides for notice; and courts will assume that the legislature did not intend to deprive parties of their day in court where they might appear to protect their rights.—Gilson v. Munson, 114 Mich. 671.

¶ 94. Laws 1850, No. 161, § 2 (Comp. L. 1897, § 5593), imposing liability for injuries caused by dogs, and providing that in an action of trespass on the case, the plaintiff and defendant may be examined under oath touching the matter at issue, and evidence may be given as in other cases, and if it shall appear to the satisfaction of the court, by the evidence, that the defendant is justly liable for the damages complained of under the provisions of this act, the court shall render judgment against such defendant for double the amount of damages proved, and costs of suit, has been operated under for nearly half a century, and the presumption is strong that the statute has been closely scrutinized by court and counsel and found valid. —Fye v. Chapin, 121 Mich. 675, writ of error dismissed in 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

¶ 95. It must be assumed, in view of the constitutional prohibition against combining the legislative and judicial functions in any one of the three state governmental branches, that, in the enactment of the Railroad Commission Act, Pub. Acts 1909, No. 300, How. St., 2nd Ed., § 6524 et seq., relating to the fixing of rates of railroads by the railroad commission and for review of decisions of the commission by the courts, that there was no intent to confer on the courts any power of legislation.—Detroit & M. R. Co. v. Michigan Railroad Commission, 203 Fed. 864; affirmed in 239 U. S. 356, 60 L. ed. 327, 36 Sup. Ct. Rep. 114.

¶ 96. The constitution of Michigan, art. 4, providing that the powers of government are divided into three departments, legislative, executive and judicial, and that no person belonging to one department shall exercise the powers properly belonging to another, except in cases expressly provided in the constitution, separates the legislative, executive and judicial powers, and, in the absence of a clear decision of the Michigan Supreme Court to the contrary, it will be assumed that legislative functions in regard to railroad rates were not granted to the courts by Pub. Acts 1909, No. 300, § 26 (How. St., 2nd Ed., § 6549) providing that any common carrier or other party in interest dissatisfied with the orders of the Railroad Commission may bring a suit in the state circuit court to set aside the order on the ground that the rates fixed are unreasonable, and that the court shall have power "to affirm, vacate or set aside the order * * * in whole or in part, and to make such other order or decree as the court shall decide to be in accordance with the facts and the law," and further providing that if different or additional evidence is introduced, the court, before judgment, shall transmit a copy of it to the commission, and the latter may alter or rescind its order, and is required to report its action to the court, and the judgment is to be rendered as though the last action of the commission had been taken at first, the words "such other order or decree" not embracing a change in the rates fixed, but only such other orders as are incident to an equity case.—Detroit & M. R. Co. v. Michigan Railroad Commission, 235 U. S. 402, 59 L. ed. 288, 35 Sup. Ct. Rep. 126; affirming 203 Fed. 864.

¶ 97. If it were simply a matter of doubt whether an act was passed in disregard of the constitutional provision that the bill must be introduced within the first fifty days of the legislative session, the act should be sustained.—Pack v. Barton, 47 Mich. 520.

¶ 98. That the state legislature intended or attempted to invade the field covered by federal legislation in enacting Act No. 173, Public Acts 1911 (How. St., 2d Ed., §§ 6526, 6531), pertaining to car service and demurrage charges, cannot be presumed.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 183 Mich. 6.

¶ 99. It must be presumed, when an order of the Michigan Railroad Commission merely requires a competing steam railroad and an interurban railroad to interchange cars, carload shipments, less than carload shipments and passenger traffic, in a certain town, in accordance with Pub. Acts 1907, No. 312, § 7, that is, "in the same manner and under the same general conditions except as to motive power as belt line railroads and terminal railroads are now or may be used for like purposes," that the state will not so construe or enforce the order as to interfere with or obstruct interstate commerce.—Michigan Central R. Co. v. Michigan Railroad Commission, 236 U. S. 615, 59 L. ed. 750, 35 Sup. Ct. Rep. 426; affirming 168 Mich. 230.

§ 24. ——As to occasion or reasonableness of legislative action.

Presumption that executive duties will be justly performed, see also post ¶ 806.

¶ 100. The legislature having an unquestionable right to prescribe the general features of local government in subordination to the constitutional purpose, and the boundary between the domain of state and local powers being indistinct, the presumption that exists in all cases, that the legislature purposes to keep within the limits of its authority, will not only obtain where legislation is assailed as an infringement upon the right of municipal self-government, but more than the usual force will be allowed to the legislative judgment as to what is proper and admissible in the particular case.—People ex rel. Attorney General v. Detroit Common Council, 29 Mich. 108.

¶ 101. In passing an act for a provisional appointment of a local officer which the city would ordinarily control as one of its local affairs, it will be presumed that the legislature was warranted by an exigency in the absence of evidence to the contrary; but it cannot be presumed when the act shows there was none.—Moreland v. Millen, 126 Mich. 381.

¶ 102. In determining the validity of a police regulation the reasonableness of the fee imposed depends largely upon the sound discretion of the legislature, and it will be presumed that the amount of the fee is reasonable unless the contrary appears upon the face of the law itself or is established by proper evidence.—Vernor v. Secretary of State, 179 Mich. 157.

¶ 103. In determining whether an enactment was passed by virtue of the police power or the taxing power, the disposition of the fee imposed is not conclusive.—Vernor v. Secretary of State, 179 Mich. 157.

¶ 104. Legislative regulation of the use of private property will be presumed to be reasonable and necessary, unless the contrary appears from facts of which the court may take judicial notice.—People v. Smith, 108 Mich. 527.

¶ 105. To warrant a decree declaring a rate statute invalid, the proof that such statute necessarily results in confiscation must be clear, satisfactory and convincing.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

¶ 106. An order of the Michigan Railroad Commission suspending a supplemental tariff of a railroad company pending a determination as to whether such tariff is justified will not be judicially interfered with on the ground of interference with interstate commerce, where a conclusion as to whether the power of the Commission has been transcended must be reached from conflicting affidavits or on ex parte affidavits.—Grand Trunk Ry. Co. of Canada v. Michigan Railroad Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; affirming 198 Fed. 1009.

§ 25. Construction of statutes with respect to validity.

See also ante ¶ 87.

Rule that statute should not be held repugnant in doubtful cases, see ante § 20.

Of rate regulating laws, see also post ¶ 234.

Construction respecting contracts impaired by law, see also post § 172, ¶ 747.

Of limitation acts with respect to fixity of period, see also post ¶¶ 1021-1023.

Of curative act to avoid legislative reversal of judgment, see also post ¶ 1077.

Of apportionment act to take effect as of time when valid, see also post ¶ 1123.

State decisions as binding United States courts on constitutionality of state laws under state constitution, and federal decisions as binding state courts on federal questions, see Courts, IV.

Construction of city charter in harmony with constitution, see also Municipal Corporations, II.

Construction of limitation acts operating on existing causes, see Limitations, I.

¶ 107. Courts will always construe a legislative act so as to give it effect as law if it be practicable to do so. An intent to violate the constitution is not to be presumed in any case; and a construction that would have that effect is not to be adopted unless forced upon the court by the terms employed.—Tabor v. Cook, 15 Mich. 322.

¶ 108. Where two constructions of a statute are possible the one that is consistent with the constitution is to be preferred as that presumptively intended by the legislature.—Motz v. City of Detroit, 18 Mich. 495.

¶ 109. Statutes are to be so construed as to render them constitutional, if possible within reason.—Albert v. Gibson, 141 Mich. 698.

¶ 110. The power given by the municipal charter of Three Rivers to the village authorities to open and vacate alleys was not designed to exclude the exercise by the circuit courts of their statutory power to alter or vacate town plats, and hence is valid.—Case v. Frey, 24 Mich. 251.

¶ 111. The statute creating the police court of Bay City confines the jurisdiction of the court so created, within that city's corporate limits, and does not interfere with the

power given justices in cases arising in other parts of the county outside of the city.—Perrott v. Pierce, 75 Mich. 578.

¶ 112. Laws 1893, Act No. 79, requiring foreign corporations to pay a franchise fee and avoiding all contracts made in this state after a certain date by any foreign corporation not complying with said section, must, to avoid conflict with U. S. Const., art. 1, § 8, the commerce clause, be held inapplicable to a foreign corporation the business of which in Michigan consists merely of selling, through itinerant agents and delivering, commodities manufactured outside of this state.—Colt v. Sutton, 102 Mich. 324.

¶ 113. Pub. Acts 1905, No. 309, construed as allowing a change of venue on making an affidavit in the form specified and not as requiring that the facts specified be established (such being the construction adopted with the statute) is not unconstitutional when so construed.—Preston Nat. Bank v. Wayne Circuit Judge, 142 Mich. 272.

¶ 114. Comp. L. 1897, § 10761, governing attachment of forest products while in transit or while being driven or sorted for delivery is not unconstitutional because is does not provide for payment of expenses of holding the attached property until the sheriff demands delivery, since the law contemplates immediate possession in the attaching officer and section 10769 provides that storage on the products shall be taxed as costs.—Lake v. Pere Marquette R. Co., 132 Mich. 190.

¶ 115. Act No. 104, Pub. Acts 1909, prescribing the liability of common carrier railroad companies to their employees should not be declared void unless it is clear that the legislature has exceeded its constitutional powers and that the act cannot be given effect within the constitutional restrictions by reasonable constructions of its provisions.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 116. A legislative repeal of a charter, involving judicial functions, could not be sustained subject to a right in the corporators to have the question of violation tried in the courts afterwards. There can be no appeal to the courts from the conclusions of the legislature in matters within its jurisdiction; and the act, if valid for any purpose, must be conclusive. But the legislature cannot pass finally upon questions of private right.—Flint & F. Plank Road Co. v. Woodhull, 25 Mich. 99.

¶ 117. The act for levying tolls on the commerce on the Muskegon river to pay for its improvement, after the auditor general had refused to honor a contract for payment out of the internal improvement fund because it was exhausted, could not be construed, and thereby supported on the ground of the state's having misappropriated the internal improvement fund, as in that case any valid claim would be against the whole state, and could not lawfully be imposed upon one section exclusively, or on the commerce of one section.—Ryerson v. Utley, 16 Mich. 269.

¶ 118. Though the legislature may provide for a single justice of the peace in cities, Local Acts 1905, No. 392, which attempted to substitute a municipal court with a judge and one associate in the city of Battle Creek for the justices, and empowered the associate to act only in certain contingencies beyond his will, cannot be regarded as an act to limit the number of justices of the peace, it not providing for the election of any eo nomine and containing provisions as to jurisdiction material to the act and inharmonious with any such purpose.—Attorney General ex rel. Hooper v. Loomis, 141 Mich. 547.

¶ 119. Local Acts 1905, No. 392, being an act to establish a "municipal court" in Battle Creek by its express terms, cannot, however, be regarded as such in actual purpose in view of the fact that the jurisdiction of the court is not limited to municipal boundaries, that it does not relieve existing courts but essays to supplant the justices of the peace, and that it serves no distinctive municipal as distinguished from a general purpose. Accordingly it cannot be sustained as an act to establish such a court.—Attorney General ex rel. Hooper v. Loomis, 141 Mich. 547.

¶ 120. The joint resolution of the legislature (Pub. Acts 1901, pages 382-385) creating a board of auditors to audit the accounts against the disorganized county of Manitou and to apportion the claims of the former territory of said county, being unconstitutional on the ground of vesting judicial power in the board and precluding claimants from a proper review, was not sustainable on the alleged ground that the board had the same power to audit such claims as is possessed and exercised by officers of municipalities other than counties, as such officers exercised no judicial power but merely acted as agents of the municipalities, and their rejection of claims did not operate as an adjudication preventing the claimants securing redress in the courts.—Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

¶ 121. The joint resolution of the legislature (Pub. Acts 1901, pages 382-385) creating a board of auditors to audit accounts against the disorganized county of Manitou and to apportion the claims of the former territory of said county, being unconstitutional on the ground of vesting judicial power in the board and precluding claimants from a proper review, was not sustainable on the

ground that boards of supervisors and in Wayne county, auditors were permitted to audit claims, as Const., art. 10, § 10, gives such bodies that authority.—Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

¶ 122. The joint resolution of the legislature (Pub. Acts 1901, pages 382-385) creating a board of auditors to audit the accounts against the disorganized county of Manitou and apportion the claims to the former territory of said county, being unconstitutional as vesting judicial power in the board, the vice was not removed by the provision that an aggrieved party might resort to mandamus proceedings.—Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

¶ 123. The joint resolution of the legislature (Pub. Acts 1901, pages 382-385) creating a board of auditors to audit the accounts against the disorganized county of Manitou and to apportion the claims of the former territory of said county, being unconstitutional on the ground of vesting judicial power in the board and precluding claimants from a proper review, was not sustainable by reason of decisions that circuit court commissioners in claims against estates of decedents might exercise judicial powers, as the legislation assailed in such cases was maintained because it was older than the constitution and its validity had been recognied since the adoption of the constitution, and in addition retrial was provided for as to the decisions of such commissioners.—Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

§ 26. ——Extraneous matters; motive or purpose of statute.

Recourse to necessity of law, see also post ¶ 336.
Evasions of limitations and prohibitions by indirect legislation, see post § 113.
Destruction or prohibition under guise of the police power, see post § 98.

¶ 124. Where a legislature acts within the line of its constitutional powers, the motives of its action can never be judicially reviewed, nor can courts in any way determine the propriety of its enactments.—Fifield v. Close, 15 Mich. 505.

¶ 125. With the reason entertained by the legislature for the enactment of a law, courts have no concern, unless such reason appears upon the face of the law itself, or upon the legislative journals and not then, unless the purpose be one prohibited by the constitution.—Attorney General v. Parsell, 100 Mich. 170.

¶ 126. The fact that a legislative measure apparently meritorious, does not warrant a disregard of constitutional provisions designed as a public protection, the effect of which would be to take away such protection in cases where needed, through the practical nullification of the fundamental law.—People ex rel. Kent Co. Sup'rs v. Loomis, 135 Mich. 556.

¶ 127. When an act can only operate by violating a provision of the constitution, it cannot be upheld on the ground that the object contemplated by the legislature was different.—People ex rel. Attorney General v. Holihan, 29 Mich. 116.

¶ 128. In determining whether the construction of a street railway by a municipality on its streets is a forbidden work of internal improvement (Const., art. 14, § 9) the purpose or design of it as a legitimate improvement of highways or as an essentially different purpose may be looked to by the courts.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

§ 27. Extent and effect of invalidity; amendments and parts of statutes.

Effect of other provisions to permit validating construction, see also ante § 25.
Validity of original act as making question of validity of amendment immaterial, see post ¶ 136.
Effect of federal legislation to abrogate state laws, see post § 123.
Process under unconstitutitonal law as justification, see Sheriffs, IV, A.
Liability of justice for causing arrest under invalid law, see False Imprisonment; Justices of the Peace, II.
[Note. Whether or not a statute may be sustained in part, though another part is invalid, will usually depend on whether the parts are severable and can stand independently. This involves general construction of statutes, and therefore is treated in Statutes, V.]

¶ 129. An unconstitutional statute is no law; it cannot legally justify any action or nonaction; no rights can be founded upon it, nor can any person or persons be deprived of any rights or privileges because such a law has apparently been enacted and appears upon the statute book.—Adsit v. Osmun, 84 Mich. 420.

¶ 130. An unconstitutional statute is a statute only in form and lacks the force of law, and is of no more saving effect to justify action under it than if it had never been enacted.—Taggart, Attorney General ex rel. Mason v. Perkins, 73 Mich. 303; Michigan Sugar Co. v. Auditor General, 124 Mich. 674, writ of error dismissed in 185 U. S. 112, 46 L. ed. 829, 22 Sup. Ct. Rep. 581.

¶ 131. A statute unconstitutional in part may be valid in its remaining parts.—Brooks v. Hill, 1 Mich. 118; Smith v. Village of Adrian, 1 Mich. 495; Ames v. Port Huron Log Driving & Booming Co., 6 Mich. 266; Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139; People v. Mahaney, 13 Mich. 481; People ex rel. Attorney General v. Detroit Common Council, 29 Mich. 108; Mathias v. Cramer, 73 Mich. 5; Feek v. Township Board of Bloomingdale, 82 Mich. 393; Chambe v. Wayne Probate Judge, 100 Mich. 112. [Note. Many other cases exemplifying this rule will be found in Statutes, V.]

¶ 132. It is competent for the legislature in the same act to repeal any former one within its purview, although every other provision in the repealing act is unconstitutional.—Campau v. City of Detroit, 14 Mich. 276.

¶ 133. The unconstitutionality of Acts No. 183, Pub. Acts 1899, and No. 170, Pub. Acts 1903, amending the local option statute, does not render said statute as originally passed (Act 207, Pub. Acts 1889) unconstitutional. —People v. Eberle, 167 Mich. 477; affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

§ 28. Occasion and right to invoke constitution.

Loss of right by waiver and estoppel, or by failure to present question below, see post §§ 29, 30.

Declination to decide unnecessary or untimely question, see post § 31.

¶ 134. Under Comp. L. 1897, chapter 272, which requires prior officers to turn over all books and papers to their successors and gives the right to institute proceedings to compel such delivery, the respondent may raise the question of the constitutionality of the amending act under which the relator claims office. —Fillmore v. Van Horn, 129 Mich. 52.

¶ 135. Act No. 170, Pub. Acts 1903, is limited to an amendment of a single section of Act No. 183, Pub. Acts 1899, the Local Option Statute, and provides that the act shall not be construed to prohibit "the sale of wine or cider from home-grown fruit in quantities of not less than five gallons." Held, even if this amendment should be deemed unconstitutional as being class legislation, the petitioner in habeas corpus convicted for keeping a place where intoxicating liquors are sold, would not be entitled to a release. —In re Wilson, 160 Mich. 42.

¶ 136. Laws 1885, Act No. 134, entitled "An act to regulate the practice of pharmacy," was amended by Laws 1887, Act No. 196 (How. St., § 2287, ch. 8), so that the original exemption contained therein of retail dealers of patent and proprietary medicines was limited to dealers of three years' standing or more. Held, that whether this amendment was or was not unconstitutional, as granting a monopoly and as introducing an object not embraced in the title of the original act, was immaterial in a prosecution, under the provisions of the act, of a person not charged with vending such medicines; since if the amendment were invalid, the original act would remain in force governing the prosecution.—People v. Moorman, 86 Mich. 433.

¶ 137. A tax purchaser holding under deeds from the state the interest which the state had in the lands, which deeds are expressly subject to the conditions imposed by Pub. Acts 1897, No. 220, relating to notice of the right to reconveyance, etc., cannot urge that the act is unconstitutional because its provisions are not within its title.—John Duncan Land & Min. Co. v. Rusch, 145 Mich. 1.

¶ 138. The question whether a proviso in Pub. Acts 1901, No. 226, that "the provisions of this section requiring a ritualistic form of work shall not apply to the New Era Association of Grand Rapids," is class legislation and void, cannot be raised in an action on a benefit certificate of such association; and such association has a valid status as a corporation, organized under the fraternal society law, until the state, upon its own initiative or on relation of an interested person, moves in the matter.—Monger v. New Era Ass'n, 145 Mich. 683.

¶ 139. Whether or not the provisions of the cumulative sentence clauses in the indeterminate sentence law are valid or not is of no concern to one sentenced under that act for a crime done in prison, for the law would not be unconstitutional in its entirety even though those provisions were invalid. —People v. Cook, 147 Mich. 127.

¶ 140. A state statute providing for mechanics' liens on watercraft on account of work done or materials furnished will not be held to be unconstitutional on the ground that the seizure of the vessel, the subjection of her to sale and the proceeds thereof to distribution in the state court would be in conflict with the exclusive jurisdiction in admiralty of the courts of the United States in favor of maritime liens where the complaint on that ground is not made by a holder of a maritime lien.—Iroquois Transportation Co. v. Dalaney Forge & Iron Co., 205 U. S. 354, 51 L. ed. 836, 27 Sup. Ct. Rep. 509; affirming 142 Mich. 84.

¶ 141. An act annexing territory to a city cannot be objected to as invalid for subjecting the annexed territory to local assessments

at the same time from two different municipalities for the same purposes, where it does not appear that at the time the act took effect any taxes or assessments were levied or collected for grading or paving of streets, building sidewalks, drains or sewers, etc.—Attorney General ex rel. Crane v. Amos, 60 Mich. 372.

¶ 142. Where it is not shown or claimed that any property owner within a highway improvement assessment district was assessed in excess of actual resultant benefits the question of violation of the constitutional requirement of uniformity of taxation by Pub. Acts 1915, No. 59, relating to the construction and improvement of highways, in providing in counties under the county highway system that the cost of the improvement shall be apportioned between the special assessment district, the affected township, and the county, while in counties retaining the township system the total amount is to be assessed against the special assessment district and the township or townships through which the road passes, thus placing a greater burden on the townships in the latter case than in the former, and relieving the county from assessment, is immaterial.—Loomis v. Rogers, 197 Mich. 265.

¶ 143. The fact that the proceeds of a tax levied upon the property of telephone companies under Pub. Acts 1909, No. 49, How. St., 2nd Ed., § 1955 et seq., providing for the assessment of their property on the ad valorem basis, but exempting from taxation companies having gross receipts less than $500, go specifically to the primary school fund and do not operate, directly or indirectly, to reduce the tax burden of the telephone companies, and that complaint is not made by some company improperly placed in the taxed class, does not support the contention that complainants suffered no harm from alleged discriminations, and so have no cause to complain.—The Michigan Telephone Cases, 185 Fed. 634; affirmed 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; 229 U. S. 335, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

¶ 144. The question of the constitutionality of Local Acts of 1889, No. 455, tit. 5. § 24. authorizing the city of Saginaw to issue its bonds for the purpose of raising money with which to purchase a site and erect thereon a city hall in said city, and making it the duty of the common council to proceed immediately to procure such site, and construct said city hall within designated boundaries as to location, will not be determined in a suit by a taxpayer to restrain the common council from issuing such bonds, where the action of the council appears to be voluntary and under no compulsion from the legislature.—Carlisle v. City of Saginaw, 84 Mich. 134.

§ 29. ——Waiver, estoppel and laches.

¶ 145. The public authorities may be precluded by acquiescence from disputing the validity of legislation under which townships are organized and have been for years performing their usual functions.—People v. Maynard, 15 Mich. 463.

¶ 146. Where a foreign corporation not only sells its products through itinerant agents, but comes within the state, asking to have its articles of association filed here, and that it be put on the same footing with home corporations, if it pays under protest the franchise fee required by Laws 1883, Act No. 79, it cannot recover back such fee on the ground that the statute is in conflict with the power of congress to regulate commerce between the states.—Moline Plow Co. v. Wilkinson, 105 Mich. 57.

¶ 147. A municipality will not be estopped to deny the validity of an act on the ground that as defendant in a prior suit involving the same act which was settled without deciding as to its constitutionality, it had contended against its constitutionality.—Cote v. Village of Highland Park, 173 Mich. 201.

¶ 148. A litigant is estopped from attacking the validity of a statute under which he is seeking relief.—Flint & P. M. R. Co. v. Rich, 91 Mich. 293.

¶ 149. The objection to the log-lien law (Sess. L. 1881, Act No. 145), that it provides for seizure without service of process of any kind, cannot be raised by parties shown to have been in contract relation with defendants, and to have been personally served with the process by which the suit was begun.—Shaw v. Bradley, 59 Mich. 199.

¶ 150. The objection, that under a statute for condemning land for streets there was no provision for such a jury as the constitution (article 18, § 2) requires, is not waived by taking a nugatory appeal from the proceedings before a justice to the circuit court, where the appeal is provided by the invalid statute and falls with it as an integral part of it.—City of Mt. Clemens v. Macomb Circuit Judge, 119 Mich. 293.

¶ 151. A voluntary payment of personal taxes for one year assessed against a corporation under an invalid statute, has no bearing upon the right of such corporation to raise the question of the validity of such statute, in a suit to recover taxes subsequently assessed thereunder.—City of Detroit v. Mackinaw Transportation Co., 140 Mich. 174.

¶ 152. A provision in a tax law (Pub. Acts 1893. No. 206), making the tax deed conclusive of title in the tax purchaser, if void, does not present a constitutional question which can be urged to other portions of the statute

involved in a petition for writ of assistance to the purchaser based on sale under a decree, and where the only irregularities urged are such as occurred prior to the decree and were concluded thereby.—Ball v. Ridge Copper Co., 118 Mich. 7.

¶ 153. Where, under the federal constitution, and after forty years of practical construction, a state has the right to choose presidential electors by districts, such right is not lost by nonuser although a different method has generally been followed for sixty years.—McPherson v. Secretary of State, 92 Mich. 377; affirmed 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

§ 30. ——Questions not presented on trial.

The general doctrine that questions for error or appeal must be seasonably raised below and saved by exception is treated in Saving Questions for Review.

The court of review will not go into questions not presented and not properly saved for review. See Appeal, XII, A. B.

On error or appeal unnecessary questions, especially constitutional ones, will ordinarily not be decided. See Appeal, XII, A.

¶ 154. A legislative act will not be declared unconstitutional unless the point is presented in such form as to render its decision imperative.—Hoyt v. Jeffers, 30 Mich. 181; Detroit, H. & I. R. Co. v. Forbes, 30 Mich. 165; Upton v. Kennedy, 36 Mich. 215.

¶ 155. The constitutionality of a statute will not ordinarily be considered by the Supreme Court where no jurisdiction was obtained in the proceedings taken under it.—Fox v. Holcomb, 34 Mich. 298.

¶ 156. Courts have not an immediate and general supervision of the constitutionality of statutes, and it is only in a litigated case where the question arises that it is the duty of a court to determine whether an act of the legislature is constitutional or not.—Chicago & G. T. R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176. 12 Sup. Ct. Rep. 400; affirming 83 Mich. 592.

¶ 157. A street railroad company cannot complain on writ of error that Pub. Acts 1893, No. 171, § 5 (How. St., 2nd Ed., § 6868), providing that the commissioner of railroads shall, as soon as possible after the passage of the act, examine the crossings of the tracks of railroads and street railroads then existing, and order such changes made in the manner of such crossings, or such safeguards for protection against accidents to be provided thereat, as in his judgment ought to be so made or provided, and shall apportion any expense incidental thereto between the companies affected, as he may deem just and reasonable, is unconstitutional because not providing for notice where, in its application for writ of mandamus to vacate the order of the commissioner of railroads requiring it to pay a portion of the expense of constructing and operating safety appliances at a grade crossing of a steam railroad it claimed that such order was invalid because it deprived such street railroad of its property without due process of law and of the equal protection of the laws, and the issue framed in the cause went to a final hearing.—Detroit, Ft. W. & B. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; affirming 127 Mich. 219.

§ 31. ——Declination of unnecessary or untimely questions.

Where person raising question is not entitled or affected, see ante § 28.

Right of Supreme Court to decide or refuse to decide when unnecessary, see Appeal, § 264.

Declination on certiorari of constitutional questions not material to decision, see Certiorari, ¶¶ 171, 172.

¶ 158. The constitutionality of statutes will not be passed upon where the case can be determined without doing so.—Powell v. Eldred, 39 Mich. 552; Morrison v. Sessions' Estate, 70 Mich. 297; Donough v. Dewey, 82 Mich. 309.

¶ 159. The validity of particular provisions in a statute cannot properly be decided unless expressly involved in a case, and are not passed on where the only questions concern other provisions in the law.—Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 160. Constitutional questions will not be passed upon when other questions are raised by the record which dispose of the case.—People v. Quider, 172 Mich. 280.

¶ 161. It is the settled policy of the court to refuse to pass upon the constitutionality of a statute when a case may be disposed of on other grounds.—People v. Hall, 185 Mich. 54. (Per Brooke, C. J., and McAlvay, J.)

¶ 162. The constitutionality of an act will not be considered where a decision of the case can be reached on other grounds.—Negaunee Nat. Bank v. Le Beau, 195 Mich. 502.

¶ 163. Upon an appeal by defendant from a conviction of having in his possession and under his control wild ducks with intent to ship them out of the state, the question whether or not the seizure of the ducks was by due process of law need not be decided.—People v. Van Pelt, 130 Mich. 621.

¶ 164. The question whether Pub. Acts 1909, No. 300, § 7, as amended by Pub. Acts 1911, No. 139, § 7 (How. St., 2nd Ed., § 6530), relating to the establishment of switching connections between railroads, is void upon its face because the severity of the penalties preclude an appeal to the courts against such provisions except at such risks and costs that they should not be compelled to incur will not be considered until the attempted enforcement thereof, since such provision for penalties is in a section by itself.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; affirming 198 Fed. 1009.

II. CONSTITUENT ORGANS AND DEPARTMENTS OF GOVERNMENT.

A. IN GENERAL; INTERFERENCE AND CONFLICT.

§ 32. Distribution of powers in general.

Powers in respect of particular subjects and matters, see post II, B.

Between states and nation, see post IV.

Judicial power defined, see post § 34.

Powers of local government divisions, see post, II, C.

Nondelegability of powers, see post II, D.

Interference by one department with another, see post §§ 36-44.

Distribution of powers under former constitution as aid in construction, see ante ¶ 30.

Judicial intervention nonessential to due process, see post § 127.

Jurisdiction of courts in general, see Courts, V.

Legislative and judicial functions of adoption and comity respecting foreign laws, see Conflicting of Laws, § 2, ¶ 3.

Ordaining power and scope of cities and villages, and validity of ordinances, see Municipal Corporations, VI, IX.

Constitutional division of powers, see Const. art. IV, §§ 1, 2.

Powers inherent in or guaranteed to the people, see Const., art. II, § 1 et seq.

General provisions as to organization, procedure and powers of legislative department, see Const., art. V.

General provisions as to executive department, see Const., art. VI.

General provisions as to judiciary, see Const., art. VII.

¶ 165. The apportionment of powers to one of the three co-ordinate departments of every free government—executive, legislative and judicial—is understood to be a prohibition of its exercise by either of the others. By a system of checks and balances of government, each is a restraint upon the rest, and if these checks and balances are disregarded, and power is usurped or abused, the remedy is by impeachment, and not by the assertion by one department of superior authority over another, its equal under the constitution.—People ex rel. Sutherland v. Governor, 29 Mich. 320.

¶ 166. The three branches of government are to be kept as distinct as possible; and legislation is invalid that attempts to confer on one powers that under the constitution belong to another.—Houseman v. Kent Circuit Judge, 58 Mich. 364.

§ 33. ——Changes by the constitution.

See also post ¶¶ 214, 866.

Amendment empowering legislature to abolish highway commissioner's office, see post ¶ 1132.

¶ 167. The constitutional amendment, Pub. Acts 1903, page 452, expressly authorizing the passage of an indeterminate sentence law negatives any argument of unconstitutionality of such a law on the ground that the legislature assumes to exercise the judicial function of imposing a sentence.—In re Campbell, 138 Mich. 597.

§ 34. "Courts" and "judicial power."

"Court" as including jury as part thereof, see also post ¶ 280.

"Judicial officers" within provision requiring election, see post § 265.

Requiring audit or approval of claim by judge, see post § 40.

Nature of powers given to commissioners, see post § 58.

Nature of the power of conservators of the peace, see post § 64.

Power of legislature to change, create or confer power, see post §§ 51-65.

General law as to nature, incidents, jurisdiction and power of courts, see Courts, V; Municipal Courts; Probate Courts.

Powers of clerks, commissioners and other ministerial officers of courts, see generally Courts, V.

Nature of office of referee of court, see Officers, I; Reference, I.

¶ 168. The word "courts," as used in Const., art. 6, § 1, means permanent organizations for the administration of justice, and not a special tribunal for a particular exigency.—Streeter v. Paton, 7 Mich. 341; Shurbun v. Hooper, 40 Mich. 503.

¶ 169. Commissioners on the estate of a deceased person act judicially in passing on claims, but are not a "court" in the constitutional sense, and Comp. L. 1871, chap. 158, How. St., ch. 224, in authorizing their appointment, is not unconstitutional.—Shurbun v. Hooper, 40 Mich. 503.

¶ 170. The State Board of Mediation and Arbitration is a "court" and within the

power of the legislature to establish a court of conciliation (Const., art. 6, § 23), though such court has not the power to make enforceable judgments and decrees and the decisions of the court must be left to the assent of the parties.—Renaud v. State Board of Mediation, 124 Mich. 648.

¶ 171. The Industrial Accident Board is not a court within the meaning of the law. —Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8.

¶ 172. The judicial power involves the power to hear and determine the matters to be disposed of, and this can only be done by some order or judgment which needs no additional sanction to entitle it to be enforced. No action that is merely preparatory to an order or judgment to be rendered by some different body can be properly called judicial. —Underwood v. McDuffee, 15 Mich. 361.

¶ 173. The distinction pointed out between judicial action and legislative and administrative action.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 173a. The power to take bail in criminal cases is not a judicial power within the meaning of Const., art. 6, § 1, conferring the judicial power of the state upon certain specified courts. But if it were, art. 6, § 16, would authorize the legislature to confer such power on circuit court commissioners.—Daniels v. People, 6 Mich. 381.

¶ 174. Judicial power is limited to litigation between parties in conflicting interest. —Lloyd v. Wayne Circuit Judge, 56 Mich. 236.

¶ 175. The removal of a person from his office for cause involves the exercise of judicial power.—People ex rel. Clay v. Stuart, 74 Mich. 411.

¶ 176. Taking a complaint and issuing a warrant of arrest for a criminal offense—e. g., keeping open a saloon on Sunday, involves judicial action, power to perform which cannot be conferred upon a clerk, and therefore Pub. L. 1885, Act No. 127, so far as it seeks to confer such power upon the clerk of the police court of Grand Rapids, is invalid (Const., Art. VI, § 1.—People v. Colleton, 59 Mich. 573.

§ 35. Official discretion as judicial power.

See also ante ¶ 173.

¶ 177. The exercise of discretion in administrative affairs does not necessarily make such action judicial.—Feek v. Township Board of Bloomingdale, 82 Mich. 393.

¶ 178. Laws 1887, Act No. 285, regulating the transaction of business by foreign insurance companies, does not attempt to confer judicial powers upon the commissioner of insurance, the revocation of the certificate therein provided being a mere ministerial duty.—Hartford Fire Insurance Co. v. Raymond, 70 Mich. 485.

¶ 179. Laws of 1887, Act No. 293 (How. St., §§ 234b-234l), providing for election contests, makes it the duty of the board of examiners merely to recount the votes as they find them in the ballot boxes, and not to pass upon any question of fraud or irregularity, so that the duties of the board are ministerial, and the act is not unconstitutional as conferring judicial powers upon such board.—Andrews v. Otsego Probate Judge, 74 Mich. 278.

¶ 180. Under Public Acts 1899, No. 262, § 98, by which the auditor general is authorized to issue a certificate of error in tax sales, the fact that the auditor general is required to exercise duties requiring judgment and determination in controverted cases, does not make his act judicial and in violation of section 1, article 6 of the Constitution.—Northrup v. Maneka, 126 Mich. 550.

¶ 181. Pub. Acts 1899, No. 237, sec 3 subd. 6, as amended by Pub. Acts 1903, No. 191, providing that the board of registration may at its discretion revoke the certificate of registration in medicine of any registered practitioner who inserts any advertisement in any newspaper relative to venereal diseases is not unconstitutional as conferring upon the board judicial power in such revocation.—Kennedy v. State Board of Registration in Medicine, 145 Mich. 241.

§ 36. Executive interference with judiciary.

See also post ¶ 1172.
Nature of judicial power, see ante § 34.
Discretion as involving judicial exercise, see ante § 35.
Judicial interference with executive, see post § 41.
Designating judges from other circuit to assist, see post § 60.
Relative functions in revising sentence and granting pardons or paroles, see post § 66.

¶ 182. Courts cannot lawfully be subjected to executive or ministerial interference in the exercise of their functions, and should not submit to it or receive directions for any purpose except from such other courts as by the constitution have superintending control over inferior courts.—Allor v. Wayne County Auditors, 43 Mich. 76.

§ 37. Executive encroachment on legislative.

Approval or veto of bills by governor, see Statutes, I.

¶ 183. Under Const., art. 4, § 1, the legislative power is vested in the senate and house of representatives and the governor has no power to make laws, wherefore he cannot insert an enacting clause in a bill coming to him for signature.—People v. Dettenthaler, 118 Mich. 595.

§ 38. Legislative encroachment on judiciary or executive.

Nature of judicial power, see ante § 34.

Judicial encroachment on legislative, see post §§ 42-44.

Relative powers as to offices and appointments, see post § 46.

Legislative provision for vacancy appointments, see post § 46.

In tax matters, see post § 47.

Interference with records, see post § 48.

Creating new courts, changing old ones, altering places, and changing or conferring jurisdiction or procedure, see post §§ 51-65.

Interference with power over contempts, see post § 63.

In respect to pardons and paroles, see post § 66.

Legislative audits, invalidity, see post § 280

Presumption against intent to encroach or displace power, see ante § 23.

Relative functions of legislature and judiciary in revoking or repealing corporate charters and franchises, see Corporations, IV, XXIII.

¶ 184. The line between judicial and legislative authority is distinct. The legislature is not authorized to exercise any portion of the judicial power. It cannot set aside a judgment or decree, nor can it even require the judiciary to give a new hearing in a case once passed upon.—People ex rel. Butler v. Saginaw County Sup'rs, 26 Mich. 22.

¶ 185. The legislature cannot, except in a few cases where it is needful to enable it to perform properly its legislative functions, exercise authority judicial in its nature.—Flint & F. Plank Road Co. v. Woodhull, 25 Mich. 99.

¶ 186. Where the legislature passed an act not purporting to be based upon a judicial finding that a private corporation had violated its charter, but simply providing that its charter "be and the same is hereby repealed," it was held that even if such act could be regarded as a legislative determination that a violation of charter had taken place, it would nevertheless be void as an attempted exercise of judicial power by the legislature.—Flint & F. Plank Road Co. v. Woodhull, 25 Mich. 99.

¶ 187. The question whether a law has formerly existed is not one for legislative, but for judicial, cognizance.—Trask v. Green, 9 Mich. 358.

¶ 187a. The joint resolution of the legislature (Pub. Acts 1901, pages 382-385) creating a board of auditors to audit the accounts against the disorganized county of Manitou and apportion the claims to the former territory of said county, is unconstitutional as vesting judicial power in the board, contrary to Const., art. 6, § 1, vesting such power in the courts.—Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

§ 39. Imposing nonjudicial functions on courts.

Taking from jurisdiction to give to nonjudicial officers, see post § 59.

¶ 188. A circuit judge cannot be compelled to perform functions not judicial.—Underwood v. People, 32 Mich. 1; Houseman v. Kent County Circuit Judge, 58 Mich. 364.

¶ 188a. A circuit judge cannot be compelled to perform functions not judicial, and How. St., § 1730, is void for seeking to impose upon a court such administrative duties as the appointment of surveyors to examine the premises assessed, for the purpose of enabling the court to relevy a tax.—Houseman v. Kent Circuit Judge, 58 Mich. 364.

¶ 189. The statute providing for the antemortem probate of wills is inoperative because arranging for a proceeding extra-judicial in its nature and inconclusive.—Lloyd v. Wayne Circuit Judge, 56 Mich. 236.

¶ 190. The inheritance tax, provided in Pub. Acts 1899, No. 188, is not unconstitutional as imposing duties not judicial upon the judge of probate, since the collection of the tax is an incident to the settlement of the estate under his administration.—Union Trust Co. v. Wayne Probate Judge, 125 Mich. 187.

¶ 191. Pub. Acts 1905, No. 272, providing for the designation of places for holding terms of the circuit court for the 37th judicial district (Calhoun county) by providing for the inspection of the court building and jail at Battle Creek by the circuit judge does not thereby confer legislative power on the judge, but the authority given is more ministerial than judicial, and is such power as may be granted to and exercised by him.—McCall v. Calhoun Circuit Judge, 146 Mich. 319.

§ 40. ——Judicial audit of claims.

Conferring on board auditing power reposed in courts, see ante ¶ 187a.

¶ 192. While duties of one department cannot be cast on another, a statute imposing upon the circuit judge the duty of auditing a coroner's account against the state is valid, and mandamus lies to compel such action.—Locke v. Speed, 62 Mich. 408.

¶ 193. The determination of the circuit court in allowing a claim by a coroner for an inquest upon a stranger, the cost of which is, by virtue of Comp. L. 1897, § 11828, paid by the state when allowed by the circuit court, involves the exercise of judicial discretion and judgment and is in that sense a judicial act.—In re Toepel, 139 Mich. 85.

§ 41. Judicial interference with executive or administrative powers.

Nature of judicial power, see ante § 34.

Executive interference with judiciary, see ante § 36.

Irreviewableness of executive action as a denial of justice, see post § 189.

Judicial power to review action of board of medical registration, see also Medicine and Surgery.

[Note. The disability of the judiciary to interfere is usually exemplified in decisions denying relief on the ground that to do so would, in the particular instance be an encroachment or assumption. Furthermore, the relief often has to be limited or adjusted so as to avoid such a result. For cases of this kind see the specific topics treating of the matter affected, such as Taxes, VI, A, or of the remedy sought, such as Certiorari, §§ 17-21; Injunctions, II, D; Mandamus, III.]

¶ 194. Administrative questions are not in their nature judicial and are not subject to review.—Benjamin v. Manistee River Improvement Co., 42 Mich. 628.

¶ 195. The judicial power cannot interfere with the legitimate discretion of any other part of government.—City of Detroit v. Wayne Circuit Judge, 79 Mich. 384.

¶ 196. As to all authority specially confided to the governor, whether by constitution or statute, it will be presumed that conclusive reasons required it to be confided to him, as an authority properly and peculiarly, if not exclusively, pertaining to the executive department, and therefore not subject to coercion by judicial process.—People ex rel. Sutherland v. Governor, 29 Mich. 320.

¶ 197. The action of the executive in a matter reposed in his discretion is conclusive on the courts.—People ex rel. Sutherland v. Governor, 29 Mich. 320.

¶ 198. The long established practice of an executive department should not be disturbed unless in violation of a statute, or so unjust and inequitable as to deprive persons or municipalities of a substantial right.—Stevens v. Saginaw County Sup'rs, 62 Mich. 579.

§ 42. Judicial interference or control in legislative matters.

In tax matters, see post § 47.

Legislative encroachment on judiciary, see ante § 38.

Inability of courts to compel by mandamus the keeping of legislative journals according to constitution, see Mandamus, I.

¶ 199. The state legislature has power to refuse to perform even a contract, and when it forbids the application of money in the state treasury to any particular use, no court can interfere.—Saniiac County Sup'rs v. Auditor General, 68 Mich. 659.

¶ 200. Where legislative bodies are made the judges of the election and qualification of their own members, and are vested with power to determine contested elections, their action is final and cannot be reviewed by the courts.—Auditor General v. Menominee County Sup'rs, 89 Mich. 552.

¶ 201. Under the division of powers in the constitution it is the duty of the courts not to enact but to expound the law, not to legislate but to construe legislation and to apply the law as found and written by a co-ordinate branch of the state government.—Cooke v. Holland Furnace Co., 200 Mich. 192.

¶ 202. A portion of a decree by which a court assumes the right to establish reasonable rules and regulations for the erection and maintenance of telegraph and telephone lines and poles upon city streets is void, as such action is legislative or administrative, and not judicial, and while the court may require a city to adopt reasonable rules and regulations, and may pass upon the validity of such action when taken, this is the extent of its authority.—Michigan Tel. Co. v. City of St. Joseph, 121 Mich. 502.

§ 43. ——Power to declare statutes invalid.

Policy and inclinations of courts in construing statutes questioned for validity, see ante §§ 6-31.

Restriction of power to expounding and construing law, see ante ¶ 201.

Persons entitled to raise question, and interest entitling persons, see ante §§ 28-30.

Proper presentation of question, see ante § 30.

Declination of questions not necessary to decision or not timely, see ante § 31.

¶ 203. The general jurisdiction of the Supreme Court to determine the constitutionality of legislative enactments is not limited to such statutes as deny or exclude political rights.—Giddings v. Secretary of State, 93 Mich. 1.

¶ 204. The discretion of the legislature in apportioning senatorial districts is not absolute, and the constitutionality of a statute making such apportionment is reviewable.—Giddings v. Secretary of State, 93 Mich. 1.

¶ 205. The Supreme Court has jurisdiction in a proper case to determine the constitutionality of an act of the legislature rearranging senatorial districts.—Giddings v. Secretary of State, 93 Mich. 1.

¶ 206. The duty of the formation of senate districts and of determining the number of districts into which a county may be divided, is reposed by the constitution in the legislature, and this court assumes to determine only, whether in any particular case, the legislature has exercised a constitutional discretion.—Williams v. Secretary of State, 145 Mich. 447.

¶ 207. Justices of the peace should not assume to hold statutes to be unconstitutional. —Ortman v. Greenman, 4 Mich. 291.

[Note. In view of the later decision in Robinson v. Miner, 68 Mich. 549, wherein the action of a police justice in refusing to act under an unconstitutional statute was sustained, the foregoing dictum is weakened; although it did not assume to do more than reprehend the assumption of power by a justice of the peace to declare a law invalid where that was urged as a defense to an action. Editor.]

§ 44. ——Rate fixing.

See also ante ¶ 202.
Particular instances, see post § 50.

¶ 208. The legislature has power to fix the maximum rates to be charged for passenger service, and the extent of judicial interference is protection against unreasonable rates.—Chicago & Grand Trunk R. Co. v. Wellman, 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400, affirming 83 Mich. 592.

¶ 209. Courts cannot either make railroad rates, or review and revise those made by competent authority, and unless the law-making body so far transgresses fundamental law as to commit a legislative theft, the courts may not interfere.—Ann Arbor R. Co. v. Fellows, 236 Fed. 387.

¶ 210. The action of the Board of Control of the St. Mary's Falls Ship Canal in fixing tolls for use of river improvements is not reviewable in the courts.—Benjamin v. Manistee River Improvement Co., 42 Mich. 628; Manistee River Improvement Co. v. Lamport, 49 Mich. 442.

B. RELATIVE POWERS AND FUNCTIONS ON PARTICULAR SUBJECTS.

§ 45. Departmental and divisional changes.

Extension of legislative powers by constitutional amendments, see ante § 33.
Local self government and encroachments thereon, see post, II, C.
Delegations of power in formation of new divisions, see post § 88.
Places or terms for courts, see post § 53.
In respect to offices and elections, see post § 46.
Apportionment laws, see post §§ 258-260.
Annexations designed to alter apportionment districts, see post ¶ 526.
Formation of new counties or division of old, see post § 69.
Changing school districts, see post § 72.
As affecting right to vote, see post § 255.
Division of counties in forming apportionment districts, see post § 259.
Change of local divisions as change of apportionment, see post § 260.
Local powers of cities and villages, see Const. Art. VIII, §§ 20-25.

§ 46. Elections, appointment and removal of officers.

Legislative power to judge of election and qualifications of own members, see also ante § 42.
General power over election of officers, see post, XII.
Constitutional modes of selection, see post §§ 74, 75, 265-267.
Power to determine mode of selection, see post §§ 265-267.
Provision for election of "judicial officers," see post § 265.
Authorizing commissioner to act as probate judge in case of vacancy, see also post ¶ 283d.
Judicial powers involved, see ante § 34.
Election contests, see also ante § 35, ¶ 179.
Powers affected by policy of local self government, see post II, C.
Designation of local officers as infringement on local government, see post § 74.
Local rights as to duties and compensation, see post § 76.
Power over townships, see post § 73.

¶ 211. Short of destruction of the elective franchise the propriety of regulations of the franchise is for the legislature to the exclusion of the courts.—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 212. Const., art. 8, § 3, vesting in the governor the power to fill a vacancy in any

state office with only the limitation that it shall be with the advice and consent of the senate, if in session, and hence giving the power to the governor to fill the vacancy for the entire unexpired term, does not prevent the legislature from providing in creating the board of state tax commissioners (Pub. Acts 1899, No. 154, § 145), that an appointee to fill the vacancy shall hold office only until the next meeting of the legislature; the office in question is not a constitutional office.—Attorney General ex rel. Dust v. Oakman, 126 Mich. 717.

¶ 212a. Under § 20, Art. VII, of the Constitution, the power to fill a vacancy in the office of judge of the superior court of the city of Grand Rapids, rests in the governor.—Attorney General ex rel. Danhof v. Renihan, 184 Mich. 272.

¶ 213. The power of appointment to office is not essentially an executive function and there is nothing in the constitution to prevent the legislature from providing for the appointment of a city park commissioner by the common council instead of by the mayor.—Attorney General ex rel. Maybury v. Bolger, 128 Mich. 355.

¶ 214. Comp. L. 1871, § 618 (How. St., § 651), permitting the governor to remove any state of county officer except the state treasurer and judges, is void, because at the time it was adopted the governor had no judicial power under the constitution.—Dullam v. Willson, 53 Mich. 392.

¶ 215. The governor cannot, by any act of his own, enlarge the power of removal of county officers granted him by the legislature.—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 216. Under Const., art. 12, § 7, the legislature may vest in another department than the judicial the question whether cause exists for the removal of a county officer, and How. St., § 653, which vests such determination in the governor, is constitutional.—People ex rel. Clay v. Stuart, 74 Mich. 411.

¶ 217. Laws 1893, Act No. 118, which provides for the appointment by the board of control of the House of Correction and Reformatory at Ionia of a warden, who shall be removable by the board for cause, after opportunity has been given him to be heard upon written charges, is not in conflict with Const., art. 12, § 8, which vests in the governor power to remove from office certain state officers, nor with Const., art. 8, § 2, which prohibits the exercise by any person belonging to one department of the government of the powers properly belonging to another, except in the cases expressly provided in the constitution.—Fuller v. Attorney General, 98 Mich. 96.

¶ 218. How. St., § 653, which authorizes the governor, in certain cases, to remove officers chosen by the electors of cities and villages, is valid, under Const., art. 15, § 13, conferring upon the legislature exclusive authority over the incorporation and organization of cities and villages, and article 12, section 7, requiring the legislature to provide by law for the removal of any officer elected by a county, township or school district.—Attorney General v. Common Council of Detroit, 112 Mich. 145.

¶ 219. Const., art. 12, § 8, empowering the governor during time the legislature is not in session to remove from office certain state officers for "gross neglect of duty, or for corrupt conduct in office," or for any other misfeasance or malfeasance therein, is not to be denied its application and force where the assigned ground is "gross neglect" because article 12, section 1, conferring sole power of impeachment on the legislature describes it as power of impeaching civil officers "for corrupt conduct in office," and there is no inconsistency or repugnancy between those provisions or any exclusiveness of the remedy by impeachment, even if they be so construed that the governor may have more grounds on which to act than are open for impeachment.—Attorney General ex rel. John T. Rich, Governor v. Jochim, 99 Mich. 358.

§ 47. Tax and assessment matters.

Limitations on taxing power, see post §§ 152, 177, 227, 274; and see generally Taxes, I.
Discretion of officers as judicial assumption, see ante § 35.
Imposing on court powers relating to assessments, see also ante ¶ 188a.
Imposing duties in collection on probate court, see also ante § 39, ¶ 190.
Giving court commissioners power to pass on tax titles, see also post ¶ 283a.

¶ 220. The question of what notice shall be given of special assessments and how it shall be given, belongs to the legislative department of government and provisions therefor made by it will be upheld by the courts unless they clearly appear to result in denial of justice.—Auditor General v. Hoffman, 132 Mich. 198.

¶ 221. Where the auditor general has made changes in the debits and credits on his books as between certain counties, a legislative joint resolution ordering them restored to their former condition, but leading the respective rights of the counties open to subsequent settlement, is not objectionable as an assumption of judicial authority.—Clare Supervisors v. Auditor General, 41 Mich. 182.

¶ 222. The establishment of a special assessment district, in the one instance by the legislature, and in the other instance by the common council, is the exercise of a legislative power with which the courts will not ordinarily interfere.—Voight v. City of Detroit, 123 Mich. 547; affirmed in 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337.

¶ 223. General Tax Law, § 127 (Pub. Acts 1893, No. 206, as amended by Pub. Acts 1899, No. 107) making it the duty of the auditor general and commissioner of the state land office to determine when state tax lands shall become state homestead lands is not unconstitutional upon the ground that the making of said determination is a judicial act which under the constitution must be performed by a court, since it is in no sense a judicial act, because it determines no private right.—Griffin v. Kennedy, 148 Mich. 583.

§ 48. Power of eminent domain.

The power and its limitations, see Eminent Domain.

¶ 224. The appropriation of private property does not come under the "judicial power," as it is located under the constitution in courts, and except for the constitution the nature of the tribunal of condemnation would have been discretionary with the legislature. —Grand Rapids, L. & D. R. Co. v. Chesebro, 74 Mich. 466.

§ 49. Custody and control of public funds, records or property.

Power of legislature as to printing reports of Supreme Court, see post § 279.

Interference with local self government, see post §§ 70, 71.

Existing or vested right of officer to custody of funds, see also post ¶ 509.

Power of court over its own records, see Courts, V; Judgments, III, V; Records.

¶ 225. It is within the power of the legislature to insure the safety of county funds by providing for their deposit notwithstanding the fact that the county treasurer is a constitutional officer, intrusted with the custody of such funds.—Board Sup'rs Gratiot Co. v. Munson, 157 Mich. 505.

¶ 226. The register of deeds is a constitutional officer, but the conditions under which deeds are entitled to record are entirely within the discretion of the legislature, and the court cannot declare them void because they are harsh.—Van Husan v. Heames, 96 Mich. 504.

¶ 227. The fact that, by the terms of the Tax Law of 1893 (Pub. Acts 1893, No. 206, § 67), the tax record, to which the decree refers for a description of the lands affected, and for the amounts decreed against them, is to be delivered to the county treasurer, in whose office it is to remain "except as needed in the office of the county clerk," does not render the act unconstitutional, as relieving the court from the necessity of entering a complete decree, to be retained in its own custody, since the court may at any time repossess itself of the tax record.—Merserean v. Miller, 112 Mich. 103.

¶ 228. The intention of the legislature in passing Pub. Acts 1905, No. 79, amending Comp. L. 1897, § 2622, providing that the county surveyor shall keep his field notes and other records in a fireproof vault in an office at the county seat to be designated by the board of supervisors, was to seek a place of safety therefor when they were not in use by him, and the legislature had the right to enact such a statute.—Grand Traverse County Sup'rs v. Allyn, 144 Mich. 300.

§ 50. Regulation of public services and rates.

Judicial encroachment on legislative functions, see also ante § 44.

Regulation as a general function of the state through the legislature, see post § 96.

Administration of the regulative power, see Public Service.

¶ 229. It is for the legislature and not for the courts to determine what are reasonable maximum rates of charges for the transportation of passengers and freight on the different railroads of the state, under the power conferred by Const., art. 19a, § 1.—Wellman v. Chicago & G. T. R. Co., 83 Mich. 592; affirmed 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

¶ 230. Pub. Acts 1907, No. 312, § 26, gives the courts authority to decide whether rates prescribed by the railroad commission are reasonable, and if they find them unreasonable to declare them invalid, and turn over the matter to the commission to make new rates. Held, the act is not unconstitutional as giving the courts power to fix rates.—Michigan Cent. R. Co. v. Wayne Circuit Judge, 156 Mich. 459.

¶ 231. The action of the Michigan Railway Commission in fixing a rate is not a legislative act upon its part, but is only administrative or ministerial in its function in putting into effect the legislative will which has been previously declared by the legislature.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 160 Mich. 355.

¶ 232. The establishment of railroad rates is a legislative and not a judicial function. —Detroit & M. R. Co. v. Michigan Railroad Commission, 203 Fed. 864; affirmed in 239 U. S. 356, 60 L. ed. 327, 36 Sup. Ct. Rep. 114.

¶ 233. Whether a railroad rate or return is reasonable is a problem with a double aspect, legislative and judicial.—Detroit & M. R. Co. v. Michigan Railroad Commission, 203 Fed. 864; affirmed in 239 U. S. 356, 60 L. ed. 327, 36 Sup. Ct. Rep. 114.

¶ 234. Pub. Acts 1909, No. 300, § 26, How. St., 2nd Ed., § 6549, providing that any common carrier, being dissatisfied with any order of the railroad commission fixing rates may, within 30 days after issuance of the order, commence an action in the circuit court to vacate such order on the ground that the rates fixed are unlawful or unreasonable; that the circuit court may affirm, vacate or set aside the order of the railroad commission in whole or in part, and make such order or decree as the court shall decide to be in accordance with the law and facts; that if, upon the trial of the action new and additional evidence is heard which was not produced before the commissioner, the court, before proceeding to render judgment, unless it is stipulated to the contrary, shall transmit a copy of the evidence to the commission and stay the proceedings; that the commission shall consider such evidence and alter, modify, amend or rescind its order, and report its action to the court; that if the commission rescinds the order the action shall be dismissed, but if it shall alter, modify or amend the same, such altered, modified or amended order shall take the place of the original order, and judgment shall be rendered thereon, and if the original order shall not be rescinded or changed by the commission, judgment shall be rendered on it; that an appeal shall lie to the Supreme Court, and that in all actions the burden of proof shall be upon complainant to show that the order of the commission was unlawful or unreasonable, as the case may be, does not confer on the reviewing courts any legislative or administrative discretion in determining what is a "reasonable" rate, the word "reasonable" meaning not confiscatory, the determination of which is a judicial question.—Detroit & M. R. Co. v. Michigan Railroad Commission, 203 Fed. 864; affirmed in 239 U. S. 356, 60 L. ed. 327, 36 Sup. Ct. Rep. 114.

§ 51. Creation and change of courts.

Places or terms, see post § 53.
Interchanging law and chancery powers, see post § 57.
Juvenile Court Act as class legislation, see post § 216.
Construction against encroachment on constitutional courts or their jurisdiction, see ante § 25.
Necessity of two-thirds vote to enact laws creating courts, see Statutes, I.
Constitutional courts and courts which legislature may establish by law, see Const., Art. VII, § 1.
Provision for establishment of courts of conciliation, see Const., Art. XVI, § 7.

¶ 235. The constitution vests the judicial power in certain specified courts, and it cannot legally be vested elsewhere.—Andrews v. Otsego Probate Judge, 74 Mich. 278.

¶ 236. The constitution having vested the whole judicial power of the state in certain specified courts and officers, and provided for the election of all judicial officers by the people, the legislature cannot confer any portion of such judicial power upon any officer not elective and not so specified.—Chandler v. Nash, 5 Mich. 409; Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139; Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 237. Courts of record other than those mentioned in § 1, Art. VII, of the Constitution of 1909, may be created by the legislature.—Attorney General ex rel. Danhof v. Renihan, 184 Mich. 272.

¶ 238. A joint resolution of the legislature authorizing the board of state auditors to investigate the claim of a person who was convicted of crime and after serving part of his sentence was pardoned, and to allow him certain compensation if the board found his claim of innocence to be true, was void as in effect establishing a court of appeals aside from constitutional courts, to determine the innocence or guilt of a convicted criminal.—Allen v. Board of State Auditors, 122 Mich. 324.

§ 52. ——Additional courts or judges.

See also post ¶ 1154.
As class legislation, see post § 222, ¶ 933.
Conferring jurisdiction belonging to another, see post § 54.
Changing or substituting judges, see post § 60.
Additional circuit judges and circuits, see Const. Art. VII, § 8.

¶ 239. It was the intent of the constitutional amendment of 1889, empowering the legislature to provide for the election of more than one circuit judge in the judicial circuit composed of the county of Kent, to place such additional judge under the provisions of the constitution and laws of the state applicable to existing circuit judges, and that his term of office should be limited and governed by the constitution, and that his successor should be chosen at the same time and in the same manner as the other circuit judges.—People ex rel. Attorney General v. Burch, 84 Mich. 408.

¶ 240. The fact that the Supreme and circuit courts only are declared by § 17, Art.

VII, of the constitution to be courts of record, does not prevent the legislature from creating other courts of record, such as the superior court of the city of Grand Rapids,—Attorney General ex rel. Dunhof v. Kenihan, 184 Mich. 272.

¶ 241. Const., art. 6, § 17, providing that there shall be not exceeding four justices of the peace in each township, does not prescribe a minimum number, thus invalidating Local Acts 1905, No. 293, which provided for one municipal judge and one associate in the city of Battle Creek instead of the justices of the peace.—Attorney General ex rel. Hooper v. Loomis, 141 Mich. 547.

§ 53. Places or terms of court.

Regulation of venue, see post § 54.
Place for state suits in chancery, see post § 54.
Statute contingent on court room being provided, see post ¶ 450.
Formation of judicial circuits and territory to be included, see Courts, I.

¶ 242. It is not required by constitutional principles to hold the circuit courts solely at the county seats.—Whallon v. Ingham Circuit Judge, 51 Mich. 503.

¶ 243. Pub. Acts 1903, No. 31, § 3, regulating the practice of the law in the circuit court for the county of Wayne, and providing for the drawing of a fresh panel for the jury once in each calendar month, is not in conflict with Const., art. 6, § 11, since it neither abolishes the terms of court in such county, nor operates either to provide for twelve terms or for one continuous term of court each year.—Fornia v. Wayne Circuit Judge, 140 Mich. 631.

§ 54. Changing or conferring jurisdiction or venue.

Power over records, see also ante § 49.
New places or terms, see ante § 53.
Granting original probate jurisdiction on certificate of probate judge, see post § 56, ¶ 260a.
Giving powers to court commissioners, see post § 58.
Conferring on board auditing power reposed in courts, see also ante § 187a.
Changing procedure, see post § 61.
Law fixing venue as depriving of right to trial by jury of vicinage, see post § 192.
Fixing venue for trial of transitory crimes as denying jury of vicinage, see post § 210.
Conferring jurisdiction over crimes without constitutional means for trial, see post ¶ 871.
Making distinctions as denial of equal protection of law, see post § 224, ¶ 950.
Total change as deprivation of office, see post § 271, ¶ 1173.

¶ 244. A judge of a newly created court cannot lawfully be clothed with the jurisdiction conferred by the constitution upon a constitutional officer.—Attorney General ex rel. Dingeman v. Lacy, 180 Mich. 329.

¶ 245. The judicial power vested in the circuit courts by the constitution cannot be reduced or divested to any extent that would impair their general authority over proceedings pending before them.—People ex rel. First Nat. Bank v. Wayne Circuit Judge, 18 Mich. 483.

¶ 246. Legislation cannot deprive the circuit court of its constitutional power of supervision of justices' courts by authorizing a municipal court to have jurisdiction of appeals therefrom.—Allen v. Kent Circuit Judge, 37 Mich. 474.

¶ 247. The constitutional jurisdiction of the circuit courts cannot be taken away by legislation.—Eddy v. Township of Lee, 73 Mich. 123.

¶ 247a. The assignment law of 1883 (How. St., §§ 8749a-8749l) is unconstitutional as violating the limitations on judicial power, since it gives a judge at chambers power which only a court should exercise in the final disposition of the debtor's property.—Risser v. Hoyt, 53 Mich. 185.

¶ 248. The constitutional jurisdiction of the circuit court cannot be interfered with by the legislature so as to give municipal or local courts like the superior court of Grand Rapids power to revise or change their action; as by authorizing the removal of causes from them after the hearing is begun.—Heath v. Kent Circuit Judge, 37 Mich. 372.

¶ 249. The legislature is not forbidden by the constitution to give jurisdiction to the circuit courts in cases where the amount claimed is less than $100.—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231.

¶ 250. Jurisdiction may be conferred upon the circuit court by the legislature, without regard to the amount involved.—Detroit Lumber Co. v. The Petrel, 153 Mich. 528.

¶ 251. Public Acts 1913, No. 186, creating a court of domestic relations in counties of 250,000 or over is unconstitutional as depriving circuit courts of Wayne county of appellate jurisdiction in certain enumerated cases.—Attorney General ex rel. Dingeman v. Lacy, 180 Mich. 329.

¶ 252. The question of the venue of actions is one within the power of the legislature.—Barnard v. Hinkley, 10 Mich. 458.

¶ 253. The constitution gives jurisdiction to the circuit courts over transitory actions upon contracts against non-residents of the state; and this jurisdiction cannot be taken away by any legislation limiting the forum of the action to the county in which the plaintiff resides.—Atkins v. Borstler, 46 Mich. 552.

¶ 254. The legislature has unquestionable power to provide that chancery suits on the part of or in behalf of the people of the state may, at the election of the attorney general, be commenced in the circuit court for the county of Ingham (How. St., § 6612); so held, upon a bill filed by that officer upon the relation of citizens and taxpayers of Cheboygan county to restrain an illegal issue of bonds by the board of supervisors of the latter county.—McMullen v. Ingham Circuit Judge, 102 Mich. 608.

§ 55. ——Prerogative writs and revisory jurisdiction.

¶ 255. The constitutional jurisdiction of the Supreme Court to issue the writ of certiorari in cases where it is properly applicable cannot be abrogated by the legislature.—Specht v. City of Detroit, 20 Mich. 168; City of Detroit v. Wabash, St. L. & P. R. Co., 63 Mich. 712; and see Tucker v. Parker, 50 Mich. 5.

¶ 256. The legislature has power to limit the time within which writs of certiorari may be issued.—Township of Blumfield v. Brown, 130 Mich. 504.

¶ 257. It is not competent for the legislature to deprive the Supreme Court of its revisory jurisdiction over all the other state tribunals, hence no legislation which practically destroys it is valid.—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

¶ 258. The Supreme Court cannot, under the constitution, be vested with jurisdiction over cases reserved from the circuit courts, and not involving the exercise of appellate powers.—Sanger v. Truesdall, 8 Mich. 543; Jones v. Smith, 14 Mich. 334.

¶ 259. When the state government was organized, and the Supreme Court of the territory abolished, certain causes pending therein were not transferred to any court. It was held competent for the legislature to pass an act afterwards transferring these causes to the Supreme Court of the state.—Scott v. Smart's Ex'rs, 1 Mich. 295.

§ 56. ——Probate, municipal and justices' courts.

Encroachment on constitutional jurisdiction of other courts, see ante § 54.

Authorizing commissioner to act as probate judge in case of vacancy, see post ¶ 283d.

Empowering recorder or city officer to act as circuit court commissioner, see also post ¶ 287a.

Authorizing inheritance tax procedure at variance with existing probate practice, see post ¶ 300.

¶ 260. The legislature, by the constitution, Art. VII, § 13, providing that in each county organized for judicial purposes there shall be a probate court, and that the jurisdiction, powers and duties of such courts and the judges thereof shall be prescribed by law, is given plenary power to prescribe the powers and duties of the probate courts and judges thereof.—In re Merrill, 200 Mich. 244.

¶ 260a. Pub. Acts 1911, No. 238 How. St., 2nd Ed., § 12117, amending Comp. L. 1897, chap. 33, § 25, granting circuit courts original jurisdiction over probate contests upon certificate of the probate judge, is not invalid on the ground that the legislature has no power under the constitution, Art. VII. § 13, providing that in each county, there shall be a probate court with jurisdiction prescribed by law and § 10 providing that circuit courts shall have original jurisdiction in all matters not excepted in the constitution and not prohibited by law, and appellate jurisdiction from superior courts, and supervisory control of the same, to grant to the circuit courts original jurisdiction in the matter of will contests.—In re Rockett's Estate, 191 Mich. 499.

¶ 261. Pub. Acts 1913, No. 186, creating a court of domestic relations in counties of 250,000 or over is unconstitutional in depriving probate courts of their constitutional jurisdiction over juvenile delinquents and dependents in certain cases.—Attorney General ex rel. Dingeman v. Lacy, 180 Mich. 329.

¶ 262. Const., art. 6, § 1, does not require every municipal court to have both civil and criminal jurisdiction. It is for the legislature to fix the extent of such a court's authority, subject to the restriction that it must not exceed that which properly pertains to a municipal court.—People ex rel. Covell v. Kent County Treasurer, 36 Mich. 332; People v. Hurst, 41 Mich. 328.

¶ 263. Whether or not it is competent to give a municipal court a jurisdiction equal in all respects with that of the circuit court, it is certainly not competent to subordinate the jurisdiction of the latter to that of the former.—People ex rel. Jones v. Kent Circuit Judge, 35 Mich. 494.

¶ 264. The constitution does not forbid giving to a municipal court original jurisdiction of crimes committed within the municipality.—People v. Hurst, 41 Mich. 328.

¶ 265. The legislature has power to determine the extent of the power of a municipal court, except that the power granted must not exceed that which can properly pertain to a municipal court.—Dunham v. Tilma, 191 Mich. 688.

¶ 266. Municipal courts cannot be authorized to try extra-municipal crimes.—Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 267. The Superior Court of Grand Rapids, established by Laws 1875, Act No. 49 (see How. St., §§ 6564-6591), is authorized by the constitution; and the county of Kent was liable for jury fees therein.—People ex rel. Covell v. Kent County Treasurer, 36 Mich. 332.

¶ 268. Laws 1875, Act No. 49, was invalid so far as it gave the Grand Rapids superior court jurisdiction of transitory actions on service upon any defendant in the city, whether any of the parties resided there or not.—Grand Rapids, N. & L. S. R. Co. v. Gray, 38 Mich. 461.

¶ 269. How. St., § 6576, conferring on the superior court of Grand Rapids exclusive jurisdiction over suits by or against city officers is valid under Const., art. 6, §§ 1, 8, since the power is there given to prohibit it to the circuit court "by law."—Chicago & W. M. R. Co. v. Nester, 63 Mich. 657.

¶ 270. How. St., § 6576, granting jurisdiction to the superior court of Grand Rapids is constitutional though the subjects would otherwise have been within jurisdiction of the circuit court.—Chicago & W. M. R. Co. v. Nester, 63 Mich. 657.

¶ 271. It is competent, under art. 6, § 1, of the constitution, for the legislature to vest in the police court of a city exclusive jurisdiction to hear, try and determine all criminal cases triable by a justice of the peace, where the offense charged was committed within the corporate limits of the city.—Perrott v. Pierce, 75 Mich. 578.

¶ 272. So much of Local Acts 1887, No. 435, as attempts to deprive justices of the peace of Bay City of exercising concurrent jurisdiction with the police justice in the apprehension and examination of persons charged with offenses not cognizable by justices of the peace under the general statutes of the state, is unconstitutional, inasmuch as Const., art. 6, § 19 declares that justices of the peace shall be conservators of the peace within their several jurisdictions.—Averill v. Perrott, 74 Mich. 296.

¶ 273. A justice who lives in a village that lies in two townships can be authorized by statute to hold court in criminal cases in that part of the village that lies in the township he does not live in.—Faulks v. People, 39 Mich. 200.

¶ 274. Const., art. 6, § 18, fixing the jurisdiction of justices of the peace and setting a limited amount in which their jurisdiction shall be exclusive, and a sum within which it shall be concurrent, does not prohibit the legislature from conferring on a municipal court created in Battle Creek by Local Acts 1905, No. 392, the same jurisdiction.—Attorney General ex rel. Hooper v. Loomis, 141 Mich. 547.

¶ 275. There is no constitutional prohibition upon the legislature against conferring upon one justice of the peace exclusive civil and criminal jurisdiction in cities over cases arising in the city or between residents of the city.—Striffing v. Baden, 155 Mich. 49.

¶ 276. Whether a city charter can constitutionally deprive justices of the peace of all criminal jurisdiction by making that of the police justice exclusive, quære.—People v. Pond, 67 Mich. 98.

¶ 277. Although a justice of the peace is a constitutional officer with judicial power, the constitution (art. 6, § 18) also provides that magistrates "shall have such criminal jurisdiction and perform such duties as shall be prescribed by the legislature," and since no mention of fees to be paid to justices of the peace is made, the legislature has power, in cases where the people are a party, to prescribe the duties of the magistrate as it did in How. St., § 7135a, and also to provide that in case of neglect or refusal to perform his duty, he shall not have the fees otherwise provided by law.—Sunderlin v. Ionia County Sup'rs, 119 Mich. 535.

§ 57. ——Changing law and chancery powers.

Statute creating proceeding at law in aid of execution, see post ¶ 808.

Laws giving remedy excluding right to jury, see post § 192.

¶ 278. The judicial power includes the cognizance of equitable questions and the system of chancery jurisprudence; therefore Pub. Acts 1887, No. 267, is unconstitutional in so far as it assumes to provide for a final decision of questions of fact in chancery suits by the verdict of a jury, and for the rejection of testimony by the presiding judge as in a suit at law.—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

¶ 279. The legislature cannot abridge the right of courts of chancery to pass upon questions of fact without the intervention of a jury.—Detroit Nat. Bank v. Blodgett, 115

Mich. 160; reaffirming and adhering to Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

¶ 280. Laws 1850, No. 161, § 2 (Comp. L. 1897, § 5593), imposing liability for injuries caused by dogs, and providing that in an action of trespass on the case, "the plaintiff and defendant may be examined under oath touching the matter at issue, and evidence may be given as in other cases; and if it shall appear to the satisfaction of the court, by the evidence, that the defendant is justly liable for the damages complained of under the provisions of this act, the court shall render judgment against such defendant for double the amount of damages proved, and costs of suit," is not unconstitutional as conferring upon the circuit judge power to act as a chancellor in a suit at law, in doubling damages, as the liability is declared to be double the damages sustained, and the presumption is that such damages will be ascertained as in ordinary cases—by the jury, in a trial before a jury, and by the court, when the jury is dispensed with. The word "court" in the quoted portion of the statute may be construed to mean the court acting through all of its instrumentalities, including the jury. —Fye v. Chapin, 121 Mich. 675; writ of error dismissed in 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

¶ 281. The legislature may limit the power of a court in chancery to set aside decrees in tax proceedings.—Cole v. Auditor General, 132 Mich. 262.

¶ 282. Inasmuch as it is not unconstitutional to confer upon courts of law jurisdiction similar to that of chancery in setting aside conveyances of land for fraud—this not being a case where equity is deprived of jurisdiction, or where the nature of a court of chancery is sought to be changed, or where a party is deprived of a constitutional right to an equitable remedy—How. St., § 8059. permitting the validity of conveyances of property to be questioned and tried by jury and to form the basis of a garnishee's liability, is valid.—Webber v. Hayes, 117 Mich 256.

§ 58. ——Conferring power on commissioners of courts.

Conferring power to admit to bail in criminal cases, see ante § 173a.

Giving commissioner's power to recorder or city officer, see post § 59, ¶ 287a.

¶ 283. Circuit court commissioners may be empowered by statute to dissolve attachments.—Edgarton v. Hinchman, 7 Mich. 352; Smith v. Collins, 41 Mich. 173; Schall v. Bly, 43 Mich. 401.

¶ 283a. The provision in the tax law of 1858 which attempts to confer upon commissioners the power to adjudicate upon tax titles is unconstitutional and void.—Waldby v. Callendar, 8 Mich. 430; Case v. Dean, 16 Mich. 12.

¶ 283b. The statute empowering commissioners to entertain summary proceedings to recover possession of lands is not unconstitutional.—Streeter v. Paton, 7 Mich. 341.

¶ 283c. Circuit court commissioners have no power under Const., art. 6, §§ 1, 16, to adjudicate under the writ of habeas corpus upon the right to the custody of children; such a power properly belongs to courts, and cannot be conferred upon an officer to be exercised in a summary proceeding out of court, —Rowe v. Rowe, 28 Mich. 353.

¶ 283d. The provision in R. S. 1846, ch. 91, § 16, authorizing a commissioner to act as probate judge in certain cases of vacancy, held valid.—Kelley v. Edwards, 38 Mich. 210.

¶ 284. The Fraudulent Debtors' Act (How. St., ch. 304), does not, because of the power it confers upon circuit court commissioners, contravene Const., art. 6, § 1, vesting the judicial power in certain courts and in justices of the peace.—Dummer v. Nungesser, 107 Mich. 481.

¶ 285. The judicial power to determine what evidence is relevant to an issue at law, sought to be conferred upon circuit court commissioners by Pub. Acts 1895, No. 181, authorizing the examination of a plaintiff or defendant before a commissioner, at the instance of the adverse party, as to facts "relevant to the issues involved," and giving testimony so taken the force of evidence, without providing for a review by the court of the rulings made on the examination, is in excess of the constitutional power of such commissioners.—Mulhern v. Kent Circuit Judge, 111 Mich. 528.

¶ 286. Pub. Acts 1905, No. 312, providing for the establishment of juvenile courts, and giving power inter alia to issue summonses and warrants, "or upon conviction" to impose fines, to suspend sentences, to place children on probation and to terminate such probation, and to make and enforce decrees for the support of children by their parents, calls for judicial proceedings by a court; and such powers cannot be conferred on circuit court commissioners under Const., art. 6, § 16, which limits their judicial powers to "those of a judge of a circuit court at chambers."—Hunt v. Wayne Circuit Judges, 142 Mich. 93.

§ 59. ——Giving power to nonjudicial officers.

Imposing nonjudicial functions on courts, see ante § 39.

Objection that misplacing judicial power denies due process, see post ¶¶ 698, 699.

¶ 287. The act of Feb. 14, 1853, "to provide for the discharge of certain duties required to be performed by circuit court commissioners," in so far as it undertakes to confer judicial powers upon notaries public in certain cases, is unconstitutional.—Chandler v. Nash, 5 Mich. 409.

¶ 287a. The legislature cannot constitutionally confer the powers of a circuit court commissioner upon the recorder of a city or other city officer.—McClintock v. Laing, 19 Mich. 300.

¶ 288. A statute conferring on the clerk of a court power to issue warrants for arrest for crime is invalid as an attempt to confer on the clerk judicial power, to-wit: The determination whether the complaint is sufficient to support a warrant.—People v. Swift, 59 Mich. 529; People v. Colleton, 59 Mich. 573.

¶ 289. Laws 1881, Act No. 150 (How. St., § 978), exempting from jury duty contributing members in companies and batteries of state troops, is not open to the objection that it confers upon military officers an arbitrary power of setting aside the authority of courts to compel attendance of qualified jurors.—Hall v. Burlingame, 88 Mich. 438.

¶ 290. A statutory provision (Laws 1887, Act No. 205, § 57), that the receiver of a bank shall make ratable dividends of moneys collected on all claims proved to his satisfaction, does not conflict with Const., Art. 6 § 1, vesting the judicial power in courts; the receiver is merely a special tribunal to determine claims, subject to review by the court which appoints him.—Bissell v. Heath, 98 Mich. 472.

¶ 291. Pub. Acts 1903, No. 217, governing insane asylums and the admission of insane persons therein, does not confer judicial powers upon keepers of asylums because it prohibits their holding a patient "except upon certificates of insanity and an order for admission."—Grinky v. Wayne Probate Judge, 137 Mich. 49.

¶ 292. Public Acts 1903, No. 217, governing insane asylums and admission of insane persons and providing that no person shall be admitted except upon certificate of insanity made by two reputable physicians, is not unconstitutional because making the authority of the probate court to commit to the asylum dependent upon certificates made by nonjudicial persons, since the act merely prescribes a rule of evidence.—Grinky v. Wayne Probate Judge, 137 Mich. 49.

¶ 293. Administrative, not judicial, power is vested in the board of supervisors by How. St., § 2283b1, which authorizes such board, in case any election district refuses or neglects to hold an election on a local option law, or in case the returns from any district are withheld, to proceed with the canvass of the votes actually returned, where the board is satisfied that the failure to vote or make return is for the purpose of preventing a full expression of the will of the electors upon the proposition submitted.—Feek v. Township Board of Bloomingdale, 82 Mich. 393.

¶ 294. The power conferred on the state commissioner of labor by Act No. 301, Pub. Acts 1913, to revoke after a hearing any license granted a private employment agency, is not of such an arbitrary or judicial character as to invalidate the act.—People v. Brazee, 183 Mich. 259, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561.

¶ 295. Whether the jurisdiction given by the charter of Grand Haven to the recorder of that city is constitutional and valid, quere. —Thompson v. Crockery School Dist. No. 7, 25 Mich. 483.

§ 60. Changing and substituting judges.

New or additional judges, see ante § 52.

Authorizing successor to act, see also post ¶ 299.

Creation and abolishment of offices, see also post § 261.

¶ 296. Pub. Acts 1895, No. 152, which authorizes the governor, when business has accumulated in any of the circuit courts of the state beyond the capacity of the local judge properly to dispose of it, to designate a judge of some other circuit to hold court in the former circuit temporarily, is valid under Const., art. 6, § 11, providing that the circuit judges may hold courts for each other, and shall do so when required by law.—In re Bromley's Estate, 113 Mich. 53.

¶ 297. Act 456, Local Acts 1887, which authorizes either of the Wayne circuit judges to act as judge of the recorder's court of Detroit on request of the recorder, etc., is constitutional so far as it affects cases of which the circuit court had original jurisdiction before the passage of the act.—People v. Gallagher, 75 Mich. 512.

§ 61. Establishment and change of procedure.

General power of legislature respecting procedure, see post VIII, and cross-references there found.

Establishing presumptions and rules of evidence or of inference, see also post § 187.
Power to authorize waiver of tort and suit on contract, see also post § 187, ¶ 802.
Legislative grant of rehearing, new trial or relief from judgment, see also ante § 38, ¶ 184.
Legislative power to deny injunction or equitable remedy where legal remedy remains, see also post § 236.
Power of legislature to cure errors by subsequent legislation, see post §§ 249-251.
Power of legislature to pass curative act pending suit based on defect, see post § 251.

¶ 298. Any change which transfers the power that belongs to a judge to a jury, or to any other person or body is a violation of the constitution.—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

¶ 299. The legislature has power to authorize the settlement of a bill of exceptions by the successor in office of the judge who tried the cause.—Mason v. Phelps, 48 Mich. 126.

¶ 300. The inheritance tax, provided in Pub. Acts 1899, No. 188, is not unconstitutional because of providing for a collection of the tax by methods not in use in the probate court.—Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487.

¶ 301. The provisions of the charter of the City of Detroit, pars. 290, 201, 292, limiting the jurisdiction and practice of the recorder's court of the City of Detroit and giving it no power to order the summoning of a grand jury do not contravene any constitutional provision.—Jasnowski v. Detroit Recorder's Court Judge, 195 Mich. 269.

¶ 302. The question of the power of the Supreme Court to modify a statutory enactment as to practice coming within the purview of the constitution art. 6, § 5, conferring power on the court to establish and modify rules of practice by rule of court was left open in Byrne v. Gypsum Plaster & Stucco Co., 141 Mich. 62.

§ 62. Jury laws and jurors.

See also ante ¶ 298.
As to grand jury, see also ante ¶ 301.
Legislative invasion of chancery functions by enactment of jury laws, see ante § 57.
Local and general concerns in jury system, see post § 68.
General power of legislature, see post §§ 192, 209.

¶ 303. Laws 1881, Act No. 150 (How. St., § 978), exempting from jury duty contributing members in companies, etc., of state troops, is constitutional, it being the province of the legislature, not of the courts, to determine the qualifications of jurors, and to provide who shall be exempt.—Hall v. Burlingame, 88 Mich. 438.

§ 63. Contempts and contempt procedure.

Jurisdiction and power of courts over contempts, including their inherent powers, see Contempt, III.

¶ 304. Whether the authority of the judiciary to punish for contempt of court can be limited by statute, quære.—In re Chadwick, 109 Mich. 588.

¶ 305. Under Const., art. III, § 2, providing that "no person belonging to one department shall exercise powers properly belonging to another, except in cases expressly provided in this constitution," the legislature has no control over the power of the circuit court to punish for contempt, there being no provision in the constitution which expressly or impliedly confers upon the legislature any control over this power.—Nichols v. Judge of Superior Court of Grand Rapids, 130 Mich. 187.

¶ 305a. The legislature has power to authorize the punishment of contempt of court committed while the court was considering the allowance of a claim filed by a coroner for an inquest upon a stranger, the cost of which is by virtue of Comp. L. 1897, § 11828, paid by the state where allowed by the circuit court.—In re Toepel, 139 Mich. 85.

§ 64. Arrests and prosecutions for crime.

As to grand jury, see also ante ¶ 301.
Conferring jurisdiction on minor courts, see ante § 56.
Necessity that court given jurisdiction have means of trying according to constitution, see also post ¶ 871.
Fixing venue for trial of transitory crime as denying jury of vicinage, see post § 210.
Municipal charters invading powers of prosecuting attorney, see also post ¶ 430.
General power as affected by constitutional guaranties, see post IX, and cross-references there found.
Constitutional office and functions of prosecuting attorney, see also Attorneys, ¶ 245.

¶ 306. The power to examine and commit persons charged with crime is not judicial, but is one of the duties of conservators of the peace, and it may be vested in other persons than courts; and those in whom it is vested by the constitution cannot be deprived of it by legislation.—Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 307. The power to take bail is not a judicial power within the meaning of Const., art. 6, § 1.—Daniels v. People, 6 Mich. 381.

¶ 308. In a criminal case the preparation for and conduct of the trial on behalf of the people are acts executive and administrative in character.—People v. Dickerson, 164 Mich. 148.

¶ 309. Section 3, Act No. 175, Pub. Acts 1905, gave the court power in homicide cases to appoint experts to investigate and testify where the issues involved expert knowledge or opinion. Held said section 3 was unconstitutional, as depriving the prosecuting attorney of his administrative function in selecting witnesses, as preventing the defendant from learning the names of the witnesses against him, and as tending to give too great weight to the testimony of such experts.—People v. Dickerson, 164 Mich. 148.

§ 65. Custody and control of prisons and prisoners.

As to pardons and paroles, see post § 66.

¶ 310. The legislature has full authority over prisons, and to determine where prisoners may be sent; and the courts have no discretion, except as the legislature gives it, as to the place to which criminals may be sentenced; accordingly the selection of a prison for confinement and the transfer of the prisoner thence to another prison is not a judicial act.—Rich v. Chamberlain, 104 Mich. 436.

¶ 311. Laws 1893, Act No. 150, empowering the governor to transfer prisoners from one prison to another, is valid, at least as to convicts sentenced subsequently; and does not infringe on judicial powers of sentencing for crime.—Rich v. Chamberlain, 104 Mich. 436.

¶ 312. A prisoner applies for and obtains release under the terms provided for in the statute, which terms are of the very essence of the indeterminate sentence law. Without the power to retake the prisoner there would be no incentive to good behavior through fear of being imprisoned again. The power of release and recall may be vested in any officer or board without any interference with judicial or executive constitutional authority.—People v. Cook, 147 Mich. 127.

§ 66. Pardons and paroles.

Powers respecting arrests and prisons, see ante §§ 64, 65.

Effect of constitutional amendment to make indeterminate sentence law a proper legislative act, see ante § 33.

Conferring power on state auditors to compensate person unjustly convicted and imprisoned, see ante ¶ 238.

Pardoning power, see Const., art. VI, § 9.

¶ 313. How. St., §§ 9630-9633, held unconstitutional and void so far as authorizing the summary reception, without bail or preliminary examination, of a convict charged with violating the condition of his pardon given by commuting his sentence.—People v. Moore, 62 Mich. 496.

¶ 314. A statute that in effect gives the board of control of prisons power to grant convicts pardon upon conditions, encroaches upon the powers of the governor, and is void.—People v. Cummings, 88 Mich. 249.

¶ 315. 316. Laws of 1889, Act No. 228 (How. St., §§ 9613b-9613g), providing for indeterminate sentences, and the disposition, management and release of criminals under such sentence, is invalid in that it contravenes Const., art. 6, § 1 and § 5, by giving the board of control of prisons judicial and pardoning powers, such powers being vested by the constitution in the courts and the governor exclusively.—People v. Cummings, 88 Mich. 249.

¶ 317. Const., art. 5, § 11, which vests the pardoning power exclusively in the governor, "subject to regulations provided by law relative to the manner of applying for pardons," is not infringed by Laws 1893, Act No. 150, providing for an advisory board in the matter of pardons.—Rich v. Chamberlain, 104 Mich. 436.

¶ 318. The board of pardons has no constitutional right to question, examine into, or determine the justice of a sentence, or to question the propriety of the conviction. This power is by the constitution vested exclusively in the courts.—People v. Cook, 147 Mich. 127.

¶ 319. Under the constitutional amendment (art. 4, § 47) and the indeterminate sentence law enacted thereunder, the legislature may confer upon the governor, the warden, the prison boards, and the board of pardons the power to determine whether the conduct of a prisoner is such that he may safely be released, and to determine whether he has departed from his criminal ways and become a good citizen, or whether he has violated his parole. The power to determine the conditions of release and the violation of release is not judicial.—People v. Cook, 147 Mich. 127.

C. LOCAL SELF-GOVERNMENT.

§ 67. In general; policy of constitution.

Protection of municipal property from deprivation without due process, see post § 137.

General provisions of constitution as to local government, see Const., Art. VIII.

¶ 320. It is a fundamental principle, recognized and perpetuated by express provisions of the constitution, that the people of every hamlet, town and village in the state are entitled to the benefits of local self-government; the constitution, however, has not pointed out the precise extent of local powers and capacities, but has left them to be determined in each case by the legislative authority of the state from considerations of general policy as well as from those which pertain to local benefits and local desires.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 321. In conferring local powers the legislature may give extensive capacity to acquire or hold property for local purposes, or it may confine the authority within narrow bounds, and what it thus confers it may enlarge, restrict or take away at pleasure.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 322. The general power of the legislature over local municipal affairs considered but not decided.—People ex rel. Le Roy v. Hurlbut, 24 Mich. 44.

¶ 323. Under our system there can be no governments, general or special, that do not immediately represent a popular constituency, and governmental power cannot be vested elsewhere.—Detroit Metropolitan Police Board v. Wayne County Auditors, 68 Mich. 576.

¶ 324. The fundamental and necessary characteristics of the various classes of municipal bodies which administer local government in Michigan cannot be changed by legislation from what they were as fixed by usage and recognition when the constitution was adopted.—Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 325. Municipal government, under our constitution, must be managed by popular representatives and agencies deriving their authority from the inhabitants, and no municipal business can be controlled by state or other outside authorities.—Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 326. There can be no municipal corporation that is not the direct representative of the people of its locality.—O'Leary v. Board of Fire & Water Commissioners of City of Marquette, 79 Mich. 281.

§ 68. Matters of general or local concern.

Matters of health, see also post ¶¶ 343, 487.
Drainage matters, see post § 84.
Local nature of office, see post § 74; and see also Officers, I.
Salaries and compensation of officers, see post § 76.

¶ 327. In all matters of general concern there is no local right in municipal corporations to act independently of the state, and the local authorities cannot determine for themselves whether they will contribute through taxation to the support of the state government, or assist when called upon to suppress insurrections, or aid in the enforcement of police laws. On all such subjects the state may exercise compulsory authority, and may enforce the performance of local duties either by employing local officers for the purpose, or through agents or officers of its own appointment.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 328. The state has no right to interfere with and control by compulsory legislation, the action of municipal corporations in regard to property rights and matters of exclusively local concern.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 329. The administration of criminal law concerns the state and not merely localities; and the selection of jurors in criminal cases is a duty that is not necessarily of a local administrative character. It may be done by officers authorized by the legislature and appointed by the governor; and the legislature may require the county in which such officers act to pay their expenses.—People v. Harding, 53 Mich. 48.

§ 69. Creation and change of local divisions of government.

See also post ¶ 443.
Places for courts, see ante § 53.
Delegation of power, see post § 88.
As depriving severed districts or divisions without due process, see post V.
Change of counties and retention or transfer of pending causes as infringing on right to trial by jury of vicinage, see post § 102.
Power to alter representative districts, see post § 258.
Effect of changes on right to vote, see post § 255.
Divisions of counties in forming apportionment districts, see post § 259.
Change of local divisions as changing apportionment, see post § 260.
Change or reduction of county territory, see Const., Art. VIII, § 2.

¶ 329a. Under Const., art. X, § 2, providing that no county shall be reduced by the organization of "new" counties, to less than sixteen townships without a vote of the peo-

ple, the legislature cannot reduce a county to fifteen townships by taking territory from it and attaching it to an existing county.—Bay County Sup'rs v. Edmunds, 139 Mich. 466.

¶ 330. Local Acts 1905, No. 627, providing for the annexation of certain territory to the city of Detroit is not unconstitutional as depriving the people of a portion of the annexed territory of their right of local self-government in their village and school matters.—Attorney General ex rel. Battishill v. Township Board of Springwells, 143 Mich. 523.

§ 70. Local taxation and fiscal affairs.

Regulation of deposit of public funds, see also ante § 49.

Taxes for purposes not wholly local, see post § 71.

Liquor taxes, see also post § 79.

¶ 331. The power to tax is the highest that can exist in local municipal government, and the most unquestionable of fundamental principles is that the people shall vote the taxes they are to pay or be permitted to choose representatives for the purpose.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 332. There is nothing in the maxim that "taxation and representation go together" that requires that the body paying the tax shall alone be consulted in its assessment.—People v. Mahaney, 13 Mich. 481.

¶ 333. Ways cannot be laid out or taxes levied therefor except by persons chosen in the community to be burdened, and acting either alone or in state or county representative bodies.—Drain Com'rs v. Baxter, 57 Mich. 127.

¶ 334. It is competent for the legislature to authorize a township board, without obtaining the consent of the electors, to issue bonds to pay outstanding orders that are presumptively valid.—Boyce v. Auditor General, 90 Mich. 314, on rehearing 90 Mich. 326.

¶ 335. Local Acts 1889, Act No. 376, authorizing the Roscommon township board to issue township bonds to pay outstanding orders, is not mandatory, and is not to be regarded as intended to include all orders, irrespective of their validity, but only such as the township board should regard as valid; and hence was held constitutional.—Boyce v. Auditor General, 90 Mich. 314, on rehearing 90 Mich. 326.

¶ 336. Local Acts 1897, No. 342, providing for the construction of a bridge in a given township, and for the contribution of $4,000 by the township in which the bridge is to be built, of $500 each by two other townships, and of $5,000 by the county, one-half of said amounts to be raised by taxation in one year and the other half in the year following, destroys local self-government; since the matter is covered by Const., art. 10, § 9, authorizing the board of supervisors to borrow or raise by tax $1,000 for constructing or repairing bridges, but providing that no greater sum shall be borrowed or raised by tax in any one year unless authorized by a majority of the electors voting thereon; and it cannot be sustained by Const., art. 10, § 11, authorizing the board to provide for constructing bridges under such restrictions and limitations "as shall be prescribed by law." The argument that the bridge was a necessity has no bearing on the constitutionality of the act.—Township of Ada v. Kent Circuit Judge, 114 Mich. 77.

¶ 337. Local Acts 1903, No. 534, authorizing the issuing of bonds for paving and providing for an assessment to pay interest and principal, is not unconstitutional as an invasion of the right of local self-government, as it imposes the duty upon the local township board, to whose duties it is germane.—Township of Grosse Pointe v. Finn, 134 Mich. 529.

¶ 338. The act establishing the board of state tax commissioners is not unconstitutional as depriving constitutional officers of their powers, or municipalities of their local regulation of taxation matters.—Board of State Tax Commissioners v. Quinn, 125 Mich. 128.

¶ 339. The fact that the duty of making assessments was reposed in the supervisor by the law in force prior to the constitution of 1850, and that supervisors were provided for by the constitution, does not import that the exclusive agency for making assessments was in the supervisor; and since Pub. Acts 1899, No. 154, does not withdraw wholly from the supervisor this duty and in any event the act only provided for supervision and correction of the work of the supervisor, it is valid and therefore the state board had the power to make revision of the local assessment.—Board of State Tax Commissioners v. Board of Assessors of Grand Rapids, 124 Mich. 491, followed in Detroit United Ry. v. Board of State Tax Com'rs, 136 Mich. 96.

¶ 340. Public Acts 1899, No. 154, empowering the board of state tax commissioners to supervise assessment rolls, is not unconstitutional as interfering with local self-government in cities and townships.—Board of State Tax Commissioners v. Board of Assessors of Grand Rapids, 124 Mich. 491; Detroit United Ry. v. Board of State Tax Com'rs, 136 Mich. 96.

§ 71. ——Taxation for purposes not local.

Fire and police department taxes, see post § 78.

¶ 341. A statute cannot extend the powers of a local police board of a city so as to enable it to draw from the funds of the county to carry on its own work in townships adjacent to the city, and at the expense as well of the municipalities where none of the money is spent as of those patrolled.—Detroit Metropolitan Police Board v. Wayne County Auditors, 68 Mich. 576.

¶ 342. The Wayne County Juvenile Court Act of 1907 (Local Acts No. 684) is not unconstitutional in that it provides for a court limited in its jurisdiction over children of the City of Detroit, while the expense of the establishment and maintenance of the court is imposed in part on the City of Detroit and in part on the County of Wayne.—Robison v. Wayne Circuit Judges, 151 Mich. 315.

¶ 343. Laws 1895, Act No. 10, entitled "An act to establish a board of health for the City of Detroit, is not unconstitutional in that it authorizes the board of health to require money to be raised by an annual tax for local purposes without the consent of any local officers or of the boards of the city; the preservation of the public health is not a local purpose, and the consent of the locality is not material, where the function is a public or general one.—Davock v. Moore, 105 Mich. 120.

¶ 344. Local Acts 1899, Act 408, § 9, directing the board established by section 10 to fix water rates, to prepare and transmit to the Detroit Common Council an estimate of the amount they deemed a just proportion of the total estimate for maintenance as a reasonable charge for furnishing water for domestic and other purposes specified, and making it the duty of the common council to levy and assess upon the taxable property of the city a sum so fixed, and not providing that it shall be submitted to the board of estimates or to a vote of the freemen of the city, is unconstitutional and void as imposing taxation for a purely local purpose without the action of the freemen of the city or their chosen representatives.—Blades v. Board of Water Com'rs of Detroit, 122 Mich. 366.

¶ 345. It is not unconstitutional for the legislature to provide, as in Local Acts 1903, No. 501, that the township treasurer pay over to a village treasurer the money raised by a bond issue by the township for the specific purpose of improving a highway, subsequently incorporated into the village.—Paye v. Township of Grosse Pointe, 134 Mich. 524.

§ 72. Schools and education.

Making other officer member of board of education, see post ¶ 377.

¶ 346. The legislature has power to change the boundaries of school districts without reimbursing the portion of the district deprived of the use of the public property owned by the districts from which the new district was formed.—Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, affirmed in 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

¶ 347. Local Acts 1901, No. 315, creating a new school district from the territory of existing districts, giving to it the property of the old districts within its limits, temporarily fixing the site of the central school house and appointing its first trustees, and providing that the township school inspectors should attach to other districts the portions not included in the new, is not invalid as impairing the right to local self-government.—Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, affirmed in 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

¶ 348. Local Acts 1901, No. 315, incorporating a graded school district and fixing its boundaries, is not void because it designated one of the sites already located as the site of the central schoolhouse, even if that was beyond legislative power; since such provision may be held to be directory merely, and was in any case not designed to prevent future action by the board.—Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, affirmed in 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

¶ 349. The fact that the legislature in creating a new school district out of existing districts, left certain parts of the territory out and provided that the township school inspectors should attach it to other districts, does not invalidate the act since the legislature had power itself to attach it to specific districts.—Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, affirmed in 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

§ 73. Township organization and officers.

Creation and abolishment of offices in general, see post §§ 261, 262.

¶ 350. The functions of township officers who are continued by constitutional enactment are within the contemplation and protection of the constitution, and the legislature cannot deprive such officers of their authority and confer it upon officers not of local selection.—Davies v. Saginaw County Sup'rs, 89 Mich. 295.

¶ 351. Const., art. 11, § 1, provides for the annual election, in organized townships, of commissioners and overseers of townships, and art. 10, § 11, provides that the board of supervisors of each county may provide for laying out highways. Held, that act 314 of the laws of 1889, which provides that certain townships in Saginaw county shall constitute two road districts, and that the board of supervisors shall elect three commissioners who shall have the care, etc., of highways, is void, because it divests local officers of their constitutional functions.—Davies v. Saginaw County Sup'rs, 89 Mich. 295.

¶ 352. Township highways and other local interests cannot be taken from the custody of the proper local officers.—People ex rel. Hubbard v. Township Board of Springwells, 25 Mich. 153.

¶ 353. A statute authorizing a given township to construct and maintain a bridge across a navigable stream that separates it from another township is not open to the objection that it seeks to divest the highway commissioner of such other township of his constitutional powers.—Dietrich v. Schremms, 117 Mich. 298.

§ 74. Designation or appointment of local officers.

Of offices in general, see post § 266.

Appointments for interim and extensions of terms for temporary period, see post § 75.

State or municipal character of office, see Officers, I; Municipal Corporations, XV.

¶ 354. The people of a municipality cannot be subjected to any delegated powers of government not exercised by their own representatives.—Detroit Metropolitan Police Board v. Wayne County Auditors, 68 Mich. 570.

¶ 355. It was held that the functions of the park commissioners of the City of Detroit, appointed by Laws 1871, Act No. 277, were local and municipal, and that their selection could not be properly made without the assent of the people or authorities of the locality.—People ex rel. Attorney General v. Lothrop, 24 Mich. 235.

¶ 356. Under the act of Congress (24 U. S. St. at L., 147), authorizing the construction of Belle Isle bridge the common council of the City of Detroit has full control thereof, as though such bridge was a street in such city, which must be exercised by ordinances, and these may authorize the hiring and fix the compensation of such employees as the council deems expedient; and so much of Local L. 1889, Act No. 388, § 11, as conflicts with this right is invalid.—Commissioners of Parks v. Common Council of Detroit, 80 Mich. 663.

¶ 357. Vesting the power to appoint a park commissioner in the city council instead of in the mayor is not an interference with the right of self-government.—Attorney General ex rel. Maybury v. Bolger, 128 Mich. 355.

¶ 358. The power to nominate all city officers of the City of Detroit was not vested in the mayor at the time of the adoption of the constitution of 1850 so as to deprive the legislature of the power to delegate appointive power to the common council.—Attorney General ex rel. Maybury v. Bolger, 128 Mich. 355.

¶ 359. A drain commissioner is not a local officer, but one exercising public functions on behalf of the state under and by virtue of its police powers. His appointment is not in contravention of the principle of local self-government because the legislature can provide that his appointment be made by state authority.—Attorney General ex rel. Alexander, v. McClear, 146 Mich. 45.

¶ 360. Local Acts 1905, No. 592, § 5, providing for the appointment of a drain commissioner for Livingston county by the governor of the state is not unconstitutional as contravening the right of local self-government.—Attorney General ex rel. Alexander v. McClear, 146 Mich. 45.

¶ 361. Public Acts 1905, No. 146, § 6, providing for the appointment of a county road commissioner for Wayne county by the county clerk and the mayor of Detroit is unconstitutional on the ground that it conflicts with the theory of local self-government guaranteed by the constitution.—Board of Road Com'rs of Wayne County v. Board of Auditors of Wayne County, 148 Mich. 255.

§ 75. ——Interim appointment or continuance.

Vacancy appointment of superior judge, see also ante ¶ 212a.

Presumption as to exigency requiring provisional appointment, see ante § 24.

¶ 362. It is competent for the legislature, in dividing two city wards into four, to continue the aldermen in office for the rest of the term in the wards in which they may reside by such division; and the result is a vacancy in a ward in which only one or no aldermen reside, which may be filled at the next election.—Stow v. Common Council of City of Grand Rapids, 79 Mich. 595.

¶ 363. Local Acts 1889, No. 374 (p. 877), creating two new wards in Grand Rapids and providing that the aldermen should continue in office until their elective terms should expire, may properly be upheld, the same not constituting an appointment of city officers by the legislature, and as making sufficient

provision for the election of aldermen in the new wards.—Stow v. Common Council of City of Grand Rapids, 79 Mich. 595.

¶ 364. Under Local Acts 1901, No. 284, the provision for an appointment by the governor of a provisional local superintendent of public works for the City of Detroit and the abolition of the local board of public works is invalid as far as the governor's power of appointment is concerned as encroaching on local government, for the reason that the facts show no exigency existing for a provisional appointment and the power of the mayor to fill a vacancy at any time confirms this lack of necessity of a gubernatorial appointment.—Moreland v. Millen, 126 Mich. 381.

¶ 365. Local Acts 1901, No. 284, providing for a so-called "provisional" appointment of a superintendent of public works for Detroit, displacing when qualified and inducted the existing board of public works, and providing that the provisional appointment shall be made by the governor for a term certain and thereafter by the mayor, or by the mayor sooner if a vacancy should occur, is void as far as it makes an unnecessary encroachment on the power to appoint local officers for which no exigency appears as a warrant for legislative action.—Moreland v. Millen, 126 Mich. 381.

§ 76. Duties and compensation of local officers.

Officers in general, see post §§ 268, 269.
Interference with function of city council, see post § 77.
In respect to streets and other public places, see also post §§ 80-84.
Delegation of power to cities, see post § 88.
Duties and compensation of county officers, see Const., Art. VIII, §§ 3-5, 8-10.

¶ 366. A representative is one chosen by a principal to exercise for him a power, or perform for him a trust, and the right to be represented implies a right not merely to name the representative but to designate the trust. A person authorized by a city to represent it for one purpose cannot be clothed by the state with authority in purely local matters to represent it for another and different purpose for which the state had no power to appoint him originally.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 367. The legislature has authority to modify the powers and duties of existing local officers. But the changes and modifications, when they relate to matters which concern the private interests and property of the city, must be in the same general direction, and not give authority of other and a higher nature, which might require for its exercise different experience, intelligence, capacity and discretion.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 368. The imposition of quasi legislative duties upon a municipal board of public works (in Detroit) in addition to its general duties, which were of a purely administrative character, was held not important so long as the general legislative authority of the common council was not interfered with; some authority of a quasi legislative nature is essential to the efficient exercise of even purely administrative powers.—People ex rel. Attorney General v. Detroit Common Council, 29 Mich. 108.

¶ 369. Local legislative authority is not infringed by having boards or other executive servants to do, under proper conditions, what is not legislative work.—Butler v. City of Detroit, 43 Mich. 552.

¶ 370. A probate judge is a state, not a county, officer, and under the constitution his salary cannot be controlled by the board of supervisors, which has at most the delegated power of fixing the salary once, and cannot change it, if at all, until the legislature directs.—People ex rel. Douvielle v. Manistee County Sup'rs, 40 Mich. 585; Chapman v. Berrien County, 50 Mich. 311.

¶ 371. Const., art. 10, § 10, does not give the Wayne county board of auditors power to fix the compensation of its members, and a statute fixing salaries is valid.—People ex rel. Kennedy v. Gies, 25 Mich. 83.

¶ 372. Const., art. 10, § 10, providing that the board of supervisors or auditors, shall have the exclusive power to fix compensation does not operate to render the legislature powerless to legislate on the subject. —Board of Auditors of Wayne Co. v. Reynolds, 121 Mich. 99.

¶ 373. The people of the state, as well as Wayne county, have an interest in the performance by the county clerk of services rendered under the marriage license law, requiring reports to the secretary of state of licenses issued. In such case, it is entirely competent for the legislature to provide the compensation for the service, and when a claim is presented to the county auditor, showing the performance of the services, and the proper fees, they must allow such claim. —Board of Auditors of Wayne County v. Reynolds, 121 Mich. 99.

¶ 374. Local Acts 1895, No. 425, fixing the salary of the county clerk of Wayne county, is not unconstitutional, although Const., art. 10, § 10, provides that the compensation of county officers shall be fixed by the board of county auditors, as such constitutional pro-

vision refers only to services rendered to the county.—Board of Auditors of Wayne County v. Reynolds, 121 Mich. 99.

¶ 375. It is competent for the legislature to provide, as it did in 1863 (Laws of 1863, p. 332), that the salary of the clerk of the police court of Detroit should be prescribed by the common council of Detroit, notwithstanding it was payable by the county of Wayne; and the county board of auditors could not reduce the salary after the common council had fixed it.—People ex rel. Schmittdiel v. Wayne County Auditors, 13 Mich. 233.

¶ 376. Local self-government is not infringed by Laws 1881, Act No. 160 (How. St., §§ 7623-7630), authorizing jurors in criminal trials to be drawn by a board of jury commissioners appointed by the governor.—People v. Harding, 53 Mich. 48.

¶ 377. The legislature has power to make the mayor of a city an ex officio member of the board of education and to give him the veto power.—Pingree v. Board of Education of Detroit, 99 Mich. 404.

¶ 378. A statute divesting a city supervisor of part of the functions of his office before the expiration of the term for which he was elected, and conferring upon city officials elected for another purpose such divested functions, does not invalidate the act as an attempted interference with the right of local self-government.—Attorney General v. Cogshall, 107 Mich. 181.

¶ 379. The Detroit Water Board Act as amended (Local Acts 1897, No. 477, § 28), conferring upon a board of commissioners the power to lay pipe and impose an assessment upon abutting property, and requiring the council to make assessments in conformity to the report of such board, is unconstitutional on the ground of conferring power upon a board consisting of members previously appointed, at a time when its powers were less, and who were not selected with a view to the exercise of such powers.—Cook Farm Co. v. City of Detroit, 124 Mich. 426.

¶ 380. Const., art. 10, § 7, providing that a city shall have such representatives in the board of supervisors as the legislature may direct, does not authorize the legislature to appoint such supervisors, and it is unconstitutional to provide, as in Local Acts 1901, No. 485, that the aldermen in certain specified wards shall be members of the board of supervisors and represent the city in lieu of certain city officers in addition to one supervisor for each ward as provided by pre-existing statute. There was no authority in the constituency of these particular wards to choose representatives for the city.—Attorney General ex rel. Penney v. Gramlich, 129 Mich. 630.

¶ 381. The legislature has not delegated to the City of Detroit power to fix the salary of the city counselor, whose appointment is provided for by Local Acts of 1893, No. 419, and the provision of said act fixing such salary is constitutional.—Speed v. Common Council of Detroit, 100 Mich. 92.

§ 77. Councilmanic functions and powers.

See also post ¶ 432.
As to parks, see post § 80.
Legislative power as to duties of officers, see also ante § 76.
Delegation on other officers, see also post ¶ 425.

¶ 382. The common council of a city is a distinctive and inseparable feature in municipal government under our institutions, and cannot be done away with or stripped of its legislative powers.—People ex rel. Attorney General v. Detroit Common Council, 29 Mich. 108.

¶ 383. The provision in L. 1873, Act No. 392, § 12, "to establish a board of public works," whereby proposed public improvements must be referred to such board before the common council can carry them out, does not unduly limit the council's legislative authority.—Butler v. City of Detroit, 43 Mich. 552.

¶ 384. Whether it is competent for the legislature to confer upon boards created by it within cities the power to control the discretion of the common council as to the amount of moneys to be raised for local purposes, or to give them authority beyond that of mere agents or assistants of the council, quere.—People ex rel. Board of Water Com'rs v. East Saginaw Common Council, 33 Mich. 164.

§ 78. Police and fire departments.

¶ 385. The legislature may establish in a city a metropolitan police board, with power to estimate the police expenses, and compel the city authorities to raise by taxation the amount so estimated. Every city is represented in the state legislature; and it is for that body to determine how much power shall be conferred by the municipal charters which it grants.—People ex rel. Drake v. Mahaney, 13 Mich. 481.

¶ 386. Laws of 1865, p. 99, creating the metropolitan police board of Detroit, confines the board's action to the city's limits, and the legislature cannot enlarge the powers of the board by an act not amendatory to the act of 1865, but which gives the board jurisdiction over townships adjacent to the city; the liquor law of 1887 (Laws 1887, Act No.

313, § 33), is therefore invalid in that its jurisdiction was thereby attempted to be extended to townships in Wayne county outside of Detroit.—Detroit Metropolitan Police Board v. Wayne County Auditors, 68 Mich. 576.

¶ 387. Whether the legislature can create police districts not conforming to any municipal subdivision of the state, quære.—Detroit Metropolitan Police Board v. Wayne County Auditors, 68 Mich. 576.

¶ 388. Public Acts of 1915, No. 81, providing that in all cities having full-paid members of fire departments, all officers and men receiving such full pay shall be entitled without any deduction of pay to a leave of absence of one day of twenty-four hours in every four days and a furlough of twenty days once in each year, is unconstitutional as constituting special legislation and as interfering with the rights of local self-government in violation of the Constitution, Art. VIII.—Simpson v. Paddock, 195 Mich. 581.

§ 79. Liquor traffic and other trade regulations.

Delegation of power, see post § 90.

¶ 389. Where a tax is to be levied on the liquor traffic for the double purpose of revenue and regulation, the moneys to be paid into the treasuries of the municipalities, the municipalities have no constitutional right to decide for themselves whether the tax shall be levied, or to have it controlled by their own officers. The general police of the state is fully under state control, and the municipalities cannot be allowed to decide for themselves whether a law of police shall or shall not be enforced in the locality.—Youngblood v. Sexton, 32 Mich. 406.

¶ 390. How. St., § 2283a1, which suspends the general law of the state relating to the taxation and regulation of the liquor traffic in such counties as have prohibited it under the provisions of the local option law, is constitutional.—Feek v. Township Board of Bloomingdale, 82 Mich. 393.

¶ 391. Public Acts 1913, Act No. 257, regulating the operation and construction of theaters and moving picture shows and providing for inspection by the state fire marshal and the issuance of a license, is not in conflict with the constitutional requirement for local self-government.—Jeup v. State Fire Marshal, 182 Mich. 231.

§ 80. Acquisition and control of parks.

Giving park commissioners power over streets, see post § 81.

Delegation of power to council, see post § 88.

¶ 392. The City of Detroit has the right to decide for itself upon the purchase of a public park.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 393. So much of the amendatory park act (Laws 1873, Act No. 214) as tends in any way to invest the park commissioners of Detroit with the entire and independent power of locating the park, contracting for the lands, creating the debt, etc., without consulting the common council, a citizens' meeting, or any other authority, held unconstitutional and void. The act is to be construed as if such provisions had never been inserted, and so construed it does not affect the provisions of the original act (Laws 1871, Act No. 277) requiring approval of both the common council and a citizens' meeting before the debt could be incurred or the bonds issued for the purchase of the proposed park.—People ex rel. Board of Park Com'rs v. City of Detroit, 29 Mich. 343.

¶ 394. It was held to be within the power of the legislature to take away from a "citizens' meeting," in which it had rested, the right to decide for the city upon the purchase of a public park (Laws 1873, Act No. 224), and to lodge this right with some other proper agent or representative of the local community. But the state could not confer the right upon its own agents, nor, by legislative amendment enlarging their powers, upon the park commissioners, who were originally state appointees, and became representatives of the city only in so far as their authority was recognized under the original statute by the representatives of the city, which recognition conferred upon them no such power. Whether this power could be vested in any other representative of the city than the common council, quære.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

§ 81. Control or use of streets and public places.

¶ 395. Under our constitution with its policy of local self-government municipalities have not power, unless authorized by statute, to grant to street railway companies exclusive privileges to occupy streets for railway purposes.—Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384; affirmed in 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

¶ 396. The legislature may authorize the laying of drains in highways by other officers than those having the highways in charge.—Kiley v. Bond, 114 Mich. 447.

¶ 397. The provisions of the constitution, art. 15, § 13, that the legislature shall provide for the incorporation and organization

of cities and villages and shall restrict their powers of taxation, borrowing money, contracting debts and lending their credit, and art. 4, § 38, providing that the legislature may confer upon incorporated cities such power of local legislative and administrative character as they may deem proper, and art. 4, § 23, providing that the legislature shall not vacate or alter any street in a city, are merely restrictions upon the manner in which the legislature shall confer powers on municipalities, when it shall see fit to do so and do not in themselves create any power in the cities.—City of Detroit v. Detroit City R. Co., 56 Fed. 867.

¶ 398. Where a federal statute authorizing the erection by a city of a bridge over navigable waters provides that the care, control and use of the bridge shall be governed by ordinances of the city enacted as though said bridge were a public street, etc., so much of a state statute as undertakes to confer upon city park commissioners the legislative power of regulation is invalid where, under its charter, the powers of local government are divided into two departments, legislative and administrative, the park commissioners being restricted to the exercise of administrative powers.—Commissioners of Parks v. Common Council of Detroit, 80 Mich. 663.

¶ 399. That portion of section 9 of the Motor Vehicle Law, Act No. 318, Pub. Acts 1909, How. St., 2nd Ed., § 2495, which attempts to take from cities and villages the reasonable control of their streets and public places violates section 28 of Article VIII of the constitution of 1909.—People v. McGraw, 184 Mich. 233.

§ 82. Public works and improvements generally.

Interference with township officers, see ante § 73.
Delegations of power, see post § 89.

¶ 400. The principles of local self-government are not infringed by leaving it to a state officer to supervise the appropriation of state lands to a local improvement.—Sparrow v. State Land Office Com'r, 56 Mich. 567.

¶ 401. A statute leaving to the probate judge of a certain county the appointment of a commissioner to superintend the work of improving a river in that and in another county, and to determine the necessity for such work, and assess taxation for benefits upon lands in the two counties, creating also a board for final review of assessments, most of whose members are supervisors of townships in the first county, is void as an encroachment upon the right of local selfgovernment.—Wilcox v. Paddock, 65 Mich. 23.

¶ 402. The legislature has power, provided the board of supervisors consents, and subject to the limitations imposed by the federal constitution and laws, to authorize a township to construct a bridge across a navigable stream extending, in part, beyond the township's limits.—Dietrich v. Schremms, 117 Mich. 298.

§ 83. Highway improvements.

Delegation of power by legislature, see post § 89.
Bridge improvements, see ante § 82.
Interference with township officers, see also ante § 73.
Highway officers as local or general officers, see also ante § 74.
Evasion of township control by declaring road a state road, see also post ¶ 529.

¶ 403. Public Acts 1915, No. 59, relating to the construction and improvement of highways, levying of assessments therefor on adjacent landowners, and giving the execution or the administration of the law to the state highway commissioner where counties retain the township road system, is not invalid as constituting an invasion of the alleged township right of self-government, as the improvement of highways is a public as well as a local concern, under the Constitution, Art. VIII, § 26, and the state necessarily has the right to designate a proper agent to carry out the work.—Loomis v. Rogers, 197 Mich. 265.

§ 84. Drainage and sewerage.

Drainage officers as general officers, see ante § 74.
Delegation of powers, see post § 86.
General police power of the state over sewerage disposal, see also post § 101.

¶ 404. Public Acts 1911, No. 185, Ch. VII, How. St., 2nd Ed., §§ 3429, 3431, 3435, relating to the joint action of county drains commissioners on drains in or affecting more than one county, and providing that the drain commissioners jointly shall agree upon the per cent of benefits to be paid by each county on the construction of any drain, and that after such agreement each commissioner shall thereafter assess the individual parcels of land and townships at large in his own county, but in case they are unable to agree an appeal shall be taken to the state highway commissioner, whose decision shall be final, is not unconstitutional as invading the right of local self-government, as the matter is one of public and not of local interest.—Cilley v. Sullivan, 187 Mich. 447.

D. DELEGATION OF POWER.

§ 85. In general.

Powers constitutionally reposed in local divisions, see ante, II, C.

Making operation of laws to depend on a contingency or on local vote, see post § 95.
Conferring functions of office on private persons, see post § 263.
What amounts to a delegation, see also post §§ 86-91.
Particular instances, see post §§ 86-91.
Powers delegable to townships, see Const. Art. VIII, § 17.

¶ 405. There are many things that a legislature can do which it cannot delegate to any other body.—Wellman v. Chicago & G. T. R. Co., 83 Mich. 592, affirmed in 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

¶ 406. Where the constitution vests authority in the legislature it in legal effect prohibits the exercise of such powers by any other bodies.—People ex rel. Bolt v. Riordan, 73 Mich. 508.

¶ 407. If the legislature were to attempt to delegate a purely legislative power to a commission, it would be unconstitutional.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 160 Mich. 355.

¶ 408. The power of enacting general laws cannot be delegated by the legislature. even to the people.—People v. Collins, 3 Mich. 343.

§ 86. Particular subjects and instances of delegation.

Of power to make internal improvements, see post § 282.
Of power to borrow money without approval of voters, see also post ¶ 1182.
Imposing limitations on actions and leaving determination of period to courts, see also post ¶ 1021.

¶ 409. To declare what shall constitute a crime, and how it shall be punished, is an exercise of the sovereign power of the state, inherent in the legislative department of the government, and, unless authorized by the constitution, this power cannot be delegated to any other body or agency.—People v. Hanrahan, 75 Mich. 611.

¶ 410. Laws 1881, Act No. 150 (How. St., § 978), exempting from jury duty contributing members enrolled in state troops, is not open to the objection that it transfers from the legislature to military officers the power to determine exemptions from jury duty.—Hall v. Burlingame, 88 Mich. 438.

¶ 411. Laws 1893, Act No. 207, authorizing courts, justices of the peace and police justices to permit persons complained of as disorderly on account of drunkenness to give a special recognizance conditioned upon their taking the cure for such drunkenness, and for the adjournment of such case against such person for a limited time for this purpose, and providing for the acquittal and discharge of such person upon a showing by him that he has conformed to the conditions of his recognizance up to that time, and that in case of his violating such conditions the trial shall proceed as if no recognizance had been given, and for the forfeiture of the recognizance if the person recognized shall fail to appear according to its conditions, is unconstitutional; it not being within the province of the legislature to delegate to private corporations the power to make laws for the discharge of offenders.—Senate of Happy Home Clubs v. Alpena County Sup'rs, 99 Mich. 117.

¶ 412. The provision of Laws 1889, Act No. 111, which authorizes the state board of fish commissioners to give permits to any person to catch or take fish from the waters, at such time and in such manner as the commission may direct, for the purpose of propagation, does not confer upon the commission legislative power, but is an exception from the enacting clause, excepting the taking of fish for the purpose of propagation under such restrictions as it is entirely competent for the legislature to prescribe.—People v. Brooks, 101 Mich. 98.

¶ 413. Laws 1885, Act No. 230, as amended by Laws 1893, Act No. 47, which provides for the prevention of the introduction and spread of cholera and other dangerous communicable diseases, and makes it unlawful for any person to refuse to permit his baggage and personal effects to be disinfected in accordance with the rules and regulations of the state board of health made and established in pursuance of said act, does not delegate to such board legislative power such as to contravene Const., art. 4, § 1, vesting the legislative power in a senate and house of representatives.—Hurst v. Warner, 102 Mich. 238.

¶ 414. Public Acts 1903, No. 237, § 14, conferring detailed and extensive powers over the acts of the drain commissioner and his employees and the making of drainage contracts, is not invalid as a delegation to the supervisors of power to amend the drainage laws of the state; since all such matters are of local administrative character, which under Const., art. 4, § 38, the legislature is authorized to confer on local governing officers.—Albert v. Gibson, 141 Mich. 698.

¶ 415. The Michigan Standard Policy Law (Pub. Acts 1881, No. 149), is invalid as contrary to Const., art. IV, § 1, which provides that "the legislative power is vested in the senate and house of representatives," since, by giving the commissioner of insurance power to fix the time when the use of the form of policy adopted or amended by the insurance commission "shall become obliga-

tory," it undertakes to delegate legislative power to such commission.—King v. Concordia Fire Ins. Co., 140 Mich. 258.

¶ 416. The Michigan Railroad Commission, by Pub. Acts 1907, No. 312, is given the power to establish maximum rates, the railroads being entitled to a hearing and the rulings of the commission being subject to review by the courts. Held, the commission's duties are not legislative but administrative, and the act does not violate section 2, art. 4 of the Constitution of Michigan, by delegating to the commission legislative powers.—Michigan Cent. R. Co. v. Michigan Railroad Commission, 160 Mich. 355.

¶ 417. The Blue Sky Law, Pub. Acts 1913, No. 143, providing for the regulation and supervision of domestic and foreign investment companies, their agents and other persons selling their securities, is not open to the objection that it delegates legislative or judicial power because it creates an administrative board supervising business affected with a public interest.—Alabama N. O. Transp. Co. v. Doyle, 210 Fed. 173.

§ 87. ——Taxing power.

¶ 418. The legislature has the power to impose specific taxes upon a street railway company according to its circumstances and this power may be delegated to and is delegated to almost every municipality.—Detroit Citizens' St. R. Co. v. Common Council of Detroit, 125 Mich. 673.

¶ 419. Pub. Acts 1899, No. 231, § 14, giving to the companies organized under Pub. Acts 1883, No. 39, of which it is amendatory, the privilege of electing each year whether they will pay a specific tax or be subject to the usual ad valorem taxation, is not a delegation of legislative power to a private corporation, and is therefore constitutional.—Attorney General ex rel. Beadle v. Arnott, 145 Mich. 416.

¶ 420. There was no abandonment of the legislative function by the legislature in the enactment of Pub. Acts 1901, No. 173 (How. St., 2nd Ed., § 1933 et seq.), providing that the board of state tax commissioners shall constitute a state board of assessors, who are to assess the railroad and certain other corporate property in the state, and prescribing as the rate of taxation, the average rate of taxation levied upon other property upon which ad valorem taxes are assessed.—Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; affirming 138 Fed. 223.

§ 88. ——Formation and government of local divisions.

Attempted alteration of existing local powers by delegation to other officers, see post XII.

¶ 421. The power to annex territory to municipal corporations may be delegated to boards of supervisors of other public bodies.—Oakman v. Wayne County Board Sup'rs, 185 Mich. 359. (Ostrander and McAlvay, JJ., dissenting.)

¶ 422. The general act, Laws 1873, Act No. 179, for the incorporation of villages was held unconstitutional for the reason that it, in effect, delegated to private citizens the legislative function of fixing boundaries and compelling the incorporation of separate villages and intervening farm lands, against consent and without any opportunity for hearing; the legislature cannot abdicate its functions or subject citizens and their interests to the interference of any but lawful public agencies.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 423. Local Acts 1905, No. 627, providing for the annexation of certain territory to the city of Detroit, by providing in section 9 that the foregoing provisions shall not become operative until the proposition shall have been approved by a majority of the electors residing in the proposed annexed territory at an election for that purpose is not unconstitutional as an unlawful delegation of legislative power.—Attorney General ex rel. Battishill v. Township Board of Springwells, 143 Mich. 523.

¶ 424. The legislature has ample power to fix the salaries of public officers, and, unless restrained by the constitution, to change them at any time, even during the official term, and it can delegate this power to municipal councils.—Wyandotte v. Drennan, 46 Mich. 478.

¶ 425. A charter provision (Local Acts 1895, No. 366) empowering the board of estimates of a city to disallow items included in the annual budget as approved by the common council is not void as a delegation of power which under Const., art. 4, § 38, can be conferred upon the common council alone.—Robinson v. City of Detroit, 107 Mich. 168.

¶ 426. The invalid delegation of legislative power by Local Acts 1890, No. 452, which provides for the amendment or repeal of the charter of the city of Detroit, at the instance of electors or the mayor, cannot be sustained under Const., art. 4, § 38, authorizing the legislature to determine what legislative and administrative powers, municipalities shall have, as the local act in question delegates legislative authority to another body than that named in the constitution, contrary to the principles of constitutional law.—Elliott v. City of Detroit, 121 Mich. 611.

¶ 427. Local Acts 1899, No. 452, providing for the submission to electors of the city of Detroit, of amendments to the city charter, operates to transfer legislative power to the executive head of the municipality, or to electors who petition for amendment or repeal of the charter, and is void as an unqualified and unauthorized delegation of legislative power.—Elliott v. City of Detroit, 121 Mich. 611.

¶ 428. The legislature's power to increase the representation of a city upon the county board of supervisors cannot be delegated to the city, and Local Acts of 1887, No. 415, in so far as it attempts to confer upon the city council of Muskegon discretionary power to increase its representation upon the board of supervisors conflicts with Const., art. 10, §§ 6, 7, providing for such board and for the legislature to fix the representation of cities on it.—People ex rel. Bolt v. Riordan, 73 Mich. 508.

¶ 429. Const., art. 4, § 1, providing that "the legislative power is vested in a senate and house of representatives" cannot be construed to prohibit the legislature from conferring upon the common council of Detroit the power to appoint a park commissioner.—Attorney General ex rel. Maybury v. Bolger, 128 Mich. 355.

¶ 430. Provisions of a city charter which seek to create municipal grievances out of violations of a state law are invalid; so, if they attempt to supersede the constitutional functions of the prosecuting attorney in the management of the prosecution of crime, or to lodge the issuing of warrants of arrest in the hands of clerks of municipal courts.—People ex rel. Robinson v. Swift, 59 Mich. 529; People v. Colleton, 59 Mich. 573.

¶ 431. The legislature has the constitutional power to confer upon the common council of a city authority to prohibit, prevent and suppress the keeping and leasing of houses of ill-fame, and to restrain, suppress and punish the keepers thereof, and the owners and lessors of such premises.—People v. Hanrahan, 75 Mich. 611; St. Ignace v. Snyder, 75 Mich. 649.

§ 89. ——Road and bridge affairs.

¶ 432. The power conferred by Local Acts of 1893, No. 415, upon the Detroit board of commissioners of parks and boulevards to order the construction of sidewalks by adjacent land owners, and to determine where and of what material such walks shall be constructed, is not such a legislative power as, under the constitution, can be conferred only upon the common council.—Turner v. City of Detroit, 104 Mich. 326.

(1 Mich. Dig. 66)

¶ 433. Local Acts 1901, No. 417, § 33, authorizing the commissioner of parks and boulevards of the city of Detroit to set apart a portion of a boulevard for a speedway is constitutional and not in contravention of the uses of a public boulevard.—Scovel v. City of Detroit, 146 Mich. 93.

§ 90. ——Liquor laws and regulations.

See also ante ¶ 411, post ¶¶ 513, 514.

¶ 434. Subd. 7, § 2769, Comp. Laws 1897, granting villages power to suppress saloons, is constitutional and ordinances passed in pursuance thereof are valid.—Fuchs v. Common Council Village of Grass Lake, 166 Mich. 569.

¶ 435. By Comp. Laws 1897, § 2769, the legislature delegated power to villages, to be exercised by local legislation of the common council, to pass all laws and ordinances relating to municipal concerns, which includes the power to suppress the liquor traffic, and this is not in conflict with either the constitution or general laws of this state.—Vernier v. Village Council of Grosse Pointe Shores, 170 Mich. 656.

§ 91. ——Local option laws.

¶ 436. The prohibitory liquor law of 1853 provided for its submission to a vote of the electors of the state, to be taken in June of that year. If approved by a majority, the law was to take effect on the 1st of December following; but if not, it was to become a law from and after the 1st day of March, 1870. A majority of the vote cast was in favor of its adoption. Whether this submission of the question to the people was to be regarded as a delegation of legislative power, and the law inoperative in consequence, quære.—People v. Collins, 3 Mich. 343.

¶ 437. Under Const., art. 4, § 38, empowering the legislature to confer powers of a local, legislative and administrative character upon boards of supervisors, etc., the legislature has authority to prescribe the conditions on which the power thus delegated may be exercised, and How. St., § 2882b2, which provides that such boards, after adopting a resolution of prohibition, shall not repeal the same in less than two years, is not an unreasonable restraint and is not void as a delegation of the power to pass irrepealable legislation.—Feek v. Township Board of Bloomingdale, 82 Mich. 393.

¶ 438. The legislature, in conferring upon the board of supervisors the authority to order the prohibition within the county of the manufacture and sale of intoxicating liquors, had the constitutional right to prescribe as a condition to its exercise that the majority of the legal electors should first

vote in favor of such prohibition.—Feek v. Township Board of Bloomingdale, 82 Mich. 393.

¶ 439. Under Const., art. 4, § 38, it is competent for the legislature to confer upon boards of supervisors power to determine whether the facts exist prerequisite to the authorizing of a special election to determine the question of local option; accordingly Laws 1889, Act No. 207, is valid.—Friesner v. Common Council of City of Charlotte, 91 Mich. 504.

¶ 440. Whether the action of the board of supervisors, under the local option law in ordering prohibition in the county, is regarded as an exercise of legislative or of administrative power, makes no difference with the constitutionality of the law, such action being authorized by the authority of the legislature under the constitution.—Feek v. Township Board of Bloomingdale, 82 Mich. 393.

¶ 441. Act No. 207, Pub. Acts 1889, simply authorized the board of supervisors to submit the question of local option to vote upon the filing of a proper petition. Act No. 183, Pub. Acts 1899, amending the Act of 1889, went further, and commanded the board to submit such question upon demand of the voters. Held, the act was not unconstitutional as giving legislative powers to the electors.—In re Wilson, 100 Mich. 42.

III. GOVERNMENTAL FUNCTIONS AND POWERS; POLICE POWER.

§ 92. Legislative powers in general.

General power of the legislature in respect to the other departments of the government, see ante II, A, B.

Power as to matters of local government, see ante II, C.

Delegations of power, see ante II, D.

General power as to submission of constitutional amendments, see ante §§ 4, 5.

Power of legislature to pass inexpedient or unwise laws, see also ante § 21.

Police power, its limits and nature, and the objects of its exercise, see post § 97 et seq.

Legislative power over procedure, see post § 187.

Powers relating to crimes and criminal procedure, see post IX.

Power to make legislation retroactive, see post XI.

Power over elections and suffrage, see post XII.

Legislative power over or respecting offices and officers, see post XII.

Legislative audits, see post § 280.

Respecting corporations, see post § 289.

Respecting exemptions and homesteads, see post § 290.

Power of eminent domain, see Eminent Domain.

General powers of the State of Michigan, see State of Michigan.

Powers and limitations of the Territory of Michigan and of the Northwest Territory under the Ordinance of 1787, see State of Michigan; and see also Public Lands; Taxes, I, II, A.

[Note. The power of the state, being plenary except as limited by the constitutions, extends to all matters within the scope of legislation. Statutes are attacked usually on the ground that they violate some specific provision, and cases of that kind are treated post V-XVIII. This division, III, is confined to general pronouncements, largely dicta, on the police power and the general scope of legislation.]

General provisions for organization and procedure of the legislature, see Const., art. V.

Inhibitions on legislative divorces, lottery laws and establishment of state paper, see Const., art. V, §§ 32, 33, 35.

¶ 442. The legislative power of the people through their agent, the legislature, is limited only by the constitution, which is not a grant of power, but a limitation on its exercise.—Attorney General v. Preston, 56 Mich. 177.

¶ 443. Legislative power is limited only by the national and state constitutions, and though the legislature can confer local legislative powers upon a board of supervisors, it can also suspend their exercise or revoke them entirely, even in the matter of laying off new townships from the territory of old ones. And this may result from a necessary inconsistency between the action of the legislature and that of the board.—Attorney General v. Marr, 55 Mich. 445.

¶ 444. If there is no express denial, or denial by necessary implication from other limitations contained in the constitution upon legislative power, the power exists, and may be exercised at the pleasure of the legislature.—Taggart, Attorney General ex rel. Mason v. Perkins, 73 Mich. 303.

¶ 445. The legislature has power to grant an exclusive franchise to maintain a plank road on a public highway.—Detroit & B. P. R. Co. v. Detroit Suburban R. Co., 103 Mich. 585.

§ 93. Power to bind successors.

Reasonableness of rates fixed for public service as question left to courts, see ante §§ 44, 50.

¶ 446. A legislature cannot bind its successors where the elements of contract, concession and consideration do not appear.—

City of Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140.

§ 94. Power to define terms and establish facts.

See also post ¶ 499.

¶ 447. The legislature can make its own definitions for statutory purposes, but cannot thereby change a constitutional definition.—Westinghausen v. People, 44 Mich. 265.

§ 95. Contingent or optional legislation.

Nondelegability of law-making power, see ante § 85.

Local option laws as a delegation of power, see ante § 91.

¶ 448. Whether the prohibitory liquor-law of Feb. 12, 1853 (which provided that the time of its taking effect should depend on its ratification by popular vote), involved a delegation of legislative power and was therefore invalid, quære.—People v. Collins, 3 Mich. 343.

¶ 449. It is competent for the legislature to provide that a law shall go into effect upon happening of a contingency.—Feek v. Township Board of Bloomingdale, 82 Mich. 393.

¶ 450. The legislature may enact a valid law to take effect upon the happening of any future event, certain or contingent, which does not involve the exercise by others of that legislative will and discretion, which cannot be constitutionally delegated; therefore the enactment of Pub. Laws 1905, No. 272, designating that two terms of the circuit court shall be held at Battle Creek, provided the common council thereof shall furnish a suitable place for holding court there is valid, and there is no delegation of the legislative power of the state to the common council of Battle Creek.—McCall v. Calhoun Circuit Judge, 146 Mich. 319.

§ 96. Regulation of public service and rates.

Relative powers of legislature and courts, see ante §§ 44, 50.

Delegation of power to Railroad Commission, see ante § 86.

Due process in laws and regulations, see post §§ 159, 160.

¶ 451. The legislature has power to regulate tolls or rates of fare to be charged by corporations which have devoted their property to a public use.—Stimson v. Muskegon Booming Co., 100 Mich. 347.

¶ 452. As the maximum rates actually fixed by the legislature for carrying passengers on railroads must, prima facie, be presumed to be reasonable, a statute reducing the rate where 1,000-mile tickets are purchased cannot be upheld on the ground that the legislature would have power to reduce the maximum rate for all persons to the rate fixed by such statute.—Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; reversing 114 Mich. 460.

¶ 453. The fact that a railroad company has voluntarily sold 1,000-mile tickets good for a year from the time of their sale, does not authorize the legislature to compel the company so to do, or furnish a standard by which to measure the reasonableness of a statute requiring the company to sell 1,000-mile tickets good for two years and running to the purchaser, his wife and children.—Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, reversing 114 Mich. 460.

§ 97. Police power in general.

Extent or limits of the power, see post § 98.

Other powers distinguished, see post § 99.

Particular objects and subjects see post § 100 et seq.

Presumption as to reasonableness of police regulation, see ante § 24.

Subjection to the federal power, see post § 122.

Exercise of police power impairing contract rights and obligations, see post § 175.

General police powers of cities and villages under their charters, see Municipal Corporations, IX.

¶ 454. The police power is a general term used to express the particular right of a government which is inherent in every sovereignty. It must, however, be exercised by the state in subordination to the provisions of the federal constitution.—Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; reversing 114 Mich. 460.

¶ 455. The police power of a state is said to be a power or organization of a system of regulations tending to the health, order, convenience and comfort of the people, and to the prevention and punishment of injuries and offenses to the public.—People v. Brazee, 183 Mich. 259, affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561.

¶ 456. The police power includes the right to enact such legislation as is deemed essential for the protection of the public peace, good order, morals, safety and health.—Locke v. Ionia Circuit Judge, 184 Mich. 535.

§ 98. ——Extent of power; regulation or destruction.

Right to destroy diseased cattle under police power, see Animals, § 21.

¶ 457. In the exercise of its police powers a state may prohibit, under penalties, the exercise of any trade or employment which is found to be hazardous or injurious to its citizens, without providing compensation to those upon whom the prohibition operates.—People v. Hawley, 3 Mich. 330; People v. Gallagher, 4 Mich. 244.

¶ 458. The police power of the state is not omnipotent; it cannot, under guise of regulation, destroy property rights arbitrarily and without reason.—City of Grand Rapids v. Powers, 89 Mich. 94.

¶ 459. Whether the legislature has the power to prohibit wholly the manufacture and use of oleomargarine, quære.—Northwestern Mfg. Co. v. Wayne Circuit Judge, 58 Mich. 381.

¶ 460. As to a business concededly subject to regulation the legislature, under the police power, has the right to locally prohibit and so destroy, without compensation, a business built up and carried on for years without previous similar restriction.—Whitney v. Township Board of Township of Grand Rapids, 71 Mich. 234.

¶ 461. The constitutional right of the citizen to use his property without regulation is plain, unless the public welfare requires that such use be regulated. But if the public welfare does require it, the private right must yield to the public exigency.—People v. Smith, 108 Mich. 527.

¶ 462. The police power of the state over railroads includes all those regulations which are necessary for the safety and protection of persons and property in transit over them, or crossing them upon the public highways.—People v. Detroit, G. H. & M. R. Co., 79 Mich. 471.

¶ 463. The legislature may, in the exercise of its police power, for the protection of game and fish, prohibit the sale of the same, though lawfully acquired, and though an article of food not deleterious in itself.—People v. O'Neil, 110 Mich. 324.

§ 99. ——Relation to and distinction from taxing and other powers.

Taxes distinguished from licenses, see Licenses; Taxes, I.

¶ 464. The police power may be combined with the taxing power in the same statute.—Reithmiller v. People, 44 Mich. 280.

¶ 465. The enactment of a statute taxing the liquor traffic does not prevent the state, in the exercise of its sovereign powers of taxation and police, from passing further laws affecting the traffic.—Reithmiller v. People, 44 Mich. 280.

¶ 466. The enactment of a liquor-tax law does not estop the state from empowering municipal councils to further regulate the local sale of liquor by requiring saloon keepers to take out licenses.—Wolf v. City of Lansing, 53 Mich. 367.

¶ 467. Local assessments for the improvement of streets are made in the exercise of the power of taxation, and cannot be justified as an exercise of police power, as under the latter power such improvements cannot be compelled.—Motz v. City of Detroit, 18 Mich. 495, 523.

¶ 468. A license is issued under the police power of the state, and if the fee required therefor is intended for revenue, its exaction is an exercise of the power of taxation.—Vernor v. Secretary of State, 179 Mich. 157.

¶ 469. Under the police power a business may be taxed with a view of discouragement.—Youngblood v. Sexton, 32 Mich. 406.

¶ 470. The fact that revenue is incidentally derived does not operate to change an enactment from an exercise of the police power to that of the taxing power, where it is not so disproportionate as to make the fee charged unreasonable.—Vernor v. Secretary of State, 179 Mich. 157.

¶ 471. Police power is regulative and restrictive only, limiting and dictating the owner's use of property for public safety, but never extends to depriving him of it for public benefit.—Allen v. City of Detroit, 167 Mich. 464; Frumveller v. Post, Id.

¶ 472. A statute taxing dogs and appropriating the resulting fund to the payment of damage done by dogs to sheep is valid, being a police regulation and not a tax law void for want of uniformity.—Van Horn v. People, 46 Mich. 183; Hendrie v. Kalthoff, 48 Mich. 306.

¶ 473. Laws 1877, Act No. 198, How. St. § 2123, imposing a tax on dogs, is not strictly a tax law, but is an exercise of the police power of the state, being in the nature of a license imposed on those who keep animals requiring special police regulations, to prevent mischief, and to provide a special fund to repair losses from their depredations.—Van Horn v. People, 46 Mich. 183; Hendrie v. Kalthoff, 48 Mich. 306.

§ 100. Particular subjects and objects of police power.

Due process in various regulations, see post §§ 156-169.

Fish regulations, see also ante ¶ 412.
Power to prohibit sale of fish or game, see also ante ¶ 463.
Fish and game laws as class legislation, see post § 220.
Regulation by city of building construction and reconstruction within fire limits, see Buildings, § 2.

¶ 474. The police power extends to the protection of the lives, health and morality of citizens, and to the preservation of good order and public morals.—People v. Phippin, 70 Mich. 6; Davock v. Moore, 105 Mich. 120.

¶ 475. The police power of a state is not confined to regulations looking to the preservation of life, health, good order and decency. Laws providing for protection against and prevention of imposition or fraud are as a general rule free from constitutional objection.—People v. Wagner, 86 Mich. 594.

¶ 476. An ordinance requiring all persons owning or occupying any real estate in a city to keep and maintain good and sufficient sidewalks along all streets and avenues in front of or adjacent to such real estate, and imposing a fine or imprisonment for a failure so to do, is unconstitutional and void, as is a charter provision authorizing such an ordinance; an indigent person could not comply with such provisions.—City of Port Huron v. Jenkinson, 77 Mich. 414.

¶ 477. The legislature has no power to authorize a municipality to make that a purpresture or nuisance which is not so in fact, if by so doing the constitutional rights of any citizen in his person or property are infringed or destroyed.—City of Grand Rapids v. Powers, 89 Mich. 94.

¶ 478. For the protection of the fish and to preserve equality in the right to fish, the state has power to regulate the manner in which they shall be caught and to protect their migrations.—People v. Collison, 85 Mich. 105.

¶ 479. The legislature has power to regulate the taking of fish and game within the confines of the state, and the waters that it owns, not only as to time and place, but as to method.—People v. Setunsky, 161 Mich. 624.

¶ 480. A city cannot, under the police power, prohibit a riparian owner on an inland lake from bathing in the waters of the lake though the city is also a riparian owner thereon and draws its water supply from the lake.—People v. Hulbert, 131 Mich. 156.

¶ 481. Laws 1889, Act 214 (How. St., § 2132b), providing for the payment by township and city treasurers to the county treasurer of the dog-tax collected by them to be kept as a special fund for the payment of losses suffered from the killing or wounding of sheep is a valid exercise of the police power.—Longyear v. Buck, 83 Mich. 236.

¶ 482. The provision of How. St., § 799, declaring the award by fence-viewers a lien on the land where the fence was built or repaired, and providing that such award may be collected as a tax, is a legitimate exercise of the police power inherent in the state.—Gilson v. Munson, 114 Mich. 671.

¶ 483. Pub. Acts 1915, No. 302, § 29, providing that the owner of a motor vehicle shall be liable for any injury occasioned by the negligent operation of such motor vehicle when it is being driven by another with his express or implied consent or knowledge, while safeguarding the rights of persons having occasion to use the streets, does not unreasonably infringe upon the rights of those able to own automobiles, and is within the police power of the state.—Stapleton v. Independent Brewing Co., 198 Mich. 170.

¶ 484. Pub. Acts 1913, No. 109, § 14, forbidding contributions to nomination and election expenses by corporations is a valid exercise of the police power as tending to aid in the purity of elections.—People v. Gansley, 191 Mich. 357.

§ 101. Food and health regulations.

See also ante ¶¶ 474, 475, post ¶ 504.
Prohibition of sale to prevent other evils, see also ante ¶ 463.
Practice of medicine, see post § 102.
Safety regulations, see post § 104.
Delegation of health powers, see ante § 86.
Due process of law in regulations, see post V.
Class laws and basis for classification, see post X.

¶ 485. The preservation of the public health is a matter peculiarly within the police power of the state.—Locke v. Ionia Circuit Judge, 184 Mich. 535.

¶ 486. Danger to the public health is a sufficient ground for the exercise of the police power by the legislature, or the courts on matters reasonably essential to guard against such danger.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 487. As the care of the public health is a police power, and is a matter of general concern in the exercise of which no right of local self-government is involved, a statute establishing a board of health for a city and vesting in the governor the appointment of the members thereof is valid.—Davock v. Moore, 105 Mich. 120.

¶ 488. Act No. 98, Public Acts 1913, conferring on the State Board of Health control over water works and sewage disposal systems, etc., is a valid exercise of the police power.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 489. The imposition by a village by-law of a license of $10 per month for the privilege of selling fresh meat in the village streets cannot be sustained as an exercise of the police power for the benefit of public health or the preservation of good order.—Chaddock v. Day, 75 Mich. 527.

¶ 490. It is competent for the legislature, under the police power, to provide for the protection of the public health by making it an offense punishable by fine and imprisonment to sell adulterated food or drink, irrespective of the seller's knowledge of the adulteration.—People v. Snowberger, 113 Mich. 86.

¶ 491. Pub. Acts 1901, No. 22, which prohibits the coloring of oleomargarine to resemble butter, is within the police power of the state.—People v. Rotter, 131 Mich. 250.

¶ 492. The legislature, in the exercise of its police power, may pass an act fixing the standard of sausage and prohibiting the sale of sausage which does not comply with such standard, under penalty.—People v. Dehn, 190 Mich. 122.

§ 102. Regulating practice of medicine and dentistry.

Advertising by physicians for venereal diseases, see post § 103.
Due process in regulations, see post § 161.
Abridgment of privileges and immunities of citizens, see post § 229.

¶ 493. The regulation of the practice of medicine and dentistry is within the police power of the state.—People v. Blair, 192 Mich. 183.

¶ 494. Pub. Acts 1899, No. 237, providing for the examination, regulation, licensing and registration of physicians and surgeons is not unconstitutional as an interference with the right of a citizen to employ whom he chooses as it is clearly within the police power of the state to provide ample qualifications to safeguard the public interest.—People v. Reetz, 127 Mich. 87; affirmed in 185 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390.

¶ 495. A state has power to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, and punishing those who attempt to engage therein, in defiance of such statutory provisions.—Reetz v. Michigan, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; affirming 127 Mich. 87.

¶ 496. The regulation of those claiming special skill or knowledge in the healing art, and who seek for gain to engage in the practice thereof, is within the police power of the state.—Locke v. Ionia Circuit Judge, 184 Mich. 535.

¶ 497. The fact that a statute (Laws 1885, Act. No. 134 §§ 6 and 7; How. St., §2287cl. 2287c5,) allows a board discretion to fix a fee for a required certificate (e. g., for the practice of pharmacy), not to exceed a named sum, does not render the act open to the objection that it gives the board power to fix fees arbitrarily and to discriminate between individuals.—People v. Moorman, 86 Mich. 433.

§ 103. Regulating advertising.

¶ 498. Pub. Acts 1911, Act No. 62, How. St., 2nd Ed., § 5299, prohibiting the advertising of treating venereal diseases and sexual ailments, is valid as a reasonable police regulation.—People v. Kennedy, 176 Mich. 384.

¶ 499. It is within the police power of the legislature to prohibit advertisements which are deceptive and misleading, although it would be a question of fact in any given case whether the representation of fact in the advertisement was untrue, deceptive or misleading.—Jasnowski v. Detroit Recorder's Court Judge, 192 Mich. 139.

§ 104. Safety and welfare of workmen.

Health regulations, see ante § 101.
Due process in liability laws, see post § 156.
Class legislation, see post § 218.

¶ 500. Pub. Acts 1893, No. 111; How. St., § 1690z3, requiring emery wheels that are in continuous use to be provided with blowers to carry away the dust arising from the operation of them, is a valid exercise of the police power. Whether it is invalid as applied to a person operating his own wheel, quære.—People v. Smith, 108 Mich. 527.

¶ 501. The state, in the exercise of its police power, may prescribe reasonable regulations for the protection of employees, notwithstanding the latter, as between themselves and their employer, may have assumed the risk of the injuries sought to be averted.—People v. Smith, 108 Mich. 527.

§ 105. Welfare and protection of women and children.

Provision for legislation as to labor by women and children, see Const., art. V, § 29.

¶ 502. It is no longer open to question that the legislature has power to determine by rules and definitions the class or classes of children requiring state wardship and to impose state supervision.—Hunt v. Wayne Circuit Judges, 142 Mich. 93.

¶ 503. The legislature has undoubted power to legislate for the removal of children from bad environment and the imposition of restraint against evil, corresponding to the prerogative jurisdiction of chancery over infants and placing their welfare above the natural rights and control of their parents.—Hunt v. Wayne Circuit Judges, 142 Mich. 93.

§ 106. Drainage.

Right of local government, see ante § 84.

¶ 504. Drainage for the purpose of private advantage, or for any other purpose than that of the public health, cannot be justified under the police power.—Kinnie v. Bare, 68 Mich. 625.

¶ 505. The diversion from a chain of lakes of water from a mill, without due process of law and without compensation, cannot be justified on the ground that it will result in the improvement of the highways and the reclaiming of marsh lands.—Stock v. Township of Jefferson, 114 Mich. 357.

§ 107. Trading and mercantile and marketing regulations.

Bulk Sales Law, see also post ¶ 702.

Bulk Sales Law as class legislation, see post § 217.

Trading Stamp Law as class legislation, see post § 217.

Trade regulations obnoxious to local self government, see ante § 79.

¶ 506. A municipal ordinance requiring peddlers of patented articles to obtain a license is merely such a regulation as may be adopted under the general police authority of the state.—People v. Russell, 49 Mich. 617.

¶ 507. Laws 1893, Act No. 148, prohibiting barbers from carrying on their business on Sunday, with an exception in favor of those who conscientiously believe in observing the seventh day of the week as the Sabbath, and refrain from secular business on that day, held within the police power of the state.—People v. Bellet, 99 Mich. 151.

¶ 508. The business of pawnbroker, junk dealer or dealer in second-hand goods and merchandise, comes expressly within the control of the police power of the state, and, while legitimate in the absence of any statute law controlling it, no inalienable right exists to carry it on without complying with those provisions and restrictions which the legislative power of the state has seen fit to require.—City of Grand Rapids v. Braudy, 105 Mich. 670.

¶ 509. The authority to establish and regulate markets falls within the police power of the state, and the right to exercise it may be conferred upon municipalities.—Petz v. City of Detroit, 95 Mich. 169.

¶ 510. How. St., § 9354j, providing that contracts limiting, controlling or regulating the production or quantity or market price of any article or commodity to be raised by mining, agricultural, etc., business, shall be void, is valid.—Bingham v. Brands, 119 Mich. 255.

§ 108. Liquor traffic regulations.

Delegation of power, see ante § 90.

Power to regulate and tax at the same time, see also ante § 99.

Due process of law in regulations, see post §§ 168, 169.

As laws impairing contracts, see post § 177.

Class legislation, see post § 221.

Privileges and immunities of citizens, see post § 231.

Operation of constitutional and statutory prohibitions in general, see Intoxicating Liquors, I, IV.

¶ 511. Laws 1875, Act No. 231, entitled "An act to prevent the sale or delivery of intoxicating liquors, wine and beer to minors, and to drunken persons, and to habitual drunkards; to provide a remedy against persons selling liquor to husbands or children in certain cases," required all saloons to be closed on Sunday, and after eleven o'clock at night. Held valid.—Kurtz v. People, 33 Mich. 279.

¶ 512. It is a lawful exercise of the police power to prohibit women from entering saloons for the purpose of drinking, notwithstanding females are granted equal rights, privileges and immunities by the constitution.—People v. Case, 153 Mich. 98.

¶ 513. The legislature has police power to confer upon municipalities by subsequent legislation the right to deal with the liquor traffic in a manner not provided for in the general law.—Sherlock v. Stuart, 96 Mich. 193.

¶ 514. Under the police power of the state the legislature may confer upon municipalities the right to determine, when they license sale of intoxicating liquors, the places where saloons may be kept, and to determine that question upon each application.—Sherlock v. Stuart, 96 Mich. 193.

¶ 515. The prohibition of the manufacture and sale of spirituous and intoxicating liquors is a valid exercise of the police power.—People v. Wheeler, 185 Mich. 164.

¶ 516. Section 5392, Comp. Laws 1897; How. St., 2nd Ed., § 5068, prohibiting the sale of intoxicating liquor to students attending any public or private institution of learning, is a valid exercise of police power.—People v. Damm, 183 Mich. 554.

§ 109. Regulating employment agencies.

¶ 517. The regulation and control by the state of private employment agencies (Act No. 301, Public Acts 1913) is a valid exercise of the police power.—People v. Brazee, 183 Mich. 259; affirmed in 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561.

¶ 518. Pub. Acts 1913, No. 301, providing for the licensing, bonding and regulation of private employment agencies, the limiting of the amount of fee to be charged by such agencies, the refunding of such fees in certain cases, the imposing of obligations on persons, firms, or corporations which have induced workmen to travel in the hope of securing employment, charging the commissioner of labor with the enforcement of the act and empowering him to make rules and regulations and fixing penalties for the violation of the act is a valid exercise of the police power of the state, the general nature of the business being such that, unless regulated, many persons may be exposed to misfortunes against which the legislature can properly protect them.—Brazee v. Michigan, 241 U. S. 340, 60 L. ed. 1034, 36 Sup. Ct. Rep. 561; affirming 183 Mich. 259.

§ 110. Blue Sky Law.

Delegation of power to commission, see ante ¶ 417.

Blue Sky Law as denying due process, see post § 164.

As deprivation of liberty to buy and sell, see post ¶ 594.

¶ 519. The Blue Sky Law, Pub. Acts 1915, No. 46 (Comp. Laws 1915, § 11945 et seq.), providing for the regulation of the sale and disposition of bonds, stocks or other securities within the state by the Michigan Securities Commission and the issuance of licenses, is within the police power of the state in the prevention of fraud, even though expense and inconvenience may be caused by its enforcement.—Merrick v. N. W. Halsey Co., 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227; reversing 228 Fed. 805.

¶ 520. The provision in the Blue Sky Law, Pub. Acts 1913, No. 143, providing for the regulation and supervision of domestic and foreign investment companies, their agents and other persons selling their securities, that no investment company shall offer to sell any of its securities until more than 30 days after it has filed with the commission full data regarding itself and its securities, is beyond the police power of the state, since it makes no distinction as to character and quality of the securities, and would prohibit the sale, during the 30-day period, of good securities offered by solvent and reliable concerns.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

¶ 521. It is not within the police power of the state to decide for its citizens the financial advisability of their investments, so long as the investors are not deceived or misled.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

¶ 522. The provision in the Blue Sky Law, Pub. Acts 1913, No. 143, providing for the regulation and supervision of domestic and foreign investment companies, their agents and other persons selling their securities, that if the commission finds that the sale of the securities will "in all probability result in loss to the purchasers" the sale is prohibited, is not within the police power of the state, since the element of fraud is eliminated, and the commission would have no power to authorize a sale if the security was not worth the price asked, even though the property was sold to a careful purchaser who was not misled and was willing to buy.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

§ 111. General power of congress.

Relative power of states and the nation, see post IV.

Scope and operation on the state police power, see post § 122.

Supersession of state laws, see post § 123.

Fourteenth Amendment as state limitation, see post ¶ 580.

Retroactive legislation, see post § 234.

Power of United States to acquire needed lands in state, see United States.

¶ 523. The act making treasury notes a legal tender in payment of private debts was within the legitimate powers of congress, and is valid.—Van Husan v. Kanouse, 13 Mich. 303.

IV. GUARANTIES AND LIMITATIONS IN GENERAL; STATE AND FEDERAL.

§ 112. Construction and operation in general.

Construction of the constitution, see generally ante §§ 6-15.

Construction of the state constitution as limitation rather than as a grant of power, see ante § 92.

Effect of the XIVth Federal Amendment, see post § 134.

Presumption against legislative intent to overstep sovereign powers, see ante § 23.
Grounds on which an act of congress may be declared void, see ante § 19.
Legislative evasions, see post § 113.
Bill of Rights, see post § 115.
Federal limitations, see post § 116 et seq.
As to works of internal improvement, see post XV.
Power over exemptions and homesteads, see post § 290.
Federal decisions as rule in state courts, and vice versa, see Courts, IV.

¶ 524. Constitutional restrictions upon the power of the legislature are not to be enlarged by construction.—Fort-Street Union Depot Co. v. Commissioner of Railroads, 118 Mich. 340.

§ 113. Evasions by indirection.

See also post ¶ 617.
Imposing impossible conditions on right to vote, see post § 252.
Authorizing aid bonds to evade prohibition respecting internal improvements, see post § 284.

¶ 525. What the legislature is prohibited from doing directly it cannot do indirectly; therefore it cannot (this was prior to the amendment to Const., art. 15, § 10) authorize mining corporations to renew their corporate existence beyond the constitutional period of thirty years.—Taggart, Attorney General ex rel. Mason v. Perkins, 73 Mich. 303.

¶ 526. A result absolutely interdicted cannot be accomplished by indirection; therefore the legislature cannot enlarge the boundaries of a city by annexing parts of adjoining townships when by so doing they alter the boundaries of representative districts in violation of Const., art. 4, § 4, Act of April 12, 1873, enlarging Detroit, held void.—People ex rel. Attorney General v. Holihan, 29 Mich. 116.

¶ 527. While it was incompetent for the legislature directly to license the sale of liquors, it could not act indirectly through municipal authorities by granting them power to do so.—Dewar v. People, 40 Mich. 401.

¶ 528. The legislature being prohibited from granting divorces (Const., art. 4, § 26), it was held that a legislative enactment authorizing a court to grant a divorce for a cause not sufficient by the general laws (e. g., the wife's insanity) was void, as conflicting with this provision.—Teft v. Teft, 3 Mich. 67.

¶ 529. Const., art. 4, § 23, prohibits the legislature from discontinuing highways laid out by township authorities. Held, that an act declaring certain township highways to be state roads, thus enabling the legislature to vacate them, is void.—Davies v. Saginaw County Sup'rs, 89 Mich. 295.

§ 114. Territorial limitations on state power.

Doctrine as to extraterritorial force of laws and comity, see Conflict of Laws, I.
Power to define as crime acts not wholly within state, see also post § 195.
Jurisdiction of crimes on Great Lakes, see also post ¶ 884.

¶ 530. There is no constitutional objection to Comp. L. 1857, § 5944; How. St., § 9420, which provides for the prosecution and punishment here of a homicide committed by a mortal blow, etc., out of the state, from which death results within it. There is a crime consummated within the state.—Tyler v. People, 8 Mich. 320.

§ 115. The Bill of Rights.

Federal guaranties, see post §§ 116-120.
Fifteenth Federal Amendment, see post § 252, ¶ 1085.
Language and provisions of Bill, see Const., Art. II, §§ 1-21.

¶ 531. The bills of rights in the American constitutions have not been drafted for the introduction of new law, but to secure old principles against abrogation or violation; they are conservatory, rather than reformatory.—Weimer v. Bunbury, 30 Mich. 201.

§ 116. Federal limitations and guaranties.

Due process clause, see post V.
Impairment of contracts clause, see post VI.
Equal protection and privileges and immunities clauses, see post X.
Federal encroachment on states, see post §§ 124, 125.
Respecting treaties, coinage and bills of credit, legal tender, etc., see U. S. Const., Art. 1, § 10.
Respecting duties and charges on imports and exports, tonnage duties, ships of war, troops, compacts, or war, see U. S. Const., Art. I, § 10, ¶(2), (3).

¶ 532. The fourth and fifth amendments to the national constitution are limitations upon federal, not upon state, powers.—Weimer v. Bunbury, 30 Mich. 201.

§ 117. ——Commerce clause.

See U. S. Const., Art. I, § 8, ¶ (3).
For the operation and effect of this clause, see Commerce.
Validity of Initial Carriers' Act, see Commerce, § 2.

§ 118. ——Full faith and credit clause.

See U. S. Const., Art. IV, § 1.
Full faith and credit clause as applied to

judgments of sister states, see Foreign Judgments.

§ 119. ——Fugitives from justice.

See U. S. Const., Art. IV, § 1 ¶ (2).
For the operation of this clause, see Extradition.

§ 120. ——Republican form of government and protection from invasion and domestic violence.

See U. S. Const., Art. IV, § 4.

¶ 533. The provision of U. S. Const., art. 4, § 4, providing that the "United States shall guarantee to every state in this union a republican form of government" was not violated by the enactment of Local Acts 1901, No. 315, providing for alteration of certain school districts by taking territory from such school districts and adding it to another school district.—Attorney General ex rel. Kies v. Lowrey 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; affirming 131 Mich. 639.

§ 121. Navigable waters.

Powers over navigable waters, see Navigable Waters, II; Commerce.
Paramountcy of maritime law to state legislation, see also Admiralty, ¶ 3.

¶ 534. Some act of the sovereign power, direct or derivative, is necessary to authorize the interruption of a navigable stream, and the only limitations of legislative power in the matter of bridging such streams are those of the Constitution and laws of the United States and the provision of Const. 1850, art. 18, § 4, requiring consent of the board of supervisors of the county where the bridge is located.—Dietrich v. Schremms, 117 Mich. 298.

§ 122. Relation between federal power and state police power.

Effect of XIVth Amendment, see post ¶ 578.
Relation of state commerce regulations to federal and interstate subjects, see Commerce.

¶ 535. The police power of the state is subject to the limitations of the federal constitution.—People v. Eberle, 167 Mich. 477; affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

¶ 536. No ordinary exercise of congressional authority can take from a state any portion of its general police power. The acts of congress assume the existence of state regulations.—City of Coldwater v. Russell, 49 Mich. 617.

¶ 537. A state may not tax the wholesale importation of liquors from other states. This is not a legitimate exercise of the police power.—Walling v. Michigan, 116 U. S. 446, 29 L. ed. 691, 6 Sup. Ct. Rep. 454; reversing 53 Mich. 264.

¶ 538. It is within the police power of a state to punish the sale of intoxicating liquors to Indians and persons of Indian descent, though they are citizens of the United States and of the State of Michigan.—People v. Gebhard, 151 Mich. 192.

§ 123. Concurrent powers; supersession of state by federal action.

Effect of Bankruptcy Act, see Bankruptcy, § 1.
Effect of Interstate Commerce Acts, see Commerce, § 3.
Authority of state over national banks, see Banking, § 90.

¶ 539. An affirmative power in congress is not necessarily incompatible with a like power in the state, but in the exercise of these powers by the two governments, if there be a conflict between them, the law of the state becomes inoperative.—Robinson v. Rice, 3 Mich. 235.

¶ 540. A state law yields only to the extent of its collision with the federal constitution.—McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; affirming 92 Mich. 377.

§ 124. Federal encroachment on states.

See also Banking, §§ 88, 89.
State encroachment, see post § 126.

¶ 541. Section 11 (k) of the Federal Reserve Act of Dec. 23, 1913, in so far as it grants to national banks the right to act as trustees, executors and administrators, has no natural connection with the carrying on of federal fiscal operations, is a direct invasion of the sovereignty of the state over the devolution of estates and the conducting of private business within the state, the creation of corporations, and the qualification and duties of such as may engage in the business of acting as trustees, executors and administrators, and is unconstitutional.—Attorney General ex rel. Union Trust Co. v. First Nat. Bank of Bay City, 192 Mich. 640; reversed in 244 U. S. 416, 61 L ed. 1233, 37 Sup. Ct. Rep. 734.

§ 125. ——Documentary stamp legislation.

¶ 542. So much of the internal revenue law as required process in state courts to be stamped, as a condition of the validity of legal proceedings, was unconstitutional and void.—Fifield v. Close, 15 Mich. 505.

¶ 543. Congress has no power to prescribe rules of evidence for the state courts; and therefore the act of congress which declared that certain instruments should not be received as evidence in any court unless stamped as required by the act was applicable only to the federal courts.—Clemens v. Conrad, 19 Mich. 170; Sammons v. Halloway, 21 Mich. 162.

¶ 544. Congress has power to lay stamp duties and to enforce collection of them by proper penalties; but to make void a contract made in one of the states, between the citizens thereof, that is permitted by the local law, is not a proper penalty under our political system.—Sammons v. Halloway, 21 Mich. 162.

§ 126. State encroachment on federal rights; patents, shipping, etc.

Federal encroachment on states, see ante §§ 124, 125.
Taxation of national banks and their stock, see Taxes, I, II.
In matters of interstate commerce, see Commerce.
Exclusiveness of rights under patents and powers of state respecting same, see Patents.
Relative rights in the public lands, see Public Lands.

¶ 545. Where any right or privilege is subject to the regulations of congress it is not competent for state laws to impose conditions which shall interfere with the rights or diminish their value.—Cranson v. Smith, 37 Mich. 309.

¶ 546. The state can punish frauds committed upon its citizens by any manner of false pretenses, but cannot punish those done under color of rights held from the United States on any different grounds from others.—Cranson v. Smith, 37 Mich. 309.

¶ 547. The Michigan statute (Comp. L. 1871, §§ 1565. 1566) imposing unusual conditions on the transfer of patent rights by requiring notes given therefor to show it, and making it a misdemeanor to take or transfer them otherwise, is unconstitutional as impairing rights that are regulated and protected by congress.—Cranson v. Smith, 37 Mich. 309.

¶ 548. State legislation interfering with the rights conferred by letters patent under United States law is void as an invasion of national authority. But a municipal ordinance requiring peddlers to obtain a license is no such interference, even though the peddler be the manufacturer and patentee of the articles sold.—City of Coldwater v. Russell, 49 Mich. 617.

¶ 549. R. S. 1846, chap. 81, tit. 19, § 10, How. St., § 6193, providing that every mortgage of goods and chattels shall be absolutely void as against the creditors of the mortgagor unless the mortgage shall be filed in the office of the township clerk where the mortgagor resides is void so far as relates to mortgages on enrolled vessels, because in conflict with the law of congress relating to mortgages on said vessels.—Robinson v. Rice, 3 Mich. 235.

V. DUE PROCESS OF LAW.

§ 127. In general; definition and elements.

Application of clause to statutes of particular kinds, see post § 145 et seq.
Persons, corporations, property and rights within operation of the clause, see post §§ 135-141.
What constitutes "deprivation," see post § 141.
Nature of hearing or trial required, see post §§ 130-132.
Requisites of warrant or ground for arrest, see post § 144.
Errors in procedure as denial of due process, see post § 133.
In contempt and criminal cases, see post §§ 142-144.
Construction of statute as implying due process for purpose of sustaining it, see ante § 25.
Due process clause in state constitution, see Const., Art II, § 16.

¶ 550. The words "due process of law," as used in Const., art. 6, § 32, mean the law of the land; by which is to be understood laws which are general in their operation, and not special acts of legislation passed to affect the rights of particular individuals against their will, and in a way in which the same rights of other persons are not affected by existing laws.—Sears v. Cottrell, 5 Mich. 251; Attorney General v. Jochim, 99 Mich. 358.

¶ 551. The constitutional guaranty of due process simply preserves to the people rights which had existed for centuries, and which had been enjoyed according to the course of the common law, and means such an exercise of governmental power as is sanctioned by settled maxims of law, under such safeguards for the protection of individual rights as those maxims prescribed.—People v. Dickerson, 164 Mich. 148.

¶ 552. Due process of law is not necessarily judicial process.—Reetz v. People, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; affirming 127 Mich. 87.

¶ 553. Due process is not necessarily judicial process. Administrative process, which has been regarded as necessary in govern-

ment and sanctioned by long usage, is as much due process of law as any other.—Welmer v. Bunbury, 30 Mich. 201.

¶ 554. The due process of law required by the constitution means that notice or summons by which a party is tendered his day in court, with a right to frame an issue and be heard before a judgment can be rendered or execution issued which shall take away his liberty or property.—Rouse, Hazard & Co. v. Wayne Circuit Judge, 104 Mich. 234.

¶ 555. Due process of law does not mean that removals from constitutional offices may not be made without the intervention of courts.—Attorney General v. Jochim, 99 Mich. 358.

¶ 556. An interested municipality cannot be final judge in its own cause (determining that a highway existed).—Sheldon v. Village of Kalamazoo, 24 Mich. 383.

¶ 557. Personal liberty is not held subject to state comity or on any less tenure than constitutional right.—In re Cannon, 47 Mich. 481.

¶ 558. A person cannot be restrained of his liberty unless the case made clearly brings him within some rule of law permitting the restraint.—People ex rel. Singer Mfg. Co. v. McAllister, 19 Mich. 215.

§ 128. Notice, charges and hearing.

See also ante ¶ 554.
Presumption that notice was intended, see ante § 23.
Stockholders or members as bound by notice to representatives or by corporate presence, see also post ¶ 710.
In local assessment proceedings, see post § 155.

¶ 559. Every person is entitled to his day in court whenever his interests are involved, and to due notice of the proceedings, and to reasonable opportunity to appear and defend.—Noyes v. Hillier, 65 Mich. 636; Prince v. Clark, 81 Mich. 167; City of Grand Rapids v. Powers, 89 Mich. 94; Township of Caledonia v. Rose, 94 Mich. 216.

¶ 560. Removal from a county office without the specific charges and findings required by statute is not by "due process of law."—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 561. If the proceedings under the statute for incorporating villages at the will of electors could be treated as judicial action the act would be defective, since there is no provision for any process or notice to subject parties interested to the jurisdiction or for giving them any effective hearing if desired.—People ex rel. Shumway v. Bennett, 29 Mich. 451.

¶ 562. Where a statute fixes the time and place of meeting of any board or tribunal, no special notice to parties interested is required, the statute being in itself sufficient notice.—Reetz v. People, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; affirming 127 Mich. 87.

§ 129. Personal service.

¶ 563. The tax law of 1893 (Pub. Acts 1893, No. 206), providing in section 62 for judicial fixing of a day for hearing, and in section 66 for four weeks' publication, which "shall be equivalent to a personal service of notice on all persons" interested in the land specified, affords due process of law though no personal service is provided for as a step in selling and divesting title to the land. The proceeding is one substantially in rem and not one between parties such as requires personal service.—Ball v. Ridge Copper Co., 118 Mich. 7; Youngs v. Peters, 118 Mich. 45; Hooker v. Bond, 118 Mich. 255.

¶ 564. The general tax law is not unconstitutional in that it provides for the foreclosure of the lien of the state, and the sale of the property, of private persons without service of process; substituted service being sustained in proceedings in rem.—Toolan v. Longyear, 144 Mich. 55; affirmed in 209 U. S. 414, 52 L. ed. 859, 28 Sup. Ct. Rep. 506.

¶ 565. Laws 1893, Act No. 206, § 61 (How. St., 2nd Ed., § 1829), relating to the preparing and filing by the auditor general as soon as practicable after June 1st, with the clerk of the circuit court, of a petition for the sale of land for taxes delinquent for more than one year prior to the 1st day of May of the year in which the petition is filed, and providing for the entry of an order that the petition be brought to a hearing at a specified time and place at which persons desiring to contest the same may appear and file their objections, and that the petition, with the order thereon must be published at least once a week for four weeks prior to the time fixed for hearing in some newspaper circulating in the county and if there is no such newspaper that the petition and order be printed and copies furnished to each voter in the county and copies posted in three public places in each township, and declaring that such publication shall be the equivalent of personal service of notice of the proceedings, does not violate the due process of law clause of the 14th Amendment to the federal constitution because of the mere fact that notice by publication of the proceedings is substituted for personal service.—Long-

year v. Toolan, 209 U. S. 414, 52 L. ed. 859, 28 Sup. Ct. Rep. 506, affirming 144 Mich. 55.

§ 130. Character of trial or hearing required.

In criminal cases, see post §§ 143, 144.
In contempt cases, see post § 142.
Due process as essential in judgment to make it a binding adjudication, see also Former Adjudication, I.

¶ 566. The provision that "No person shall be deprived of life, liberty or property without due process of law," as applied to proceedings of a judicial character, was intended to secure to the citizen the right to a trial, according to the forms of law, of the questions of his liability and responsibility before his person or his property shall be condemned.—Parsons v. Russell, 11 Mich. 113; Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139.

¶ 567. The trial must be by an impartial tribunal, and judgment must precede the deprivation of property.—Parsons v. Russell, 11 Mich. 113; Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139.

¶ 568. A railroad company is not deprived of its property without due process of law on the ground that it is deprived of a full hearing on the matter of valuation, where a tax is levied under Pub. Acts 1901, No. 173 (How. St., 2nd Ed., § 1933 et seq.), providing that the board of state tax commissioners shall constitute a state board of assessors, who are to assess the railroad and certain other corporate property in the state, and prescribing as the rate of taxation, the average rate of taxation levied upon the property upon which ad valorem taxes are assessed, where the statute names a time and place for the sessions of the assessing board, gives to any person or company interested the right to be heard and also authorizes the board to correct the valuation, since one hearing is sufficient to constitute due process.—Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; affirming 138 Fed. 223.

¶ 569. Comp. Laws 1897, § 3406, How. St., 2nd Ed., § 6231, relating to assessments for city improvements, is not invalid under the due process clause of the 14th Amendment to the federal constitution as not affording to the property owner notice and opportunity of hearing upon the questions of what lands, if any, are specially benefited by the improvement, and therefore to be included in the assessment district, and what is the amount of the special benefit, since he is given a thoroughly efficient opportunity to test the legality of the charge against him and in the legality of such charge is necessarily involved the legality of all which precedes it and of which it is the consequence.—Voight v. City of Detroit, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337; affirming 123 Mich. 547.

§ 131. ——Right to trial by jury.

In criminal cases, see post §§ 143, 144.

¶ 570. The Assignment Law of 1883 (How. St., §§ 8749a-8749l), which confers upon the judge in vacation the authority to hear and determine summarily upon the question of a debtor's insolvency and preference of creditors, violates the prohibition against taking property "without due process of law," since by constituting the orders of the judge as final and conclusive, it deprives the debtor of the right of trial by jury.—Risser v. Hoyt, 53 Mich. 185.

¶ 571. Due process of law does not include trial by jury for violation of a municipal by-law which relates to offenses not embraced in the general criminal legislation of the state and one charged with the violation of an ordinance restricting the use of public places even though punishable by imprisonment, waives the right to jury trial by failure to demand it as provided in the city charter.—In re Cox, 129 Mich. 635.

¶ 572. A provision in a city charter that in prosecution for violation of an ordinance the right of trial by jury shall be waived by failure to demand it is not unconstitutional as to taking away due process of law.—In re Cox, 129 Mich. 635.

§ 132. ——Right of appeal or review.

Power to grant or deny appeal or review, see post § 191.

¶ 573. The right of appeal is not essential to due process of law.—Reetz v. People, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; affirming 127 Mich. 87.

§ 133. Denial by errors in procedure.

See also post ¶¶ 613, 948.
Judicial construction as abridging privileges and immunities, see post ¶ 985.

¶ 574. The omission of the judge of a state court wherein condemnation proceedings are taken to charge the jury as to a particular element of damages regarding which no special instruction has been asked by counsel, is, if error at all, not such error as denies due process of law or the equal protection of the laws, but is mere matter of administrative procedure.—Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. St. Rep. 445, affirming 103 Mich. 556.

¶ 575. Where a Michigan statute governing condemnation proceedings provides for an appeal by written notice, specifying the objections, none but specified objections to be passed upon, the refusal of the state Supreme Court to hear counsel upon the question of the necessity for taking the property, when no objection on such ground has been specified in the notice of appeal, does not deprive respondent of due process of law or of the equal protection of the laws.—Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct., Rep. 445, affirming 103 Mich. 556.

¶ 576. A state cannot be deemed guilty of a violation of its obligations under the Constitution of the United States because of a decision, even if erroneous, of its highest court, while acting within its jurisdiction.—In re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191, affirming 42 Fed. 217.

§ 134. Object and effect of XIVth Amendment.

See also post ¶ 612.
Particular instances, see also post § 135 et seq.
Equal protection clause, see post §§ 224-227.
Privileges and immunities clause, see post §§ 228-231.
Application and operation of the Vth Amendment, see ante ¶ 532.
Equality clause in state constitution, see post ¶ 889.

¶ 577. U. S. Const., amend. 14, was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens, nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the state laws.—In re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191, affirming 42 Fed. 217.

¶ 578. The right of the state to exercise its police power is not affected by the fourteenth amendment to the federal constitution.—People v. Damm, 183 Mich. 554.

§ 135. Public and persons inhibited.

Persons, property and rights protected, see post §§ 136-141.

¶ 579. The legal safeguards of property exist against the state or the municipality as well as against individuals; they have no more power than a private citizen to deprive an owner of his possessions.—Burford v. City of Grand Rapids, 53 Mich. 98.

¶ 580. The fourteenth amendment of the federal constitution is addressed to the states and not to congress.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

§ 136. Persons and corporations protected.

By privileges and immunities clause, see post § 230.
Public and persons or corporations inhibited, see ante § 135.
Vested rights in charter or franchise, see post § 245.
Particular laws affecting corporations, see post §§ 159-166.

¶ 581. The constitutional principle that no person shall be deprived of property without due process of law applies to artificial as well as to natural persons, and to municipal corporations in their private capacity.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

¶ 582. A corporation has the same right to the protection of its property as a natural person.—People v. Lake Shore & M. S. R. Co., 52 Mich. 277; Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564.

¶ 583. Pub. Acts 1913, No. 109, § 14, forbidding contributions for nomination and election expenses by corporations does not deprive a corporation of any property without due process of law.—People v. Gansley, 191 Mich. 357.

§ 137. ——Municipalities.

¶ 584. Municipal corporations are protected in their rights to property which they have lawfully acquired for local purposes, and cannot be deprived of it by the state.—City of Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140.

¶ 585. The authority of a legislature to determine what shall be the extent of a city's capacity to acquire and hold property is not equivalent to, nor does it contain within itself, the authority to deprive the city of property actually acquired by legislative permission. As to property thus held for its own private purposes, a city is to be regarded as a constituent in state government, and is entitled to the like protection in its property rights as any natural person who is also a constituent. The right of the state as regards such property is one of regulation, not appropriation.—People ex rel. Detroit Park Com'rs v. Detroit Common Council, 28 Mich. 228.

§ 138. Property protected.

Vested rights, what are, see post §§ 241-248.
Liability of property to destruction under the police power, see also ante § 98.
Municipal property, see ante § 137.

¶ 586. Property does not consist merely of the title and possession, but includes the right to make any legal use of it, and the right to pledge or mortgage, or to sell and

transfer it; the right to contract a debt or other personal obligation is a right of property.—Kuhn v. Common Council of Detroit, 70 Mich. 534.

¶ 587. Where a statute makes a contract void for want of compliance with the requirements of the stamp law, the right to avoid it for this defect is not "property"which is protected by constitutional provision; and congress has full power by a subsequent act to waive the penal consequences, and make the contract valid on the proper stamp being affixed.—Gibson v. Hibbard, 13 Mich. 214.

¶ 588. The right to have one's property protected does not depend on the character of the property.—People v. Lake Shore & M. S. Ry. Co., 52 Mich. 277.

¶ 589. A common-law right of action is property, and as such is within the rules of constitutional protection.—Dunlay v. Toledo, A. A. & G. T. R. Co., 50 Mich. 470.

¶ 590. The property rights of a railroad company in its right of way are protected. —Grand Rapids, N. & L. S. R. Co. v. Grand Rapids & I. R. Co., 35 Mich. 265; Toledo, A. A. & N. M. R. Co. v. Detroit, L. & N. R. Co., 62 Mich. 564.

¶ 591. A railroad company cannot be required by statute to pay for constructing across its right of way a highway not necessitated by the existence of the railroad.—People v. Lake Shore & M. S. R. Co., 52 Mich. 277; Chicago & Grand Trunk R. Co. v. Hough, 61 Mich. 507.

§ 139. Rights and liberties protected.

See also post ¶¶ 614, 615, 720, 912.
Property rights, see also ante § 138.
What rights are regarded as vested and immune from retrospective legislation, see post §§ 241-248.
Right of contract denied by law limiting hours of labor, see post ¶ 682.
Depriving of liberty of occupation or contract as unusual punishment for crime, see post §§ 202-203.
Business rights and occupations subject to police power, see also ante III.

¶ 592. The provision in Laws 1887, Act No. 313, § 8, requiring the surety in a liquor bond to state that he is not engaged in the sale of any liquor mentioned in the act, and is not a surety upon any other bond required by the act, violates the constitutional principle that no one shall be deprived of liberty or property without due process of law; and it also violates U. S. Const., amend. 14. The right to sign a bond or other contract cannot be made to depend upon the business in which one is engaged.—Kuhn v. Detroit Common Council, 70 Mich. 534.

¶ 593. Personal liberty, which is guaranteed to every citizen under our constitution and laws, consists of the right of locomotion, —to go where one pleases, and when, and do that which may lead to one's business or pleasure, only so far restrained as the rights of others may make it necessary for the welfare of all citizens.—Pinkerton v. Verberg, 78 Mich. 573.

¶ 593a. Sections 1 and 6, Pub. Acts 1905, Act No. 329, which provide in substance that all agreements not to engage in any avocation, employment, pursuit, trade, profession, or business, except where the only object of the restraint is to protect the vendee or transferee of a trade, pursuit, avocation, profession, or business, or the good will thereof sold and transferred for a valuable consideration in good faith, shall be void, are not void as in restraint of the right to contract, and violating Const. U. S., amend. 14.—Grand Union Tea Co. v. Lewitsky, 153 Mich. 244.

¶ 594. The right to issue and sell, or to buy and sell securities is "property" and "liberty" within the due process of law clause of the federal constitution.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

§ 140. ——Rights in office.

¶ 595. The legislature cannot by any act deprive a person of a right to hold an office to which he has been elected or appointed and the duties of which he has assumed, except by due process of law.—People ex rel. Metevier v. Therrien, 80 Mich. 187.

¶ 596. Holding and exercising an office to which a person has been elected during the term for which he has been elected is a right of which he cannot be deprived without due process of law, and this requires notice to the party, a hearing and determination. —People ex rel. Clay v. Stuart, 74 Mich. 411.

¶ 597. A public office cannot be called "property" within the meaning of the provisions of the federal and state constitutions against depriving any person of property without due rocess of law.—Attorney General v. Jochim, 99 Mich. 358.

¶ 598. U. S. Const., amend. 14, § 1, providing that no state shall "deprive any person of life, liberty, or property, without due process of law," is not infringed by Const., art. 12, § 8, which provides for the removal by the governor of certain state officers.—Attorney General v. Jochim, 99 Mich. 358.

¶ 599. Local Acts 1907, No. 461, requiring the county treasurer of Gratiot County to deposit county funds in a designated depository, and to account for the interest there-

on, does not impair any existing or vested right of the treasurer where the act was in force before he took office.—Board Sup'rs Gratiot Co. v. Munson, 157 Mich. 505.

¶ 600. Act 77 of 1885 made the poor commissioners of Detroit ex officio county superintendents, but they are no longer so, inasmuch as act 273 of 1887, leaving them out, and confining the board to appointed members, was valid.—Jackson v. James, 74 Mich. 733.

§ 141. "Depriving" or taking property or liberty.

See also ante ¶ 583.
Withholding favor, see post ¶ 614.
Distinction of inheritance tax from a taking or deprival, see post ¶ 652.
Destruction of value of property by restrictive or prohibitory liquor laws, see also post ¶ 725.

¶ 601. The prohibitory statute of Feb. 3, 1855, did not destroy or affect the right of property in spirituous liquors, or prevent title being transmitted, though it rendered sales unprofitable by depriving the vendor of the ordinary advantages of a sale, and also affixed certain penalties.—Niagara Fire Ins. Co. v. De Graff, 12 Mich. 124.

¶ 602. The fee of the soil beneath the waters of the great lakes being in the state, and the rights of riparian owners being limited to the enjoyment of such easements as were at common-law incident to the ownership of lands bordering upon navigable streams, Pub. Acts 1895, No. 112, setting aside for public shooting grounds certain submerged lands in Lake Erie, and making it unlawful to destroy the rushes and other submarine vegetation on such lands, is not unconstitutional as depriving the riparian owner of property rights without due notice and compensation.—People v. Silberwood, 110 Mich. 103.

¶ 603. Private property of the City of Detroit is not taken without due process of law by a decree requiring it to abate a nuisance by enlarging an inadequate sewer into which the village of Highland Park has rightfully discharged sewage for fifteen years under a decree of a court of chancery and the payment of annual rentals.—City of Detroit v. Village of Highland Park, 186 Mich. 166. (Equally divided court.)

¶ 604. Workmen's Compensation Act, Pub. Acts 1912 (First Extra Session), No. 10, How. St., 2nd Ed., §§ 3939-4008, does not deprive municipality subject to it of property without due process of law.—Wood v. City of Detroit, 188 Mich. 547; Purdy v. City of Sault Ste. Marie, 188 Mich. 573.

¶ 605. Local Acts 1895, No. 337, § 27, which incorporates into the charter of Detroit a provision directing the city treasurer to place to the credit of the board of health a certain sum of money for the maintenance of the board for the fiscal year, by transfer from any other funds in the city treasury, and which provides that the sum thus transferred shall be repaid from moneys collected from liquor taxes, does not conflict with U. S. Const., art. 14, § 1, as taking money or property from the city, the receipts from liquor taxes being absolutely under the control of the legislature.—Davock v. Moore, 105 Mich. 120.

¶ 606. There was no deprivation of school districts of their property without due process of law, within the 14th amendment to the federal constitution, by the enactment of Local Acts 1901, No. 315, providing for the alteration of certain school districts by taking territory from such school districts and adding it to another school district.—Attorney General ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; affirming 131 Mich. 639.

¶ 607. If a statute has a real and substantial relation to the public welfare, if it provides for a deprivation by due process of law, and if it affords an equal protection of the laws, it is valid, notwithstanding its enforcement will deprive a person subject thereto of his liberty or property.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

§ 142. In contempt cases.

¶ 608. Comp. Laws 1915, § 13765, providing that each judge of probate shall have power to issue warrants for the apprehension and imprisonment of any person who shall refuse or neglect to obey any of the court's orders, is not invalid as not affording equal protection of the law and due process of law within the fourteenth amendment to the federal constitution.—In re Merrill, 200 Mich. 244.

¶ 609. The purpose of Comp. L. 1915, providing that the judge of probate shall have power to issue warrants directed to any officer, requiring him to apprehend any person who shall refuse or neglect to perform any order, sentence or decree of the probate court and requiring such officer to apprehend and imprison such person in the county jail until he shall perform such orders, sentence or decree, or be delivered by due course of law, in authorizing such warrants was to provide an effective, if somewhat summary, method of enforcing the orders of the probate court, and a warrant so issued is in the nature of a body execution to enforce an order of the court and may be issued by the judge, without a previous order there-

for, and without notice to the petitioner, without constituting lack of due process of law.—Ex parte Merrill, 245 Fed. 778.

§ 143. In criminal cases.

Criminal prosecution resulting in acquittal on ground of insanity, see post § 150.
Summary judgment on forfeited criminal recognizance, see post ¶ 625.

¶ 610. Due process of law in criminal cases includes the right to trial by a common law jury, to the aid of counsel in making defense, and to have the jury properly instructed concerning the law by a competent court.—In re Silverthorn, 73 Mich. 644.

¶ 611. Before a citizen is subjected to the degradation of imprisonment in a state prison, he should be permitted to avail himself of all his constitutional rights; these include "due process of law" in criminal cases, which has not yet been conferred upon justices of the peace.—In re Silverthorn, 73 Mich. 644.

¶ 611a. The Detroit charter of 1883 (§ 13, ch. 4) provides for a mitigated punishment as municipal grievances of the offenses of city officers' accepting and soliciting bribes, and also provides for a special procedure in the recorder's court. Held, that such offenses are within the general statutes punishing bribery (How. St., § 9241, 9242), and that the charter provisions are invalid.—People ex rel. Robison v. Swift, 59 Mich. 529.

¶ 612. While the fourteenth amendment to the Constitution of the United States undoubtedly forbids any arbitrary deprivation of life, liberty or property, and in the administration of criminal justice requires that no different or higher punishment shall be imposed on one than is imposed on all for like offenses it was not designed to interfere with the power of the state to protect the lives, liberty and property of its citizens nor with the exercise of that power in the adjudications of the courts of a state in administering the process provided by the law of the state.—In re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191, affirming 42 Fed. 217.

¶ 613. The Supreme Court of Michigan did not exceed its jurisdiction or deliver a judgment abridging the privileges or immunities of an attorney at law or deprive him of the law of the land of his domicile, in violation of the due process clause of the fourteenth amendment to the federal constitution by affirming a judgment of conviction for embezzlement of funds of his clients under How. St., § 9151, as an "agent" upon a plea of guilty of embezzlement as an attorney at law on the ground that the word "agent" in the statute applied to attorneys at law, the defendant having been subjected, as all persons within the state are, to the law in the regular course of administration through courts of justice.—In re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; affirming 42 Fed. 217.

¶ 614. A convict who was sentenced under the indeterminate sentence act of 1903 (Pub. Acts 1903, No. 136) and is still detained in prison after the expiration of the maximum term of two years named in the sentence on the ground that because he had been twice previously convicted of a felony the law provided a maximum term of five years in such a case and such term had not lapsed, and he was not entitled to parole, is not imprisoned without due process of law and is not denied equal protection of the laws within the prohibition of the fourteenth amendment to the federal constitution, since such act provides for the granting of a favor to persons convicted of crime who are confined in a state prison and the state may attach such conditions to the granting of the form it deems best, or it may, in its discretion, exclude such classes of persons from participation in the favor as may to it seem fit, and it is immaterial that the convict is not given a hearing upon the question of prior conviction.—Ughbanks v. Armstrong, 208 U. S. 481, 52 L. ed. 582, 28 Sup. Ct. Rep. 372.

¶ 615. It is not an invasion of constitutional right to punish conduct in fact disorderly and dangerous to and destructive of good order, such as loitering about the streets and bar rooms of a city in idleness, without apparent habitation and without any means of support, and it is not certain that a person so acting is not a disorderly person, punishable at common law.—In re Stegenga, 133 Mich. 55.

§ 144. ——Requisites of the process, warrant or arrest.

Constitutional requisites of warrants, see also post § 197.
General necessity for warrant, see Arrest, Commitment and Bail.

¶ 616. Due process of law for the restraint of personal liberty requires a warrant issued by a court or magistrate upon a proper showing or finding, except in cases of reasonable belief of treason or felony, or breach of the peace committed in the presence of the officer.—Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 617. Acts that do not embrace some sort of violent and dangerous conduct cannot be declared by a statute to be breaches of the peace, thus evading the constitutional prohibition of arrests without process; and therefore the provision of Laws 1887, Act No. 313,

§ 17, authorising the arrest without process as for a breach of the peace of one selling liquors on certain days or after certain hours, is invalid.—Robison v. Miner, 68 Mich. 549.

¶ 618. So far as the opinion in Robison v. Miner, 68 Mich. 549, used language implying that the legislature could not extend the right to arrest without process for other misdemeanors, not amounting to a breach of the peace, committed in the officer's presence, such language was unnecessary to a determination of the question there involved, and should not be followed.—Burroughs v. Eastman, 101 Mich. 419.

¶ 619. The due process clause does not prevent the legislature from enacting as a part of a city charter that police officers of the city shall have power to arrest without process all persons who, in the presence of the arresting officer, shall be engaged in violating any ordinance of the common council of the city (Grand Rapids Charter, 1891, p. 60; Local Acts, 1885, p. 83); and due process in such a case is not determined by what would have justified arrest without warrant when the constitution was adopted.—Burroughs v. Eastman, 101 Mich. 419.

§ 145. Acts affecting remedies and procedure.

Statutory rights of action, see also post § 147.

Validity of retroactive laws, see post §§ 235-237.

¶ 620. Comp. L. 1897, § 10421, providing that an action in assumpsit may be brought to recover the damages where an injury has been caused by fraudulent representations or conduct for which an action on the case for fraud or deceit would lie, is not unconstitutional.—City of Battle Creek v. Haak, 139 Mich. 514.

¶ 620a. Comp. L. 1897, ch. 308, § 25, which provides that a landlord who obtains restitution of premises after appeal, may, at his election, sue and recover on the appeal bond, or bring an action for treble damages under section 24, is not unconstitutional though an action on the bond precludes a subsequent action under section 24 for items which could not be recovered in the action on the bond, since section 24 provides a new remedy and the legislature may prescribe conditions under which a statutory remedy may be used.—Schellenberg v. Frank, 139 Mich. 183.

¶ 621. The statute providing for proceedings at law in the nature of a judgment creditor's bill, criticized as inadequate to reach or protect third persons entitled to due process of law in cases where transactions are attacked for fraud or illegality.—Reed v. Baker, 42 Mich. 272; Ehlers v. Stoeckle, 37 Mich. 261.

¶ 622. Public Acts 1897, Act 99 (Comp. L. 1897, § 10208), providing that in all suits in aid of execution, the complainant shall make a prima facie case by introducing in evidence the judgment against the principal defendant, the execution with the levy thereon indorsed and proof of the conveyance complained of, is constitutional and is not a deprivation of "due process of law" in failing to require the giving of some evidence of a fraudulent intent by the debtor, shared by his grantee.—Crane v. Waldron, 133 Mich. 73.

¶ 623. Const., art. 6, § 32, in protecting property rights, was intended only to protect persons from being deprived of their property without their assent unless by due process of law; therefore the Justices' Act of 1855, § 7029, authorizing the circuit court, on rendering judgment against an appellant, to enter it, also, on motion against the surety in the appeal, is valid; the bond is considered as executed by the surety in contemplation of the statute, and consequently operates as an assent by him to the entry of judgment in such manner.—Chappee v. Thomas, 5 Mich. 53.

¶ 624. The Joint Debtor Act (How. St., §§ 7730, 7732), authorizing judgment in form to be entered against all, though only one has been served with process, was intended to supersede the necessity of the plaintiff's proceeding to outlawry against one not found or brought into court, which was essential before judgment could pass against those served with process; and it is not unconstitutional.—Brooks v. McIntyre, 4 Mich. 316.

¶ 625. Whether the statute of 1861, permitting the entering up of judgment summarily, without suit or notice, upon a criminal recognizance two days after forfeiture is entered of record, unless cause to the contrary be shown, was constitutional, quære; the court being divided.—Lang v. People, 14 Mich. 439.

¶ 626. It is within the power of a state to make the whole administration of an estate a single proceeding and to provide that one who has undertaken it within the jurisdiction of the state court shall be subject to the order of the court in the matter until the administration is closed by distribution, and that he shall be required to account for and distribute all that he receives by the order of the probate court, even though he has become a nonresident.—Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. ed. 867, 33 Sup. Ct. Rep. 550; reversing 175 Fed. 667, 681.

¶ 627. A decree by the probate court in the state requiring an executor, who has become a nonresident, to render an account

of all his receipts as executor and to deliver the assets of the estate to his appointed successor within the state, under Comp. L. 1897, §§ 9428, 9435 (How. St., 2nd Ed., §§ 11139, 11146), providing for charging an executor in his account with the whole of the goods of the deceased that come to his possession and with waste in case of neglect to pay over the money in his hands, or of loss to the persons interested is not invalid because of the fourteenth amendment to the federal constitution when the steps taken are concurred in by the foreign court controlling his person and by the domestic court having jurisdiction of the cause.—Michigan Trust Co. v. Ferry, 228 U. S. 346, 57 L. ed. 867, 33 Sup. Ct. Rep. 550; reversing 175 Fed. 667, 681.

§ 146. ——Limitations.

Requiring person in possession to sue tax title claimant, see post § 154.
Validity of retroactive laws, see post §§ 238, 239.

¶ 628. A legislative act retrospective in its operation, and cutting off all remedy for the lapse of time occurring before it became a law, would violate the constitutional provision against depriving a person of property without due process of law; and would therefore be void.—Price v. Hopkins, 13 Mich. 318.

¶ 629. The legislature has authority to shorten the period within which an existing cause of action may be prosecuted, provided it gives a reasonable opportunity.—Semer v. Auditor General, 133 Mich. 569.

¶ 630. Public Acts 1903, No. 84, imposing a limitation of six months within which an action to annul the state's title to lands previously deeded to the state as tax homestead lands is valid.—People v. Christian, 144 Mich. 247.

¶ 631. It seems that Pub. Acts 1899, No. 127, limiting the time within which tax deeds may be set aside, to six months, is valid.—Commissioner of State Land Office v. Auditor General, 131 Mich. 147.

¶ 632. The legislature has power to extend or repeal a statute of limitation, or abolish the rule of adverse possession, and such law will apply to cases where the period has not already run, or title had been previously acquired.—Klatt v. City of Detroit, 162 Mich. 186.

¶ 633. The 1885 Tax Law, § 115 (Pub. Acts 1885, Act 153), providing that one claiming under a tax deed shall after five years' actual and peaceable "possession" be conclusively deemed the owner of the land, and section 116 providing that no action for the recovery of such land or "possession" thereof shall be brought against such person after the expiration of five years after the time when such action accrued, constitute a valid statute of limitations; they do not divest title without due process.—St. Mary's Power Co. v. Chandler-Dunbar Water Power Co., 133 Mich. 470.

¶ 634. Public Acts 1901, No. 63, How. St., 2nd Ed., § 13066, providing that the holder of a sheriff's certificate of sale of real estate shall be entitled to a sheriff's deed at any time within ten years from date of expiration of time of redemption, and that, if the time of redemption elapsed before the act took effect a deed might be given within five years after date the act took effect, but that if the deed was not taken and recorded within time limited by the act, the certificate should be void, held constitutional as a statute of limitations.—Pike v. Halpin, 188 Mich. 447.

§ 147. Imposing or limiting liabilities by statute.

See also ante § 145, and post this division §§ 148-169.
Lien laws, see post § 149.
Making taxes a personal charge recoverable by action, see post ¶ 678.
Stockholders' liability proceedings, see post § 166.

¶ 635. How. St., § 2035, which requires those who float logs in navigable streams, including such streams as are artificially made navigable for logs, to avoid obstructing them, and which provides that when they obstruct them through failure properly to drive their logs or break jams, others who find it necessary to put labor upon the obstructing logs may recover a reasonable compensation, is valid; the legislature may lawfully protect those who wish to avail themselves of artificial flooding, to the extent of requiring others to move obstructing logs at all reasonable times, whether the floods are natural or artificial.—Crane Lumber Co. v. Bellows, 117 Mich. 482.

¶ 636. An act (Laws 1887, Act No. 139, amending Laws 1885, Act No. 233), by which recovery of damages for injury to reputation from newspaper libels is prevented by limiting the recoverable damages to certain defined elements, deprives libeled persons of life, liberty or property without due process.—Park v. Detroit Free Press Co., 72 Mich. 560; McGee v. Baumgartner, 121 Mich. 287.

§ 148. Laws for seizure or sale of property.

Under lien laws, see post § 149.
Labor claim laws against corporations, see post § 165.

Effect as destroying right of trial by jury, see post § 192, ¶ 819.

¶ 637. Under the boat and vessel law (Comp. L. 1857, ch. 149) a vessel might be seized and sold upon the mere assertion of a debt or demand, without any proof to substantiate the claim being made before a judicial tribunal, and without any judgment or decree of any such tribunal allowing the sale. It is therefore in conflict with Const., art. 6, § 32, and void.—Parsons v. Russell, 11 Mich. 113.

¶ 638. A provision for the sale of impounded beasts to pay costs and charges, if the owner, after notice, fails to reclaim the property, the surplus to belong to the owner, does not, although no judicial hearing is provided for, deprive him of his property without due process of law. For an illegal seizure a suit in replevin, or for the value, lies.—Grover v. Huckins, 26 Mich. 476.

¶ 639. A statute allowing animals running at large in a public highway to be taken by any person and publicly sold by a public officer, and providing that, after the expenses of the proceedings and of keeping the animals were paid, the remainder should be paid over to their owner, who should be allowed a certain time within which to redeem them, is to remedy a public grievance, and is not unconstitutional as divesting property rights without due process of law.—Campau v. Langley, 39 Mich. 451.

¶ 640. Comp. L. 1897, §§ 9234-9242, inclusive, as amended by Pub. Acts 1901, No. 55, authorizing chancery courts on published notice against persons not in esse to sell lands held under a life estate whenever it shall appear that the rights of interested parties will otherwise be jeopardized, is a valid exercise of legislative power.—Garrison v. Hecker, 128 Mich. 539.

§ 149. Lien laws.

¶ 641. The Mechanic's Lien Law of 1887 (How. St., §§ 8398a-8398n) held unconstitutional as a whole, because divesting title to land without the owner's act or default.—Spry Lumber Co. v. Sault Sav. Bank & Trust Co., 77 Mich. 199; Mellis v. Race, 78 Mich. 80.

¶ 642. The Mechanics' Lien Law (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199), is not unconstitutional as an unwarrantable abridgment of the freedom of contract, in that the owner is prohibited from paying according to the terms of the contract, and the contractor is prevented from obtaining his pay, whenever it appears from the contractor's sworn statement that there are bills outstanding in favor of subcontractors, laborers, or material men, as the owner is not required to make payments beyond the amount called for in the contract, and is fully protected by the statute, as he may refuse payment until the contractor provides a sworn statement, or he may make payments without the sworn statement if the money paid is distributed, in accordance with the statute, and the owner's contract must be presumed to have been made in accordance with the statute.—Smalley v. Gearing, 121 Mich. 190.

¶ 643. Laws 1881, Act No. 145, gives laborers for a contractor a lien against the owner of the logs, though there is no privity of contract between such laborers and owner; and in so doing the act is constitutional.—Reilly v. Stephenson, 62 Mich. 509.

¶ 644. The log-lien law (Laws of 1887, Act No. 229), is not objectionable for holding the owner of the logs liable to the amount of the contract price to his contractor's laborers, even though he has fully paid the contractor.—Federspiel v. Johnstone, 87 Mich. 303.

¶ 645. The statute of 1855 (Comp. L. 1857, § 1942), for the incorporation of log-driving, etc., companies, held unconstitutional, in so far as it gives a lien for driving logs without consent of the owner and when there is no private right in the corporation; as it deprived persons of their property without due process of law, since under the statute the corporation and its agents must of necessity determine when the emergency has arisen which justifies assuming control, and they must also assess their own charges and sell the property to pay them.—Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139.

§ 150. Lunacy proceedings.

¶ 646. Laws 1873, Act No. 168, providing for the confinement in the insane hospital at the state prison of such persons as are acquitted of murder on the ground of insanity, does not furnish adequate means for enforcing its provisions for releasing them when such confinement becomes unnecessary, and is unconstitutional, as contemplating inquisitorial and ex parte proceedings, which might result in restraining personal liberty without due process of law.—Underwood v. People, 32 Mich. 1.

§ 151. Eminent domain and condemnation.

Effect of errors in condemnation proceedings, see also ante § 133.

Taking property for drains, see post § 155.

¶ 647. U. S. Const., amend. 14, providing that no person shall be deprived of his property without due process of law, is not violated by a statute permitting, in condemnation cases, the taking of possession prior to the final determination of the amount of

compensation and payment thereof, if adequate provision is made for compensation when the amount is determined.—Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445, affirming 103 Mich. 556.

¶ 648. For want of jurisdiction extending so far, a probate court cannot constitutionally make an order under How. St., § 3340, allowing a railroad company to remain in possession of land pending condemnation proceedings.—Detroit, L. & N. R. Co. v. Livingston County Probate Judge, 63 Mich. 676.

§ 152. Tax laws and taxation.

Laws relating to collection, sale of property, and tax titles, see post §§ 153-155.
In local assessment proceedings, see post § 155.
Unequal protection of the laws, see post § 227.
Relative powers of departments, see ante § 47.
Taxing power and limitations in general, see Taxes, I.

¶ 649. The taking of property under pretense of taxation, for a purpose for which taxation is not admissible, is an unlawful confiscation, and not due process of law, and is therefore forbidden by Const., art. 6, § 32.—People ex rel. Bay City v. State Treasurer, 23 Mich. 499.

¶ 650. Taxation for a local purpose cannot be sustained if the law authorizing it be unconstitutional, even though the tax be voted by a majority; for, so far as the minority are concerned, its enforcement deprives them of their property without due process of law.—Anderson v. Hill, 54 Mich. 477.

¶ 651. Local Acts 1905, No. 627, providing for the annexation of certain territory to the city of Detroit is not unconstitutional as depriving the residents of a portion of the annexed territory of their property without due process through the means of illegal taxation.—Attorney General ex rel. Battishill v. Township Board of Springwells, 143 Mich. 523.

¶ 652. The inheritance tax, provided in Pub. Acts 1899, No. 188, is not unconstitutional for taking property without due process because of failure to provide for personal notice and opportunity to resist assessment as it is not taking legatee's property but imposes a condition upon his acquisition of it.—Union Trust Co. v. Wayne Probate Judge, 125 Mich. 487.

¶ 653. Taxation of domestic-owned shares in a foreign corporation and of the property of the foreign corporation within the state, and not taxing shares in a domestic corporation under like circumstances, is not offensive to the fourteenth amendment, where all owners of foreign corporation stock are taxed alike.—Thrall v. Guiney, 141 Mich. 392.

¶ 654. The due process clause of the Fourteenth Amendment of the federal constitution forbidding any state to deprive any person of his property without due process of law was not violated by the failure to provide for a hearing before the state board of tax assessors before the imposition of a tax upon railroad property under Pub. Acts 1901, No. 173, How. St., 2nd Ed., § 1933 et seq., since a definite rate is fixed by the statute and by the Michigan Constitution, art. 14, § 11, as amended in 1900, providing that the legislature shall provide a uniform rule of taxation for such property as shall be assessed by a state board of assessors, and the rate of taxation on such property shall be the rate which the state board of assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes.—Michigan Railroad Tax Cases, 138 Fed. 223;, affirmed in 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

¶ 655. The rate of taxation of the property of railroad companies under Pub. Acts 1901, No. 173, How. St., 2nd Ed., § 1933 et seq., providing for the assessment by the state board of assessors of the property of railroad companies at the average rate of taxation of the then current year levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes, upon receipt of reports from each of the taxing districts, and for taxation of the property of the companies as assessed by it, at the rate as determined, is determined by the legislature and by the Michigan Constitution, art. 14, § 11, as amended in 1900, providing that the legislature shall provide a uniform rule of taxation for such property as shall be assessed by a state board of assessors, and the rate of taxation on such property shall be the rate which the state board of assessors shall ascertain and determine is the average rate levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes, and is not determined by the local legislatures and assessing officers of the counties, cities, towns, villages and school districts of the state so as to constitute want of due process of law.—Michigan Railroad Tax Cases, 138 Fed. 223; affirmed in 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

§ 153. ——Collection and sale of property.

In making assessments, see also ante ¶¶ 568, 569.
Personal service, see also ante § 129.

¶ 656. Summary process to enforce the payment by a collector and his sureties of the taxes not returned by him (see How. St., § 1064), having been in use by express legislation, both before and ever since the adoption of the constitution, must be considered permitted by that instrument and regarded as due process of law.—Weimer v. Bunbury, 30 Mich. 201; Bringard v. Stellwagen, 41 Mich. 54.

¶ 657. The provision in the tax law of 1853, that, "In case any person shall refuse or neglect to pay the tax imposed on him, the treasurer shall levy the same by distress and sale of the goods and chattels of said person, or of any goods and chattels in his possession," "and no claim of property to be made thereto by any other person shall be available to prevent a sale," but giving the owner of any property which might be thus seized and sold to pay the tax of another a remedy against the person taxed, held not unconstitutional.—Sears v. Cottrell, 5 Mich. 251.

¶ 658. The validity of the provision of the charter of the City of Grand Rapids requiring the marshal to levy upon any personal property found on the premises assessed, to satisfy such assessment, is questioned but not decided.—Tompkins v. Johnson, 75 Mich. 181.

¶ 659. Public Acts 1893, No. 206, § 60, which subjects to sale and redemption in accordance with the provisions of that statute lands theretofore returned delinquent, does not, even though it has the effect of hastening the time of sale and of lessening the period for redemption as to such lands, conflict with Const., art. 6, § 32, providing that no person shall be deprived of his property without due process of law.—Muirhead v. Sands, 111 Mich. 487.

§ 154. ——Affecting titles or evidence of title.

Shortening time for redemption, see ante § 153, ¶ 659.
Limitation laws, see also ante § 146.

¶ 660. The provision in tax law of 1893, § 135, requiring, as a condition precedent to the recording of a deed, the filing with the register of deeds of a certificate that the taxes on the land for the previous five years have been paid, is not an unwarrantable infringement of property rights, nor are its provisions incapable of enforcement by the officers named therein.—Van Husan v. Heames, 96 Mich. 504.

¶ 661. That portion of the tax law of 1858, § 124, which makes a tax deed prima facie evidence of the legality of the proceedings to the date of the deed does not conflict with the constitution, and is valid.—Groesbeck v. Seeley, 13 Mich. 329.

¶ 662. Comp. L. 1871, § 1129, providing that no sale for delinquent taxes shall be held invalid unless it be made to appear that all legal taxes were paid or tendered, and that all taxes shall be presumed to be legally assessed until the contrary is affirmatively shown, is unconstitutional so far as it sustains sales for taxes which are in part illegal.—Silsbee v. Stockle, 44 Mich. 561.

¶ 663. Comp. L. 1897, § 3870, making the tax roll prima facie evidence of the tax sought to be recovered, is not in conflict with the taxpayers' constitutional rights.—Township of Decatur v. Copley, 133 Mich. 546.

¶ 664. A tax deed pursuant to a sale made under Pub. Acts 1891, No. 200, wherein the state's title was conveyed by the county treasurer is valid; as even if it be conceded that at the time of the sale in question the conveyance was required to be made by the auditor general, the deed was validated under Pub. Acts 1893, No. 206, § 124, validating deeds made by county treasurers.—Hoffman v. Pack, Woods & Co., 123 Mich. 74, distinguishing Hall v. Perry, 72 Mich. 202, where sale was void.

¶ 665. Public Acts 1897, No. 229, General Tax Law, § 143, as amended by Pub. Acts 1901, No. 128, is unconstitutional in that it deprives one of property without due process of law, being an attempt to compel one who is in full possession of his property, and who thereby makes the most positive assertion of his rights, to resort to a court not to gain his own, but to restrain another from asserting an unwarrantable claim.—O'Connor v. Carpenter, 144 Mich. 240.

¶ 666. Public Acts 1897, No. 229 (General Tax Law, § 143), as amended by Pub. Acts 1901, No. 128 is not a curative act, but purports to be a statute of limitations, and makes no distinction between tax titles of varying degrees of validity. It cannot be sustained as amounting to a prohibition against raising a question of the validity of a tax title based on a defect arising out of an omission of an act which might originally have been dispensed with.—O'Connor v. Carpenter, 144 Mich. 240.

¶ 667. The General Tax Law, § 127 (Pub. Acts 1893, No. 206, as amended by Pub. Acts 1899, No. 107), is not unconstitutional because it provides that the determination of the auditor general and the commissioner of the state land office as to when state tax lands shall become state homestead lands shall be conclusive unless assailed by suit within six months, though it applies to one in possession, if he has no rights to be protected.—Griffin v. Kennedy, 148 Mich. 583; O'Connor v. Carpenter, 144 Mich. 240, distinguished.

¶ 668. There is no infringement of private property rights in the enactment of a statute (Pub. Laws 1897, No. 229), which provides for six months' grace to the original purchaser of lands sold to the state for taxes and conveyed to private parties, because the state may provide for this measure of protection to delinquent owners, and one who buys a conditional title is not in a position to complain of the conditions.—Reed v. Auditor General, 146 Mich. 208.

§ 155. ——Local improvement, drain and assessment proceedings.

¶ 669. An act authorizing the cost of paving streets to be assessed upon the abutting property according to frontage is valid and is not violative of the Fourteenth Amendment of the United States Constitution.—Cass Farm Co. v. City of Detroit, 124 Mich. 433, affirmed in 181 U. S. 396, 45 L. ed. 914, 21 Sup. Ct. Rep. 644.

¶ 670. Local Acts of 1885, Act No. 292, and Local Acts of 1887, Act No. 436, amendatory of the charter of Grand Rapids, in so far as they provide for assessments for the payment of damages sustained by the regrading of streets, are wholly inoperative, in that they fail to provide for notice to the parties who are to be assessed to satisfy the judgments recovered by landowners entitled to such damages in proceedings provided for in said acts.—Sligh v. City of Grand Rapids, 84 Mich. 497.

¶ 671. Comp. L. 1897, § 3406, providing that if the common council of a city believe that a portion of the city in the vicinity of a proposed improvement will be benefited thereby, they may determine that the whole or any just proportion of the compensation awarded by the jury shall be assessed upon the owners or occupants of the land deemed to be benefited, and that thereupon they shall, by resolution, fix and determine the district benefited, and specify the amount to be assessed upon the owners or occupants of the taxable real estate therein, etc., is not unconstitutional as taking property without due process of law, for its failure to provide for a notice of the hearing relating to the establishment of the assessment district, and the amount of the total assessment.—Voigt v. City of Detroit, 123 Mich. 547, affirmed in 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 337.

¶ 672. Under the rule in Voigt v. City of Detroit, 123 Mich. 547, Comp. L. 1897, § 3406, is not unconstitutional as taking property without due process of law, by reason of its failure to provide for a notice of the hearing relating to the establishment of an assessment district, and the amount of the total assessment.—Goodrich v. City of Detroit, 123 Mich. 559, affirmed in 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397.

¶ 673. Comp. Laws 1897, § 3406, How. St., 2nd Ed., § 6231, relating to assessments for city improvements, is not invalid under the due process clause of the Fourteenth Amendment to the federal constitution as not requiring the amount imposed upon the district to be limited to the amount of special benefit, since, as construed by the Supreme Court, the amount of taxes which can be assessed upon the district or upon any given parcel of land cannot exceed the benefits.—Voigt v. City of Detroit, 184 U. S. 115, 46 L. ed. 459, 22 Sup. Ct. Rep. 377; affirming 123 Mich. 547.

¶ 674. The due process of law clause of the Fourteenth Amendment to the federal constitution is not violated by Comp. L. 1897, §§ 3394, 3395 (How. St., 2nd Ed., §§ 6219, 6220), because no provision is made for notice of the taking of land for street improvement purposes to those against whom the assessments for benefits will be taxed, notice to the person whose property is taken being all that is necessary.—Goodrich v. City of Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397; affirming 123 Mich. 559.

¶ 675. A resolution of a common council of a city passed in pursuance to Comp. L. 1897, § 3406, How. St., 2nd Ed., § 6231, that such council fixes and determines that a specified district is benefited by the opening of a certain street and that there be assessed and levied upon the several pieces and parcels of real estate, included in the description, a certain amount in proportion, as near as may be, to the advantage which each lot or parcel is deemed to acquire by this improvement, does not offend the due process of law clause of the Fourteenth Amendment of the Federal Constitution because not expressly stating that the property included therein is benefited to the amount ordered to be assessed, since by section 3406 when the proceedings reach such a stage that it becomes necessary to decide what proportion of the cost of the improvement shall be assessed to any given description of land an opportunity must be given the owner of the land to be heard on the question.—Goodrich v. City of Detroit, 184 U. S. 432, 46 L. ed. 627, 22 Sup. Ct. Rep. 397, affirming 123 Mich. 559.

¶ 676. A statute (Pub. Acts 1895, No. 217, chap. 3, §§ 6-8) cannot be held to provide for the taking of property without due process of law merely because it does not give one who is assessed for a drain but whose land is not taken for such drain the right to contest the public necessity for the drain.—Roberts v. Smith, 115 Mich. 5.

¶ 677. Comp. L. 1897, § 4353, providing for the appointment of a board to review drain assessments as between townships, is not invalid in that it does not provide for

notice to the townships not appealing to such board as the act contemplates that the county drain commissioner who is required to be notified, will look after the interests of such townships and notify them if necessary. —Scholtz v. Ely, 123 Mich. 541.

¶ 678. Local Acts 1895, No. 443, which provides that assessments for public improvements heretofore made by the city of Grand Rapids against certain named railroads shall be legal demands against the railroad companies and enforceable by action in assumpsit and levy and sale upon execution, is invalid since taxes which are not a personal liability when assessed and levied cannot be made so by subsequent legislation. —City of Grand Rapids v. Lake Shore & M. S. R. Co., 130 Mich. 238.

§ 156. Food, health and employment regulations.

¶ 679. Public Acts 1901, No. 22, which prohibits the coloring of oleomargarine to resemble butter does not violate the Fourteenth Amendment of the United States Constitution nor Michigan Constitution, Art. VI, § 32.—People v. Rotter, 131 Mich. 250; People v. Phillips, 131 Mich. 395; People v. Hinshaw, 135 Mich. 378.

¶ 680. Act No. 104, Pub. Acts 1909, providing that common carrier railroads are liable for injuries caused by the negligence of the company, its officers, agents or employees, and that contributory negligence does not bar recovery if the negligence of the one injured is of less degree than that of the company, and that contracts of employment, etc., are no defense to actions for injuries, does not violate the provisions of the Fourteenth Amendment of the Federal Constitution nor the State Constitution, Art. 2, § 16, which prohibit depriving any person of life, liberty or property without due process of law.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 681. Act No. 104, § 4, Pub. Acts 1909, providing that contracts of employment, etc., with common carrier railroads are no defense to actions for injuries, does not abridge the right to freely enter into contracts.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 682. Act No. 285, Pub. Acts 1909, provides that women shall not be employed in factories, mills, etc., to exceed an average of nine hours a day or fifty-four hours a week, nor for more than ten hours in any one day, except those engaged in preserving perishable goods. Held, this act does not abridge the right of contract so as to contravene the Fourteenth Amendment of the Constitution of the United States.—Withey v. Bloem, 163 Mich. 419.

§ 157. Regulations of public use of ways or waters.

¶ 683. Laws 1879, Act No. 219, requiring any plank road company to remove its toll-gate beyond municipal limits, is invalid as taking property without due process of law where the effect thereof would be to deprive the company of a substantial part of the road upon which it collected toll.—City of Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140.

¶ 684. The exaction of tolls under a statute for the use of an improved waterway is not a deprivation of property within the meaning of the provision that no state shall deprive one of property without due process of law.—Sands v. Manistee River Imp. Co., 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; affirming 53 Mich. 593.

§ 158. Motor vehicle laws and regulations.

¶ 685. Const., Art. VI, § 32, providing that no person shall be deprived of life, liberty or property without due process of law, is not violated by an ordinance requiring motor vehicles to be registered and numbered and to display the numbers assigned to them.—People v. Schneider, 139 Mich. 671.

¶ 686. Act 318, P. A. 1909, sec. 10, subd. 3, How. St., 2nd Ed., § 2496, providing that owners of motor vehicles shall be liable for injuries occasioned by the negligent operation thereof by any person except in case such vehicle shall have been stolen is unconstitutional.—Barry v. Metzger Motor Car Co., 175 Mich. 466.

¶ 687. The infirmity of the provision of Act 318, P. A. 1909, subd. 3, § 10, that owners of motor vehicles are liable for injuries caused by the negligent operation thereof by any person except by one who has stolen such vehicle which is unconstitutional under Art. 2, § 16, of the State Constitution and the Fourteenth Amendment of the Federal Constitution relating to the taking of property without due process of law would have been cured had it been followed by language indicating that the owner should not be liable if the vehicle was taken in violation of Act 33, P. A. 1909, which makes it a felony to take or use motor vehicles without authority "without intent to steal the same."—Daugherty v. Thomas, 174 Mich. 371.

§ 159. Regulation of railroads.

Railroad taxation and assessments, see ante § 152.

Employers' liability laws, see ante § 156.

¶ 688. The due process of law clause of the Federal Constitution was not violated by the Railroad Commission Act, Pub. Acts 1909, No. 300, § 7, as amended by Pub. Acts 1911, No. 139, How. St., 2nd Ed., § 6530, pro-

viding that every common carrier operating within the state shall receive and transport at reasonable rates all car load traffic offered for transportation under the usual conditions locally consigned between points in the same city or town and shall receive and transport at reasonable rates from any junction point or transfer point or intersection with another railroad in such city or town all such car load freight destined to team tracks or other sidings on any line operated by the delivering carrier and shall deliver such cars upon such team tracks or sidings in the city or town, where such cars are received from any such connecting line when required so to do, since a service calling for the use of the so-called terminal facilities of a connecting railroad does not lose what would otherwise be the quality of transportation from the mere fact either that the movement begins or ends within the switching, or corporate limits of a city, or that the transportation is only between an intra-city junction and a team track or sidetrack, and, whether a given service is delivery as incidental to and as a part of a transportation in which the delivering carrier has substantially participated, or is a delivery incidental only to "transportation" which has been wholly performed by another carrier, is, at the last, a question of fact, to be determined in each case, as it may arise.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 198 Fed. 1009; affirmed in 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

¶ 689. Under Pub. Acts 1909, No. 300, § 7, as amended by Pub. Acts 1911, No. 139, § 7 (How. St., 2nd Ed., § 6530), relating to the establishment of switch connections between railroads, and providing that every common carrier operating within the state shall receive and transport at reasonable rates any carload traffic offered for transportation under the usual conditions, locally consigned between points in the same city and town, and shall receive and transport at reasonable rates from any junction point or transfer point or intersection with another railroad in such city or town any and all such carload freight destined to team tracks or other sidings on any line operated by the delivering carrier, and shall deliver such car or cars upon such team tracks, or sidings in the city or town where such car or cars are received from such connecting line, when required so to do, a railway company being operated in the city of Detroit, may be required by the Railroad Commission, without violation of the due process clause of the Fourteenth Amendment to the Federal Constitution, to use its tracks within the corporate limits, including team tracks, for the interchange of intrastate traffic, such required use not constituting the use of terminal facilities.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152; affirming 198 Fed. 1009.

¶ 690. A steam railroad, which is required by an order of the Michigan Railroad Commission, pursuant to Pub. Acts 1907, No. 312, § 7, providing for the connection of the railroad tracks at a certain town with a competing interurban railroad, and the interchange of cars, carload shipments, and less than carload shipments, is not deprived of its property without due process of law within the Fourteenth Amendment to the Federal Constitution, where such order does not require the steam railroad to haul cars to points on the interurban railroad, but only to permit them to be hauled by the latter, nor by the provision requiring delivery of the cars to the interurban railroad, nor on the ground that there is no provision made for the paramount needs of the steam railroad for the use of its own equipment, nor for the prompt return or adjustment for loss or damage to such equipment nor for compensation for the use thereof, where such order, reasonably construed, does not exclude the ordinary remedies for delay in returning cars or for loss or damage to them and it does not contemplate that the steam railroad shall be required to permit the use of its cars, or of the cars of other railroads for which it is responsible, off its line without compensation.—Michigan Central R. Co. v. Michigan Railroad Commission, 236 U. S. 615, 59 L. ed. 750, 35 Sup. Ct. Rep. 426; affirming 168 Mich. 230.

¶ 691. The due process clause of the Fourteenth Amendment to the Federal Constitution is not invocable where an order of the Michigan Railroad Commission directing a railroad company to relay rails removed by it from a part of a logging spur and to resume service thereon is enforced by mandamus, although a proceeding in equity to review such order is pending in the circuit court, the petitioner being required to furnish an adequate bond to indemnify the railroad company from possible loss, in case the order of the commission is vacated.—Detroit & Mackinac R. Co. v. Michigan Railroad Commission, 240 U. S. 564, 60 L. ed. 564, 36 Sup. Ct. Rep. 424; affirming 178 Mich. 230.

¶ 692. A street railroad company was not deprived of its property without due process of law by an order of the railroad commissioner under Pub. Acts 1893, No. 171, § 5 (How. St., 2nd Ed., § 6868), requiring it to pay a portion of the expense of constructing and operating safety appliances at a grade crossing of a steam railroad, although such latter railroad was built across the street after the street railroad had built its tracks in the street and had occupied them, and especially where it appeared that the crossing was one of unusual danger.—Detroit, Fort W. & B. I. R. Co. v. Osborn, 189 U. S.

383, 47 L. ed, 860, 23 Sup. Ct. Rep. 540; affirming 127 Mich. 219.

§ 160. ——Regulating railroad fares.

¶ 693. Public Acts 1891, No. 90, requiring railroad companies to keep for sale at specified prices less than the maximum rates previously fixed by the legislature for the carriage of passengers, 1,000-mile tickets valid for two years, and to be issued, whenever required, in the name of the purchaser, his wife and children, cannot be sustained as an exercise of the power of the legislature to fix maximum rates of fare, or to make reasonable regulations for the convenience of the public concerning the conduct of railroad business; and it is void as violating that part of the federal constitution which forbids the taking of property without due process of law.—Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; reversing Smith v. Lake Shore & M. S. R. Co., 114 Mich. 460.

¶ 694. How. St., § 3323, subd. 9, which fixes a maximum charge for the transportation of passengers on the different railroads of the state upon the basis of their gross earnings per mile, and which in so doing distinguishes between railroads located in the upper peninsula and those in the lower peninsula, does not contravene U. S. Const., amend. 14, which declares that no state shall deprive any person of his property without due process of law, or deny him the equal protection of its laws.—Wellman v. Chicago & G. T. R. Co., 83 Mich. 592; affirmed 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

¶ 695. The amendment of 1889 to the Railway Act fixing the rate of fare on railroads whose passenger trains earn more than $2,000 per mile, at 2½ cents per mile, is not unconstitutional as applied to companies organized under the act to take over railroads sold on foreclosure of mortgages antedating such amendment; since the right to reorganize under the act is a privilege and not a property right and accepting the privilege of incorporating carries with it the burden of submitting to all the provisions of the act.—Commissioner of Railroads v. Grand Rapids & I. R. Co., 130 Mich. 248; affirmed in 193 U. S. 17, 48 L. ed. 598, 24 Sup. Ct. Rep. 310.

§ 161. Regulations of business or occupation generally.

¶ 696. Laws 1893, Act No. 148, making it unlawful for barbers to carry on their business on Sunday does not conflict with U. S. Const., amend. 14.—People v. Bellet, 99 Mich. 151.

¶ 697. Laws 1883, Act No. 167, regulating the practice of medicine by forbidding practice by persons without stated qualifications, unless for five years they have practiced in Michigan, does not deprive other persons of any liberty without due process of law.—People v. Phippin, 70 Mich. 6.

¶ 698. Due process of law, as accorded by the Federal Constitution, is not denied an applicant for a certificate of registration for the practice of medicine by Pub. Acts 1899, No. 237, How. St., 2nd Ed., § 5108 et seq., on the ground that the board of registration is given authority to exercise judicial powers without any appeal from its decision, because it may refuse a certificate of registration if it finds that no sufficient proof was presented that the applicant had been "legally registered" under Pub. Acts 1883, No. 167, since a state may legally grant to a tribunal, whether called a court or a board of registration, the final determination of a legal question and a review of proceedings of the board may be had in the courts, although the act does not specifically so provide.—Reetz v. People, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; affirming 127 Mich. 87.

¶ 699. Public Acts 1899, No. 237, How. St., 2nd Ed., § 5108 et seq., relating to the determination of qualifications of persons to practice medicine and the issuance of certificates of registration to applicants, does not deprive an applicant of due process of law on the ground that it deprives him of the benefit of a hearing and because there is no provision in the statute for notice, or hearing, or authority to summon witnesses, or to compel them to testify, since the statute fixes the time and place of the meeting of the board semi-annually, and if applicant had applied at any meeting for a hearing the board would have been compelled to grant it, and if, on his hearing, his offer of or demand for testimony had been refused, the action of the board would have been subject to review by the courts.—Reetz v. People, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; affirming 127 Mich. 87.

§ 162. ——Of insurance.

¶ 700. Comp. L. 1897, § 5180, providing that no policy of fire insurance shall hereafter be declared void for breach of conditions where such breach did not contribute to the loss, is not unconstitutional as interfering with the right of contract; the insurance companies are creatures of statute and the legislature has power to prescribe their contracts and to limit forfeitures for causes which are not in fact injurious to the companies.—McGannon v. Michigan Millers' Mut. Fire Ins. Co., 127 Mich. 636.

¶ 701. Comp. L. 1897, § 5183, prohibiting the insured from being regarded as a co-insurer is not invalid as imposing an unconstitutional limitation upon the right to make contracts. The power to make a standard

form of policy for use in the state of Michigan involves the power to make all of the terms of the policy.—Attorney General ex rel. Michigan Lubricator Co. v. Commissioner of Insurance, 148 Mich. 566.

§ 163. ——Bulk Sales Act.

Viewed as class legislation, see post § 217.
As denial of equal protection, see post § 225.

¶ 702. Public Acts 1905, No. 223, relating to the sale in bulk of stocks of merchandise, is within the police power of the legislature for the regulation of the manner of the use or disposition of property, and does not violate Const., art. VI, § 32, which provides that no person shall be deprived of life, liberty or property without due process of law. —Spurr v. Travis, 145 Mich. 721.

¶ 703. The Bulk Sales Act, Pub. Acts 1905, No. 223 (How. St., 2nd Ed., § 2612 et seq.), providing that the sale, transfer or assignment in bulk, of any part of a stock of goods otherwise than in the ordinary course of business shall be void as to creditors unless a full and detailed inventory of the stock is made out at least five days before the sale and unless the seller, transferee or assignee demand and receive a written list of creditors with their addresses and the amount of the debt owing to each, and unless the purchaser, transferee and assignee shall at least five days before taking possession notify personally or by registered mail every creditor whose name is contained in the list of the proposed sale, is not repugnant to the Fourteenth Amendment to the Federal Constitution, as wanting in due process of law and denying the equal protection of the laws. —Kidd, Dater & Price Co. v. Musselman Grocery Co., 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; affirming 151 Mich. 478.

§ 164. ——Blue Sky Law.

As a police measure, see ante § 110.
As denial of equal protection, see post § 226.

¶ 704. The due process of law clause of the Federal Constitution is violated by the Blue Sky Law, Pub. Acts 1913, No. 143, providing for the regulation and supervision of domestic and foreign investment companies, their agents and other persons selling their securities, since the statute has no real or substantial relation to the public welfare, affecting only a private business.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.
[Note. See Compilers' annotation to Comp. L. 1915, ¶ 11945, as bearing on this point. —Editor.]

§ 165. Laws affecting corporations and associations.

Blue Sky Law, see ante § 164.
Vested rights in charter or franchise, see post § 245.
Power under provision for alteration or amendment of charters, see post § 289.
Irrepealable franchises as subject to police regulations fixing liability for wrongs, see also Franchises.

¶ 705. The reserved right to amend the charter of a corporation will not authorize the legislature to add requirements that would be inconsistent with constitutional principles, as by depriving it of its property without due process of law.—City of Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140.

¶ 706. An act repealing the charter of a corporation engaged in the municipal water supply, is not unconstitutional upon the ground that it deprives the company of its property without due process of law.—People ex rel. Ellis v. Calder, 153 Mich. 724, affirmed in 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122.

¶ 707. Comp. L. 1897, § 9551, providing for preferences for wage claims is unconstitutional because it makes no provision and provides no due process of law for determining a question of insolvency and preference between the parties interested.—Fisher v. Wineman, 125 Mich. 642.

¶ 708. Public Acts 1903, No. 232, § 12, How. Ann. St., 2nd Ed., § 9543, imposing penalties and liabilities on directors of mercantile and manufacturing companies is not invalid as in contravention of the "due process" clause.—Reuter Hub & Spoke Co. v. Hicks, 181 Mich. 250.

¶ 709. Since section 12 of Act 232, Pub. Acts 1903, How. Ann. St., 2nd Ed., § 9543, imposing penalties and liabilities on directors of manufacturing and mercantile corporations for failure to make annual reports to the secretary of state, is applicable to all corporations and directors of a class, and does not impose such penalties and liabilities until the directors have had their day in court, it does not contravene the "due process" clause of the Fourteenth Amendment of the Federal Constitution.—Reuter Hub & Spoke Co. v. Hicks, 181 Mich. 250.

¶ 710. How. St., p. 3397, chap. 124a (Laws 1889, Act No. 162), which provides for the winding up in chancery of mining and manufacturing corporations the charters of which have expired, is not unconstitutional because it does not make all stockholders necessary parties to the proceedings, and omits to make sufficient provision for notice to them. The proceedings are in behalf of all stockholders, and the statute contemplates that the general powers of the court may be exercised, when required, to supplement the statutory procedure.—Brown v. Pontiac Mining Co., 105 Mich. 653.

¶ 711. Where a limited partnership association is organized under Comp. Laws 1915, § 7950 et seq., including § 4, providing that no transferee of any interest in the association shall be entitled thereafter to any participation in the subsequent business of the association, unless he or she be elected thereto and any change of ownership, whether by sale or otherwise, which shall not be followed by election to the association, shall entitle the owner only to his interest in the association at a price and upon terms to be mutually agreed upon, and "in default of such agreement the price and terms shall be fixed by an appraiser appointed by the circuit court of the county where such association has its principal office, subject to the approval of such court," no question of due process of law or constitutionality of the act is involved, in a proceeding to have an appraiser appointed to appraise stock, although such act does not provide the machinery or mode of procedure, since the details of procedure may be left to a court without invalidating the statute.—Goodspeed v. Wayne Circuit Judge, 199 Mich. 273.

§ 166. Stockholders' or membership liability proceedings.

Imposing liabilities on directors, see ante § 165.
Laws impairing contract by adding liability, see post § 183, ¶ 792.
Retroactive remedies, see also post § 237, ¶ 1017.

¶ 712. The statute under which mutual fire insurance companies are formed provides (Laws of 1873, Act No. 82, § 15) for notice by publication where the insurance commissioner files a petition to wind up a company's affairs and to appoint a receiver. Held, that the act is not invalid because it makes no provision for the service of notice to the members of the company.—Wardle v. Cummings, 86 Mich. 395.

¶ 713. How. St., § 2366, which provides that, upon the return unsatisfied of an execution issued against the property or effects of a limited partnership association, an execution may issue against any of the members of the association to the extent of the portions of their subscriptions, respectively, in the capital of the association not then paid up, is not in conflict with the constitutional provision that no person shall be deprived of life, liberty or property without due process of law.—Rouse, Hazard & Co. v. Wayne Circuit Judge, 104 Mich. 234.

¶ 714. In proceedings against members of a partnership association the entry of a motion based upon the files and records in the case, and upon an affidavit setting forth the organization of the association, the rendition of the judgment, the issue of the execution, its return unsatisfied, the amount of the capital stock of the association, the amount paid in by each member, and the amount remaining unpaid, together with service upon the association and each of its members of a copy of said motion and affidavit, with notice of hearing, constituted "due process of law."—Rouse, Hazard & Co. v. Wayne Circuit Judge, 104 Mich. 234.

§ 167. Fishing and game laws.

¶ 715. Laws 1889, Act No. 111, § 5, protecting fish and regulating fishing, is not open to the objection that in prohibiting fishing with nets it makes less valuable, by depriving him of the right to fish, respondent's land abutting on a lake, and his nets and paraphernalia used in fishing, and that the statute thus deprives him of his property without due process of law.—People v. Brooks, 101 Mich. 98.

¶ 716. Public Acts 1893, No. 110, authorizing the state fish warden to seize all nets "found in use in violation of the law," and providing that all fish or nets seized shall be disposed of in such manner as may be directed by the court before which the offense is tried, and that the warden shall not be liable in damages for the seizure or destruction of nets "in accordance with the provisions of this act," separates the seizure and destruction; and so is not a deprivation of property without due process of law, since the statute only gives a right to seize as a valid exercise of police power where the property is in unlawful use and the act also requires a judicial determination of illegal use before the property can be destroyed.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 655.

§ 168. Liquor laws and regulations.

See also post ¶ 850.
Authorizing arrest without warrant, see also ante ¶ 617.

¶ 717. The "search and seizure clause" in the prohibitory liquor law of 1855 gave no opportunity to the party accused to defend his property; required no notice to him, and provided no means by which he was to be informed when, where and before whom the search warrant was to be returned. It was therefore unconstitutional.—Hibbard v. People, 4 Mich. 125.

¶ 718. No one possesses a natural, inalienable or constitutional right to keep a saloon for the sale of intoxicating liquors.—Sherlock v. Stuart, 96 Mich. 198.

¶ 719. The provision of Laws 1887, Act No. 313, § 7, directing officers to close places of sale of liquors on their own determination of the fact of nonpayment of tax, and failure

to display the proper card is invalid, as lacking due process of law.—Robison v. Miner, 68 Mich. 549; People v. Brown, 85 Mich. 119.

¶ 720. The right to contract a debt or other personal obligation is included in the right to liberty; and, consequently, the provision in Laws 1887, Act No. 313, § 8, that a dealer in liquor shall not become surety upon a liquor dealer's bond, is unconstitutional.—Kuhn v. Common Council of Detroit, 70 Mich. 534.

¶ 721. Laws 1887, Act No. 313, § 31, requiring that curtains, screens, etc., obstructing the view from the street, etc., must be removed during the times when places of sale of liquor must be kept closed, does not infringe U. S. Const., amend. 14, providing that no one shall be deprived of life, liberty or property without due process of law.—Robison v. Haug, 71 Mich. 38.

¶ 722. Laws 1887, Act No. 31, providing that it shall not be lawful to maintain a saloon or other place of entertainment in which intoxicating liquors are sold, etc., within one mile of the Soldiers' Home, does not conflict with Const., art. 6, § 32, which declares that no person shall be deprived of life, liberty or property without due process of law; and this is so although said act operates to prohibit sales of liquors in buildings erected and occupied for such purposes before said home was established or said act passed.—Whitney v. Grand Rapids Township Board, 71 Mich. 284.

¶ 723. Section 3, Act No. 507, Local Acts 1907, regulating the liquor traffic of municipalities in Cheboygan county, is not unconstitutional on the ground that it permits the council to unjustly discriminate against one and deprive him of the right to engage in the liquor business, without a hearing.—Quay v. Cheboygan Circuit Judge, 150 Mich. 457.

¶ 724. The Michigan Local Option Law of 1889, making it unlawful to manufacture or sell malt, vinous, spirituous, or intoxicating liquors in any county where a majority of the electors vote in favor of prohibition, is not unconstitutional as depriving breweries of their property without due process of law because making no provision for the sale of liquor on hand at the time the law became operative.—Eberle v. Michigan, 232 U. S. 700; 58 L. ed. 803, 34 Sup. Ct. Rep. 464; affirming 167 Mich. 477.

¶ 725. A brewing company owned property which was greatly depreciated in value by the passage of the Local Option Law forbidding the manufacture of liquors, and the adoption of said law in the county in which the property of the brewery was located. Held, the Local Option Law (Act 207, Pub. Acts 1889 as amended) was not unconstitutional on the ground of taking property without due process of law, since such depreciation in the value of the property was one of the risks attached to the liquor business.—People v. Eberle, 167 Mich. 477, affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

¶ 726. Act No. 381, Pub. Acts 1913, regulating and prohibiting sale, etc., of intoxicating liquors, is not in conflict with Art. II, § 16, of the Constitution.—People v. Wheeler, 185 Mich. 164.

¶ 727. The fact that the proprietor of a saloon is criminally liable under § 5392, Comp. L. 1897, How. St., 2nd Ed., § 5068, for sales of liquor made in his absence and without his knowledge by his agent to a student attending an institution of learning, does not render the act repugnant to § 1, Art. XIV of the Federal Constitution.—People v. Damm, 183 Mich. 554.

¶ 728. Act No. 381, Pub. Acts 1913, regulating and prohibiting the sale, etc., of intoxicating liquors, is not contrary to the Fourteenth Amendment to the Federal Constitution.—People v. Wheeler, 185 Mich. 164.

§ 169. ——Civil Damage Act.

¶ 729. Laws 1887, Act No. 313, § 20, providing for the recovery, by the father or mother of a minor to whom intoxicating liquors are sold, of both actual and exemplary damages not less than fifty dollars in each case, against the seller, is not open to the objection that in authorizing the recovery of a fixed sum without evidence of actual damages it takes property without due process of law. It may be assumed that a sale of intoxicants to a minor son necessarily injures a parent informed thereof.—Cramer v. Danielson, 99 Mich. 531.

¶ 730. Laws 1871, Act No. 196, amending the act prohibiting the liquor traffic (Comp. L. 1871, ch. 69), and giving to such as are injured on account of the intoxication of others a right of action against dealers, is held valid.—Kreiter v. Nichols, 28 Mich. 496.

VI. IMPAIRMENT OF OBLIGATION OF CONTRACT.

§ 170. Inhibition in general.

Application to contracts with state, see post §§ 172, 173.

Exercise of police power impairing contracts, see post § 175.

Application of inhibition to subsequent contracts, see post § 174.

Forbidding certain contracts or enforcement of them, see post § 184.

Doctrine that party cannot alter or impair his own contract against consent of other party, see Contracts, VII, VIII.
Provision of state constitution against impairment of obligation of contracts by legislation, see Const., Art. II, § 9.
Federal provision, see U. S. Const., Art. I, § 10, ¶ 1.

¶ 731. No legislation is valid which impairs the obligation of a contract.—People ex rel. Whitly v. Lansing Common Council, 27 Mich. 131.

§ 171. Existence and essentials of "contract."
See also post ¶ 773.
Substantive and remedial rights affected by laws, see also post §§ 175-184.
Subjection to police power, see post § 175.
Statutory declaration of invalidity of contract invalid at common law, see post § 184.

¶ 732. A judgment is not a contract within the constitutional inhibition of laws impairing the obligation of contracts.—Crane v. Hardy, 1 Mich. 56.

¶ 733. An exemption from taxation granted to railroads building roads in certain territory (Pub. Acts 1891, No. 174; Pub. Acts 1873, No. 129) is a mere gratuity, bounty, or privilege, and such a statute does not create a contract.—Manistee & N. E. R. Co. v. Commissioners of Railroads, 118 Mich. 349.

¶ 734. By the Train Railway Act, § 22 (How. St., § 3516) it was provided that each company organized thereunder should pay to the state one-half of one per cent on its capital stock in lieu of all other taxes; and section 34 of the same act (How. St., § 3525) provided that the act might at any time be amended or repealed, but that such amendment, etc., should not alter the corporate rights of companies formed under it. Held, Laws 1882, Act No. 6, repealing How. St., § 3516, and leaving the companies to be taxed under the general laws, was valid.—City of Detroit v. Detroit City R. Co., 76 Mich. 421; Detroit City St. R. Co. v. Guthard, 51 Mich. 180.

¶ 735. There was an impairment of the contract obligations of the Detroit United Railway, a street railroad company in the City of Detroit, in violation of § 10 of Art. I of the Federal Constitution, which company succeeded by purchase under Comp. L. 1897, § 6448, How. St., 2nd Ed., § 6997, to lines operated originally in the city and its suburbs under independent franchises which authorized certain fares, and united them under one organization, where the Supreme Court places such a construction on the ordinance of January 3, 1889, granting the Detroit City Railway, one of the predecessors of the street railroad company, the right to extend its easterly terminus to the city limits and finding that the city lines should be operated as a whole and certain reduced fares charged, and acts of the legislature annexing suburban territory to the city (Acts of June 16, 1905, and June 19, 1907) as to make the provision of the ordinance as to reduced fares applicable to all territory within the city, including such extensions. Detroit United Ry. v. Michigan, 242 U. S. 238, 61 L. ed. 268, 37 Sup. Ct. Rep. 87; reversing 162 Mich. 460 and 173 Mich. 314.

¶ 736. Section 9 of the Act of February 13, 1855 (Laws of 1855, p. 305), providing that a certain railroad company should, on or before the first day of July, pay the state treasurer an annual tax of 1 per cent on the capital stock of said company paid in lieu of other taxes paid in, except for penalties imposed upon said company by its act of incorporation, or any other law of the state, created a contract between the state and the corporation, based upon sufficient consideration, which prevented the subjection of the property of the corporation to any other than the tax prescribed in the statute.—Powers v. Detroit, G. H. & M. R. Co., 201 U. S. 543, 50 L. Ed. 860, 26 Sup. Ct. Rep. 556; affirming 138 Fed. 264.

¶ 737. An irrevocable contract, supported by a consideration, was not made by the enactment of the Act of May 27, 1893, § 3, which, after levying a specific tax on railroads, provided "that the rate of taxation fixed by this act or any other law of this state shall not apply to any railway company hereafter building and operating a line of railroad within this state north of parallel forty-four of latitude until the same has been operated for the full period of ten years, unless the gross earnings shall equal $4,000 per mile," etc., regardless of the fact that a road was built and operated in reliance upon the act.—Wisconsin & M. R. Co. v. Powers, 191 U. S. 379, 48 L. Ed. 229, 24 Sup. Ct. Rep. 107.

¶ 738. The provision of an act exempting specified lands of a railroad company from local taxation for a period of three years was not a contract where there was no consideration, the company not being required to give anything in return; it was the promise of a gratuity spontaneously made, which might be kept, changed or recalled at pleasure.—Tucker v. Ferguson, 22 Wall. (89 U. S.) 527, 22 L. ed. 805.

¶ 739. A statute exempting from taxation property employed in a certain manufacture, when made by way of bounty to encourage such manufacture, does not constitute a contract, and may be repealed at any time, though it is unrestricted in duration by its terms.—East Saginaw Salt Mfg. Co. v. City of East Saginaw, 19 Mich. 259, affirmed 13 Wall. (80 U. S.) 373, 20 L. ed. 611.

¶ 740. The Act of February 15, 1859, a general law, providing in effect that all corporations and individuals who shall manufacture salt in Michigan from water obtained by boring shall be exempt from taxation as to all property used for that purpose and, after they have produced 5,000 bushels of salt, they shall receive a bounty of ten cents per bushel, is a bounty law and not a contract, except to bestow the promised bounty upon those who earn it as long as the law remains unrepealed.—East Saginaw Salt Mfg. Co. v. City of East Saginaw, 13 Walk, (80 U. S.) 373, 20 L. ed. 611, affirming 19 Mich. 259.

¶ 741. Local Acts of 1893, No. 415, which imposes upon landowners adjoining the boulevard in Detroit the expense of constructing sidewalks, is not invalid as impairing the obligation of an implied contract between them and the city, exempting them from such expense, where the statute (Local Acts of 1889, No. 388), under which the boulevard was opened and is maintained, contains no agreement or obligation on the city's part to construct sidewalks.—Turner v. City of Detroit, 104 Mich. 326.

¶ 742. The constitutional provision is not infringed by a law declaring contract void on ground of public policy, which would have been so without such law.—McNamara v. Gargett, 68 Mich. 454.

¶ 743. Local Acts 1905, No. 612, providing for locating and establishing drains in Ionia county, and that it shall not apply in any case where a contract shall have been let for the construction of a drain or any part of it, does not impair the obligation of any contract; since the drain commissioner has no such contractual relations under the law that his duty may not at any time be suspended, restricted or enlarged, and persons interested in the construction of drains have also no such rights.—Rice v. Ionia Probate Judge, 141 Mich. 692.

§ 172. ——Corporate franchises and charters.

Street railway franchise as contract with city inalterable without consent, see also Street Railways, I.

¶ 744. Charters of municipal corporations are subject to the general legislation of the state; they are not contracts, and are amendable at the pleasure of the legislature.—Smith v. Village of Adrian, 1 Mich. 495; City of Detroit v. Blackeby, 21 Mich. 84.

¶ 745. The charter of a banking corporation is a contract; and if it contain no reservation of a power to repeal, its repeal is a violation of the constitution of the United States.—Michigan State Bank v. Hastings, 1 D. 225.

¶ 746. The charter of a private corporation is a law, and something more, in that it contains stipulations which are terms of compact between the state and the corporation, and which neither party may disregard or repudiate; they are as much removed from the modifying and controlling power of legislation as would be contracts between two private parties.—Flint & F. Plank Road Co. v. Woodhull, 25 Mich. 99.

¶ 747. Where the essential elements of a contract do not appear in a statute granting a franchise, the courts will not be astute in discovering contract obligations therein for the purpose of defeating later statutes on the same subject, but will solve all doubts in favor of the state.—City of Detroit v. Detroit & Howell Plank Road Co., 43 Mich. 140.

¶ 748. The Plank Road Act of 1848 (How. St., § 3566 et seq.) empowers companies organized thereunder to build and maintain toll gates where they deem necessary. Held, that the amendment of 1879 (How. St., § 3596) to said act, prohibiting the maintaining, except with consent of the local authorities, of toll gates within the limits of any city or village, is void as impairing the obligation of contracts, and does not prevent a company from erecting a gate within the limits of a village where none had previously existed.—Highland Park v. Detroit & B. P. R. Co., 95 Mich. 489.

¶ 749. The acceptance and user by a public service corporation of a franchise created by Act No. 264, Pub. Acts 1905, How. St., 2nd Ed., § 2941, in the streets of a municipality, create a contract between the company and the state which the latter cannot subsequently impair or destroy by recalling the grant.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

¶ 750. The power reserved to the legislature by § 1, Art. XV, of the Constitution of 1850, to amend, alter or repeal laws pertaining to corporations, does not permit it to impair franchises acquired under Act No. 264, Pub. Acts 1905, How. St., 2nd Ed., § 2941, where large sums of money have been expended in reliance thereon.—City of Lansing v. Michigan Power Co., 183 Mich. 400.

¶ 751. The exercise by a mining company of the power to purchase stock in other mining companies, given by the 1905 amendment to the Mining Act, Pub. Acts 1905, No. 105, How. St., 2nd Ed., § 7800, does not violate the contract between the stockholders of the purchaser, as expressed in their articles of incorporation, which do not in terms include such power, since the power to make such amendment was given by Constitution, art. 15, § 1, providing for the formation of

corporations under the general laws, and that "all laws passed pursuant to this section may be amended, altered or repealed," and the stockholders are as much bound by such provision as if it had been contained in their articles of incorporation.—Bigelow v. Calumet & Hecla Mining Co., 167 Fed. 721, affirming 167 Fed. 704.

¶ 752. Public Acts 1873, No. 198, making provision for the creation of a new corporation upon the reorganization of a railroad by the purchasers at a mortgage foreclosure sale, did not constitute a contract protected by the Constitution of the United States, and the right therein conferred upon purchasers to reorganize and become a new corporation was subject to the laws of the state existing or in force at the time of such reorganization regulating rates, and enacted subsequent to the giving of such mortgage.—Grand Rapids & I. R. Co. v. Osborn, 193 U. S. 17, 48 L. Ed. 598, 24 Sup. Ct. Rep. 310; affirming 130 Mich. 248.

¶ 753. The power reserved in Mich. Const. 1850, art. 15, § 1, to the legislature to alter, amend or repeal future acts of incorporation authorized the legislature to enact a statute (Pub. Acts 1885, p. 116) permitting each stockholder of a corporation to cumulate his votes upon any one or more candidates for directors, and hence such statute is not unconstitutional as impairing the obligation of a contract.—Looker v. Maynard ex rel. Dusenbury, 179 U. S. 46, 45 L. Ed. 79, 21 Sup. Ct. Rep. 21; affirming 111 Mich. 498.

¶ 754. The directors of a corporation, in making a contract or incurring a debt, contracted subject, not paramount to the proviso for the repeal of the charter, under Laws 1849, Act No. 223, § 11, providing that the legislature may, at any time thereafter, amend or repeal the act.—Calder v. Attorney General ex rel. Ellis, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122; affirming 153 Mich. 724.

¶ 755. A judgment ousting the directors of a water company engaged in supplying a city with water under a charter giving the legislature the right to repeal it at any time is proper, where an act (Local Acts 1905, No. 492) is passed repealing the charter and providing for compensation for the property, except the franchise, or for the removal of the property by the company, at its election, even though the effect of the enforcement of the statute may be to destroy the franchise, which with the other property has been mortgaged, and has not been paid for.—Calder v. Attorney General ex rel. Ellis, 218 U. S. 591, 54 L. ed. 1163, 31 Sup. Ct. Rep. 122; affirming 153 Mich. 724.

¶ 756. The graded railroad fare law of 1889 (How. St., § 3323, subd. 9) does not violate the obligation of any contract between the state and a railroad company organized subsequently to the adoption of Const., art. 19a, § 1.—Wellman v. Chicago & G. R. R. Co., 83 Mich. 592; affirmed 143 U. S. 339, 36 L. ed. 176, 12 Sup. Ct. Rep. 400.

¶ 757. The state has the power to make a valid contract with a railroad company whereby it is authorized to fix its own rates and an attempt by the legislature to fix tolls where the power has been clearly given to a corporation is a violation of a contract under the provision of the Federal Constitution.—Pingree v. Michigan Cent. R. Co., 118 Mich. 314.

§ 173. ——Contracts with state.

Corporate charters and franchises, see ante § 172.
Subjection to police power, see post § 175.
Effect of statute taking away suability of state officers as contracting parties, see post § 180.
Vested right to earned payments, see post § 241.

¶ 758. The rule that an agreement, not based upon a consideration, is a nude pact revocable at pleasure, applies where one of the parties is a state.—Tucker v. Ferguson, 22 Wall. (89 U. S.) 527, 22 L. Ed. 805.

¶ 759. Where an act of a state legislature would impair a contract obligation existing between the state and the general government it is void, and cannot be given effect by a subsequent release from the contract obligation.—Fenn v. Kinsey, 45 Mich. 440.

¶ 760. Laws 1877, Act No. 132, confirming the transfer by the governor and board of control of railroads, to the Port Huron & Lake Michigan Railroad Company, of lands granted by congress to the state in aid of the construction of railroads, and at first assigned to the Detroit & Milwaukee Railway Company, was void as impairing the contract obligation arising from the conditions of the grant, whereby the lands were to revert to the general government if the roads to which the state assigned them were not completed within a specified time.—Fenn v. Kinsey, 45 Mich. 446.

¶ 761. Local Acts 1901, No. 315, creating a new school district out of the territory of existing districts and giving to it the property of the old districts within its limits, is not invalid as impairing the obligation of contracts since the districts did not hold the property under contract with the state but as a public agency.—Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639; affirmed in 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

¶ 762. Local Acts 1901, No. 315, providing for the alteration of certain school districts by taking territory from such school districts and adding it to another school district, does not impair any contract of the school districts with the legislature of the state, since the existence of a school district is not based on any contract.—Attorney General ex rel. Kies v. Lowrey, 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27; affirming 131 Mich. 639.

¶ 763. The fact that a township has acted under an act giving to townships the right to adopt a township system for the building and maintaining roads and for raising funds to pay therefor, does not render a subsequent act repealing it, void under U. S. Const., art. 1, sec. 10, and Mich. Const., art. 4, sec. 43, prohibiting the impairment of contracts, since such provision has no application to legislation affecting townships.—Saginaw Co. Sup'rs v. Hubinger, 137 Mich. 72.

¶ 764. The act of a board of supervisors in fixing the salary of a prosecuting attorney does not constitute a contract between the latter and the county; and where the constitution does not prevent, the legislature can authorize the board to change the salary so far as it has not already been earned, even though a part of the official duties are duties to the state.—Knappen v. Barry County Supervisors, 46 Mich. 22.

§ 174. Pre-existing and subsequent contracts.

¶ 765. A statute affecting the rights of parties cannot apply to existing contracts, but so far as regards the method and form of suing it may apply as well to existing as to future contracts.—Waldron v. Harring, 28 Mich. 493.

¶ 766. Comp. L. 1897, § 5180, providing that no policy of fire insurance shall hereafter be declared void for breach of conditions where such breach did not contribute to the loss is not unconstitutional as impairing the obligation of contract where it applied only to contracts made subsequently to the passage of the act.—McGannon v. Michigan Millers' Mut. Fire Ins. Co., 127 Mich. 636.

§ 175. Impairment by exercise of the police power.

By liquor laws, see post § 177.
By other regulative laws, see also post §§ 178-184.

¶ 767. A law passed in pursuance of the police power of the state is not unconstitutional because operating to prevent the performance of a contract previously made.—People v. Hawley, 3 Mich. 330.

¶ 768. The police power of a municipality cannot be abridged, bargained away, or impaired by contract.—Petz v. City of Detroit, 95 Mich. 169; City of Detroit v. Fort Wayne & B. I. R. Co., 95 Mich. 456.

¶ 769. A plank road company's charter, although not alterable until after thirty years, is, even during that time, subject to reasonable and proper police regulations enacted to preserve the lives and health of the people.—Carver v. Detroit & S. Plank Road Co., 69 Mich. 616.

¶ 770. State contracts may be subjected to the police power.—Robertson v. State Land Office Commissioner, 44 Mich. 274.

§ 176. Laws amounting to impairment in general.

See also post §§ 177-184.

¶ 771. The statute requiring a new promise to be in writing, in order to revive a debt barred by the statute of limitations, does not violate the obligation of contracts.—Joy v. Thompson, 1 D. 378.

¶ 772. The constitution leaves the opinions of the Supreme Court free for publication by any person. By act 168 of 1879 the publication of the Supreme Court reports was let by contract, and the act provided that the secretary of state should hold the copyright. The legislature of 1881 enacted that the judges should file head-notes with the opinions. Held, that as the opinions are excluded from copyright, and the head-notes would be the only remaining feature of the reports worth copyrighting, the act would impair the obligations of the contract with the publishers and is therefore unconstitutional and void.—In re Head Notes, 43 Mich. 641.

¶ 773. A bank, being indebted to the state, conveyed certain property to the state as security, by an agreement with the commissioners appointed by the state to settle with the bank, upon the express condition that the state should indemnify the bank against certain liabilities. The legislature of the state passed a statute accepting and sanctioning the agreement of the commissioners except the condition to indemnify the bank. Held, that the state had no power to accept the conveyance and reject the condition, and that such exception in the statute was unconstitutional and void.—Michigan State Bank v. Hastings, 1 D. 225; Michigan State Bank v. Hammond, 1 D. 527.

§ 177. ——Liquor laws.

¶ 774. An act prohibiting the manufacture and sale of intoxicating liquors is not unconstitutional because operating to prevent the performance of a contract previously made.—People v. Hawley, 3 Mich. 330.

§ 178. ——Tax and assessment laws.

Corporation tax laws as contracts, see also ante § 171.
Remedial tax laws, see also post § 179.
Changing time for redemption from sale, see post § 182.

¶ 775. A statute that should seek to limit the taxing power of a city so as to preclude it from raising an amount necessary to satisfy its pre-existing legal obligations, would be void as impairing the obligation of contracts.—Hammond v. Place, 116 Mich. 628.

¶ 776. An act imposing a special tax upon a corporation whose charter is silent as to taxation is not a law violating the obligation of a contract.—People v. Detroit & P. R. R., 1 Mich. 458.

¶ 777. The provision in the tax law of 1891 authorizing the mortgagor to pay the tax against the mortgage interest in case of the mortgagor's default, and deduct same from amount owing on mortgage, does not impair the obligation of the contract between mortgagor and mortgagee that the former shall pay the tax.—Common Council of Detroit v. Board of Assessors of Detroit, 91 Mich. 78.

¶ 778. The imposition of taxes upon bondholders and other creditors of a specially chartered railroad corporation, under Pub. Acts 1911, No. 95, How. St., 2nd Ed., § 1989 et seq., impairs the obligation of the contract between the company and its bondholders and other creditors whereby it has contracted to pay such bondholders and creditors not only the principal of the amount of indebtedness due them, but also certain stipulated interest, and to require it to deduct from the principal or interest payable to them the amount of such taxes is to interfere between it and its bondholders and other creditors, especially in view of the fact that "the power to tax is the power to destroy."—Detroit, G. H. & M. Ry. Co. v. Fuller, 205 Fed. 86.

¶ 779. Pub. Acts 1911, No. 95, How. St., 2nd Ed., § 1989 et seq., providing for the imposition of certain specific taxes on the stock, bonds and other indebtedness of specially chartered railroad companies, does not impair the obligation of the contract as to taxation contained in the railroad company's charter, since the tax is not on the company itself, as is provided by the charter, but is upon bondholders, stockholders and other creditors.—Detroit, G. H. & M. R. Co. v. Fuller, 205 Fed. 86.

§ 179. ——Regulation or change of remedies.

Taking away remedy or capacity to be sued, see post § 180.
Execution and redemption laws, see post §§ 181, 182.
Imposing statutory liabilities, see post § 183.
Denying enforceability, see post § 184.

¶ 780. Statutes that affect or alter the remedy only, without touching rights secured by the contract, are not prohibited.—Mundy v. Monroe, 1 Mich. 68; Cargill v. Power, 1 Mich. 369.

¶ 781. The provision in the tax law of 1858 authorizing proceedings before a circuit court commissioner to test the validity of tax titles plainly purports to act on rights and not on remedies, and is therefore absolutely void.—Case v. Dean, 16 Mich. 12.

¶ 782. The Act of 1839 (see How. St., § 8750), abolishing imprisonment for debt, operated upon the remedy to enforce contracts before it took effect, and, thus construed, did not impair the obligation of contracts.—Bronson v. Newberry, 2 D. 38.

¶ 783. How. St., § 8016a, which authorizes the commencement of suit by attachment before the debt matures, does not conflict with Const., art. 4, § 43, inasmuch as it does not impair the obligation of contracts.—Mosher v. Bay Circuit Judge, 108 Mich. 503.

§ 180. ——Taking away remedy or suability.

¶ 784. The Act of 1843 (How. St., § 7847), prohibiting mortgagees from bringing ejectment before foreclosure is unconstitutional and void as to mortgages previously executed. It does not affect the remedy merely, but takes away the right to the rents and profits, which constitute a part of the mortgage security.—Mundy v. Monroe, 1 Mich. 68; Blackwood v. Van Vleet, 11 Mich. 252; Todd v. Davis, 32 Mich. 160.

¶ 785. The Assignment Law of 1883 (How. St., §§ 8749a-8749l), violates the constitutional prohibition against impairing the obligation of contracts, since it deprives creditors of their remedies.—Risser v. Hoyt, 53 Mich. 185.

¶ 786. A contract for installing a heating plant was made with the Board of Control of the State Public School while Comp. L. 1897, § 2021, providing that such board might sue and be sued, was in force. This power was taken from the board by Pub. Acts 1903, No. 143. Held, that such statute did not impair the obligation of the contract and hence could be set up in abatement of the action brought against such board.—Wheeler v. Board of Control of State Public School, 137 Mich. 291.

§ 181. ——Affecting executions and enforcement by sale.

¶ 787. The provision of the Act of 1841 (Sess. L. 1841, p. 45, §§ 1, 2) prohibiting the sale of property on execution unless it would bring two-thirds of its value as appraised by three disinterested freeholders, so far as it applied to the remedy to enforce pre-existing contracts, was unconstitutional and void. —Willard v. Longstreet, 2 D. 172.

¶ 788. A law increasing exemptions from execution affects the remedy only, and is not unconstitutional as applied to pre-existing debts.—Rockwell v. Hubbell's Adm'rs, 2 D. 197; Breitung v. Lindauer, 37 Mich. 217.

§ 182. ——Redemption laws.

¶ 789. The law allowing a certain time for redemption after foreclosure of a mortgage under the power of sale is a part of the contract; and a legislative act shortening the time is unconstitutional as to mortgages in existence at the time the act is passed.—Cargill v. Power, 1 Mich. 369.

¶ 790. Pub. Acts 1893, No. 206, § 60, which has the effect of hastening the time of sale and of shortening the period of redemption as to lands previously assessed does not violate the provision of the federal constitution that no state shall pass any law impairing the obligation of contracts; proceedings for collecting taxes are essentially in invitum, and do not presuppose the existence of any contract relation.—Muirhead v. Sands, 111 Mich. 487.

¶ 791. Pub. Acts 1899, No. 200, amending the foreclosure act so as to shorten the time within which sale may be ordered, and adding the right of redemption after the sale, simply applies to the remedy and does not impair the obligation of the contract created by a mortgage executed prior to the passing of the act.—State Savings Bank v. Matthews, 123 Mich. 56.

§ 183. ——Imposing new or different liabilities.

¶ 792. The provision in the General Banking Law of 1887 (Laws 1887, Act No. 205, § 46), rendering personally liable the stockholders of existing banks does not impair pre-existing contracts between the stockholders and the corporation; under the reservation of power in Const., art. 15, § 1, to the effect that all laws providing for the formation of corporations under general laws may be amended, etc., it is competent to provide by subsequent legislation that as to future contracts of the corporation its stockholders shall be subject to a further liability.—Bissell v. Heath, 98 Mich. 472.

§ 184. ——Forbidding contract or denying enforcement.

¶ 793. The constitutional provision against impairing the obligation of a contract is not infringed by declaring a contract already made void on the ground of public policy. —McNamara v. Gargett, 68 Mich. 454.

VII. FREEDOM OF WORSHIP, SPEECH AND PRESS.

§ 185. Religious liberty in general.

Operation of provision excluding religious tests for competency of witnesses, see Witnesses, II, VI, A.

Freedom of worship and conscience, see Const., Art. II, § 3.

Provision as to competency as witness, see Const., Art. II, § 17.

¶ 794. Religious liberty does not cover purposes or methods that are unlawful in themselves, or that interfere with another's liberty of action or violate peace and good order. —In re Frazee's Case, 63 Mich. 396.

¶ 795. Comp. L. 1897, § 5912, prohibiting the playing of baseball on Sundays is not unconstitutional on the ground of infringing upon religious freedom.—Scougale v. Sweet, 124 Mich. 311.

¶ 796. The action of a board of education in permitting the use of a book in the public schools known as "Readings from the Bible," made up of moral precepts enforcing the Ten Commandments, no instruction being given from the said book, and no note or comment by teachers being allowed, is not in violation of Const., art. 4, § 39, providing the legislature shall not pass any law preventing a person from worshipping according to the dictates of his own conscience, or to compel any person to pay taxes to support religions. —Pfeiffer v. Board of Education, 118 Mich. 560.

¶ 797. The action of a board of education in permitting the use of a book in the public schools known as "Readings from the Bible," made up of moral precepts enforcing the Ten Comandments, no instruction being given from the said book, and no note or comment by teachers being allowed is not in violation of Const., Art. 4, § 41, providing that the legislature shall not diminish or enlarge civil or political rights on account of opinions or beliefs concerning matters of religion.— Pfeiffer v. Board of Education of Detroit, 118 Mich. 560.

§ 186. Freedom of speech and of the press.

Freedom of speech and liberty of the press, see Const., art. II, § 4.

Provisions as to justification by truth in libel, see Const., art. II, § 18.

¶ 798. Pub. Acts 1913, No. 109, § 14, forbidding contributions for nomination and election expenses by corporations, is not violative of the Constitution, Art. II, § 4, providing that every "person may freely speak, write or publish his sentiments on all subjects, being responsible for the abuse of such right; and no law shall be passed to restrain or abridge the liberty of speech or of the press," as such section applies only to natural persons.—People v. Gansley, 191 Mich. 357.

VIII. CIVIL PROCEDURE AND RIGHT TO JUSTICE.

Style and name in which process runs, see Process.

Citation to officer on charges as "process" within constitution, see Officers, V.

§ 187. Legislative power over procedure.

Legislation affecting procedure is usually questioned for constitutionality either because it encroaches on the judiciary (see ante II, B), or because it also involves property rights or liberties and denies due process (see ante, V), or because it operates through the remedy to impair the obligation of contract (see ante, VI), or is unequal or discriminating (see post, X), or because the statute was improperly enacted (see Statutes, I-IV). It is also questioned less frequently as offending some one of the guaranties, like that of jury trial (see post § 192) and others, which see in their appropriate places.

Class legislation, see post X.

Power of legislature to change or affect courts under the constitution, or their jurisdiction and functions, see ante §§ 51-65.

Power over prerogative writs and revisory jurisdiction, see ante § 55.

Legislation on remedies and procedure under the due process clause, see ante V.

Limitation laws as due process, see ante § 146.

Legislation affecting rights in existing remedies or granting remedies as impairing obligation of contract, see ante § 179-184.

Invalidity of federal law requiring stamps on state process, see ante ¶ 542.

¶ 799. The right to have equity controversies dealt with by equitable methods is as sacred as the right of trial by jury.—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

¶ 800. The power of the legislature to prescribe rules of evidence being undoubted, it had the power to say that the deeding by a person in debt of all his property subject to execution, to another who had no visible property, should be prima facie evidence of a fraudulent intent (Pub. Acts 1897, No. 99).—Crane v. Waldron, 133 Mich. 73.

¶ 801. Pub. Acts 1901, Act No. 239, relating to the exclusion of the testimony of the agent of a defendant, where the plaintiff has died, is constitutional.—Wood v. Kaufman, 135 Mich. 5. [Note. It does not appear in the opinion what particular clause of the constitution was invoked.—Editor.]

¶ 802. The legislature has the power to permit recovery for a tort in an action in form ex contractu.—Mintz v. Jacob, 163 Mich. 280.

¶ 803. Comp. L. 1897, § 10423-10425, providing that the jury in rendering a verdict shall designate the amounts respectively awarded for injuries to feelings and for other damages is not unconstitutional, as it does not attempt to deprive the plaintiff of any common-law right of action for slander or libel.—Smedley v. Soule, 125 Mich. 192.

§ 188. ——Penalties and increased damages.

¶ 804. The legislature has power to provide for the recovery of treble damages by one who, having obtained judgment of restitution, brings trespass or case for damages. No constitutional provision is invaded.—Lane v. Ruhl, 103 Mich. 38, 42.

¶ 805. It is competent for the legislature to provide for doubling damages when injuries are inflicted by dogs.—Fye v. Chapin, 121 Mich. 675; writ of error dismissed in 179 U. S. 127, 45 L. ed. 119, 21 Sup. Ct. Rep. 71.

§ 189. Denial of justice or remedy.

Right to sue or defend, see Const., Art. II, § 12.

¶ 806. A denial of jurisdiction to enforce, by judicial remedy, rights that depend upon the performance of executive duties, is not, in legal effect, a denial of all remedy; a party applying for action, which under the constitution and laws depends on the executive discretion, or is to be determined by the executive judgment, must submit to the decision. The presumption is as conclusive in favor of executive as of judicial action.—People ex rel. Sutherland v. Governor, 29 Mich. 320.

§ 190. Grant or denial of rights of action.

As invading vested rights, see post §§ 241-248.

Protection of existing actions and rights on adoption of constitution, see Const. Schedule, § 2.

¶ 807. Actio personalis moritur cum persona is not a constitutional maxim, and the legislature can give the representative of one who has been killed by negligent injury the right to sue therefor.—James v. Emmet Min. Co., 55 Mich. 335.

¶ 808. The statute (How. St., §§ 8107-8109) which authorizes proceedings at law in the nature of a judgment creditor's bill, does not, in so far as it provides for the examination of a judgment debtor, and a discovery of his assets, conflict with any provision of the constitution; and it is harmonious with the provision for the abolishment of unnecessary distinctions between law and equity.—Lee v. Kalamazoo Circuit Judge, 101 Mich. 406; Berles v. Comstock, 104 Mich. 129; Grand Rapids Savings Bank v. Widdicomb, 114 Mich. 689.

¶ 809. Pub. Acts 1897, No. 25, § 1, providing for suit against an unincorporated voluntary association in its own name is not unconstitutional as authorizing suit to be maintained against nothing, no recognizable entity.—United States Heater Co. v. Iron Molders' Union of North America, 129 Mich. 354.

§ 191. Grant or denial of review by courts.

See also post ¶ 1077.

In criminal cases, see post § 206.

Constitutional right respecting appeal, see also Appeal, § 1.

Statutory nature of right to appeal or to have review, see Appeal, § 1.

¶ 810. The right to appeal from one tribunal to another is a statutory, not a constitutional, right.—Kundinger v. City of Saginaw, 59 Mich. 355.

¶ 811. The legislature may deny the right of appeal to certain courts created by it and grant such right to other courts; it may deny appeals from the judgments of the Detroit police court and permit them in other parts of the state.—Sullivan v. Haug, 82 Mich. 548.

¶ 812. The right of appeal from justice's court is not constitutional, but is subject to legislative control.—Messenger v. Teagan, 106 Mich. 654.

¶ 813. The statute limiting the absolute right of appeal from justices' judgments in Detroit to cases where the amount involved is not less than fifty dollars, is valid; since Const., art. 6, § 18, only defines jurisdiction "with such exceptions and restrictions as may be provided by law."—Messenger v. Teagan, 106 Mich. 654.

¶ 814. As the remedy by information is not, and as the remedy by the old writ of quo warranto was not, a matter of right at common law, the legislature has power to leave cities to determine the title of their own officers without further review.—People ex rel. Dafoe v. Harshaw, 60 Mich. 200.

¶ 815. Pub. Acts 1899, No. 237, § 3, subd. 6, as amended by Pub. Acts 1903, No. 191, providing that the board of registration may at its discretion revoke a physician's certificate for publication of certain advertisements, is not unconstitutional because no method of judicial review of the action of the board is provided; since if the statute is observed no constitutional right will have been infringed and if not observed the courts will afford relief without any provision for appeal.—Kennedy v. State Board of Registration in Medicine, 145 Mich. 241.

§ 192. Jury trials and juries.

Jury as part of "court," see also ante ¶ 280.

Jury trial as part of due process, see also ante § 131.

Class exemptions from jury service, see post § 222.

In criminal cases, see post §§ 209, 210.

Nature of the right to trial by jury under the constitution, see Jury, I.

Waiver of right to trial by jury, see Jury, I.

Jury in eminent domain proceedings, see Eminent Domain, V; and see also ante ¶ 224.

Operation of provision making jury judges of the law, see Instructions, I; Trial, VI; Indictment, IX; Libel, VIII.

Provision as to jury trial, see Const., art. II, § 13.

Provision for jury of less than twelve, see Const., Art. V, § 27.

¶ 816. A claimant in possession of lands is entitled to have his right thereto tried by jury, and it is not competent to give the adverse claimant a remedy in equity which would exclude jury trial.—Tabor v. Cook, 15 Mich. 322.

¶ 817. Laws 1887, No. 260, p. 337, extending the jurisdiction of the court of equity to quiet titles to cases where the lands are unoccupied, is not unconstitutional as depriving a defendant in a suit to quiet title of the right to trial by jury, secured by Const., art. 6, § 27, since such constitutional provision extends only to cases where, by the common-law, a trial by jury was customary.—Grand Rapids & I. R. Co. v. Sparrow, 36 Fed. 210.

¶ 818. A statute undertaking to place exclusive jurisdiction in a court of equity so as to deprive one claiming property wrongfully taken of a jury trial would be unconstitutional.—Edwards v. Symons, 65 Mich. 348.

¶ 819. Legislative permission to log-driving companies to assume control of and sell logs of non-assenting owners, held to contravene right of jury trial.—Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139.

¶ 820. The Assignment Law of 1883 (How. St., §§ 8749a-8749l) is unconstitutional as violating the provision which secures the right of trial by jury, since it looks to a summary disposition of cases which necessarily turn on questions of fact.—Risser v. Hoyt, 53 Mich. 185.

¶ 821. Since proceedings under the Fraudulent Debtors' Act are not criminal in nature, the intervention of a jury is unnecessary, and the statute is not repugnant to Const., art. 6, § 28.—Johnson v. Maxon, 23 Mich. 129.

¶ 822. The right of trial by jury involves the indefeasible right to be tried by a jury of the vicinage; and therefore Comp. L. 1871, ch. 256 (How. St., § 9409) is unconstitutional in so far as it authorizes persons charged with trespasses on state lands to be tried in some other county than that where the offense was committed.—Swart v. Kimball, 43 Mich. 443.

¶ 823. The right to trial by a jury of the vicinage does not inhibit the legislature, in creating a new county out of territory taken from two old ones, to enact that suits, including those of a local nature, pending on a certain date in any court in either of the old counties shall be prosecuted to final judgment in the county where commenced. So held in an ejectment case for land in the new county.—Spalding v. Kelly, 66 Mich. 693.

¶ 824. How. St., § 466, providing that, on the trial of an action in which a county is interested, the electors and inhabitants of such county shall be competent jurors, is not invalid as attempting to deprive a party of his constitutional right to a trial by an impartial jury, since the interest of such persons as taxpayers is so remote that it may be presumed to be incapable of influencing their conduct.—Smith v. German Ins. Co., 107 Mich. 270.

¶ 825. Comp. L. 1897, § 10504, giving the Supreme Court power to review decisions of the lower court, does not violate the constitutional guaranty of trial by jury though it gives power to set aside the verdict of the jury because against the weight and preponderance of the evidence, since the court does not undertake to enter a verdict but only to submit the matter to another jury.—Hintz v. Michigan Cent. R. Co., 132 Mich. 305.

¶ 826. Pub. Acts 1895, Act No. 215, § 17, chap. 25, providing for a trial by jury in the circuit court upon appeal from justice court in street condemnation proceedings, contemplates a trial de novo and is unconstitutional in that it does not provide for a jury of freeholders from the vicinage as required by the constitution in the matter of the taking of private property for public uses; circuit court jurors being merely required to have the qualifications of electors.—City of Mt. Clemens v. Macomb Circuit Judge, 119 Mich. 293.

§ 193. Imprisonment for debt.

Invalidity as taking away jury trial, see ante ¶ 821.

Causes and grounds for arrest on capias or as fraudulent debtor, see Civil Arrest, I-III.

Provision as to nonimprisonment for debt, see Const., Art. II, § 20.

¶ 827. Imprisonment for a wrongful act in no way dependent on contract is not unconstitutional.—People v. White, 53 Mich. 537.

¶ 828. That part of Comp. L. 1857, chap. 117, § 19, How. St., § 6832, which authorizes the issuing of a warrant in an action on contract, on the ground solely of the nonresidence of defendant, is in violation of Const., art. 6, § 33, forbidding imprisonment for debt, except, etc.—Chappee v. Thomas, 5 Mich. 53.

¶ 829. The Fraudulent Debtors' Act (How. St., ch. 304), is not in conflict with Const., art. 6, § 33, prohibiting imprisonment for debt founded upon contract, inasmuch as the constitutional provision expressly excepts cases of fraud and the act conforms.—Dummer v. Nungesser, 107 Mich. 481.

¶ 830. Imprisonment on an execution in replevin is not prohibited by Const., art. 6, § 33, or Comp. L. 1857, chap. 166.—Fuller v. Bowker, 11 Mich. 204.

¶ 831. Under the constitutional prohibition of imprisonment for debt, a defendant in a divorce cause cannot be imprisoned, except as for contempt, for failing to comply with an order directing him to pay over to the complainant a sum of money awarded as temporary alimony, and for expenses of the suit.—Steller v. Steller, 25 Mich. 159.

¶ 832. A cause of action based simply on a breach of promise to marry, without any charge involving fraud, is within the constitutional provision forbidding imprisonment for debt.—In re Tyson, 32 Mich. 262.

¶ 833. Although there can be no imprisonment for debt for breach of promise to marry involving no fraud alleged and proved, it is otherwise where seduction under promise of marriage is alleged.—In re Sheahan, 25 Mich. 145; Badger v. Reade, 39 Mich. 771.

¶ 834. The failure of an agent, not being an attorney-at-law, to pay over money collected by him for another, is not "misconduct or neglect in a professional employment" within the meaning of the Act of 1839, § 2,

How. St., § 8751, which states the exceptions to the abolishment of imprisonment for debt.—Bronson v. Newberry, 2 D. 38.

§ 194. ——Contempt or ne exeat proceedings.

See also ante ¶ 831.

¶ 835. The Assignment Law of 1883 (How. St., §§ 8749a-87491) violates the constitutional prohibition against imprisonment for debt, in that it allows a circuit judge to issue the writ of ne exeat at discretion.—Risser v. Hoyt, 53 Mich. 185.

¶ 836. The provisions of the constitution (art. 6, § 33) and of Comp. L. 1897, § 9553, prohibiting imprisonment for debt do not prohibit contempt proceedings to enforce a decree in chancery being excepted by Comp. L. 1897, § 9554, which provides that the proceedings of the previous section shall not extend to contempt proceedings to enforce civil remedies.—Carnahan v. Carnahan, 143 Mich. 390.

¶ 837. The imprisonment under Comp. L. 1915, § 13765, of an executor refusing to obey an order of the probate judge for the payment of money to the executor of another estate is not imprisonment for debt nor for contempt within the state Constitution, art. II, § 20, providing that no person shall be imprisoned for debt arising out of, or founded on, a contract, express or implied except in cases of fraud, or breach of trust, or of moneys collected by public officers or in any professional employment.—In re Merrill, 200 Mich. 244.

IX. CRIMES AND CRIMINAL PROCEDURE; SEARCH AND SEIZURE.

Pardoning power and its relation to other powers, see ante II, A, B.

§ 195. Statutes relating to crime in general.

Criminal law as matter of general or local concern, see ante § 68.

Classifications and distinctions permitted, see post §§ 214, 215.

Ex post facto laws, see post § 232.

Fifth Amendment to U. S. Constitution as a federal and not a state limitation, see ante ¶ 532.

Right of accused to question validity of laws as dependent on their being involved in his case, see ante § 28.

¶ 838. Comp. L. 1857, § 5797, How. St., § 9177, is valid in enacting that any person who shall feloniously steal the property of another in any other of the United States, and shall bring the same into Michigan, shall be guilty of larceny here and punished accordingly.—People v. Williams, 24 Mich. 156.

¶ 839. Whether Comp. L. 1857, § 5797, How. St., § 9177, is constitutional in providing for such punishment where the larceny was committed in a foreign country, quære; the court being equally divided.—Morrissey v. People, 11 Mich. 327.

§ 196. Criminal proceedings within the constitution.

Essentials of due process in criminal cases, see ante §§ 143, 144.

Criminal procedure in general, including application by the court of the rights of accused under the constitution, see Indictment and Prosecution.

¶ 840. The Fraudulent Debtors' Act (How. St., ch. 304) does not contravene Const., art. 6, § 28, guaranteeing to the accused in every criminal prosecution certain rights for the action that said statute provides for is a civil and not a criminal proceeding.—Dummer v. Nungesser, 107 Mich. 481.

§ 197. Arrest and bail.

Requisites to due process, see ante § 144.

Validity of act giving circuit court commissioners power to admit to bail in criminal cases, see ante ¶ 173a.

Fourth Amendment of U. S. Constitution as a Federal and not a state limitation, see ante ¶ 532.

Relative judicial and executive and legislative functions in respect to arrests and prosecutions, see ante § 64.

Mode and validity of arrest and admission to bail, see generally Arrest, Commitment and Bail.

Provisions for admission to bail, see Const., art. II, §§ 14, 15.

Habeas corpus clause, see Const., art. II, § 11.

¶ 841. The provision of the charter of the city of Grand Rapids (Local Acts 1885, p. 83; Charter 1891, p. 60) which authorizes police officers to arrest without process all persons who shall, in the presence of the arresting officer, be engaged in the violation of any ordinance of the city, is not obnoxious to the provision of the constitution (Const. 1850, art. 6, § 26) against the issuance of "warrant" without probable cause supported by oath.—Burroughs v. Eastman, 101 Mich. 419.

§ 198. Accusation and knowledge of same.

Requisites and sufficiency of indictments or informations, see Indictment, I.

Provisions as to information as to nature of accusation, see Const., Art II, § 19.

¶ 842. Const., art. 6, § 28, requiring the accused in every criminal prosecution "to be informed of the nature of the accusation," is based upon a presumption of innocence,

and on a theory that an innocent man may be indicted as well as a guilty one, and may not be able to prepare for trial without knowing what he is to meet.—People v. Olmstead, 30 Mich. 431.

¶ 843. It was not meant to preclude the legislature from so altering the common-law form of charging an offense as to dispense with mere formal description and unsubstantial particularity. But they can authorize no form of indictment that shall not give the offender fair notice of the particular offense to be proved, and an opportunity to procure his testimony in defense, that he may not be taken by surprise on the trial.—Brown v. People, 29 Mich. 232.

¶ 844. The search and seizure clause of the Liquor Law of 1855, which makes no provision for informing the owner of the liquors of the nature of the accusation against him on which the seizure and condemnation is made, is unconstitutional for that reason. —Hibbard v. People, 4 Mich. 125.

¶ 845. How. St., § 9421, providing that, under an information charging the embezzlement of money only, a conviction may be had for the embezzlement of any check, draft, bill of exchange, etc., does not violate the constitutional right of the respondent to be informed of the nature of the accusation against him, since he may in such case have the charge made certain by examination or by bill of particulars.—People v. Hanaw, 107 Mich. 337.

¶ 846. Laws 1887, Act 153 (How. St., § 9314c), which provides that to an information charging rape upon a female child under fourteen years of age there may be added a count charging respondent with having taken liberties, etc., without committing, or intending to commit, the crime of rape, is valid.—People v. Goulette, 82 Mich. 36.

§ 199. Public and speedy trial; confrontation.

Acts or rulings of court infringing right to public trial, see Indictment, IX, A.
Operation of provision guaranteeing speedy trial, see Indictment, II, VI, IX, A.
Production and confrontation of witnesses, see Indictment, IX, B.
Use of depositions in criminal cases as denial of right to confront witnesses, see Indictment, IX, B.
Provision as to speedy trial, see Const., art. II, § 19.

¶ 847. Local Acts of 1893, No. 408, § 18, authorizing the judge of the recorder's court of Detroit to exclude from the court room, upon the trial of any cause wherein evidence of licentious, lascivious, degrading, or peculiarly immoral acts will probably be given, all persons except those necessarily in attendance, is unconstitutional as applied to a criminal case, in that it violates the right of the accused to a public trial.—People v. Yeager, 113 Mich. 228.

§ 200. Right to counsel and witnesses.

Provision as to counsel and process for witnesses, see Const., art. II, § 19.

¶ 848. One who is not upon trial, but who is merely subpoenaed to appear before the grand jury, cannot take exception to his not having the assistance of counsel when interrogated.—People v. Lauder, 82 Mich. 109.

§ 201. Privilege against self incrimination.

Questions impairing privilege, and application of the privilege, see Examination of Witnesses, IV.
Admissibility of self criminating testimony when given or answer made, see Indictment, VIII, B.
Exclusion of unfavorable inferences or comment from fact of claiming privilege, see Indictment, VIII, A, IX, C.
Immunity of witnesses from prosecution on testimony previously given by them, see Witnesses, I.
Privilege against self crimination on accounting suit, see also Accounting Suits, ¶ 29.
Provision against being witness against self, see Const., art. II, § 16.

¶ 849. The privilege against self crimination (Const., art. VI, § 32) is not violated by an ordinance requiring motor vehicles to be registered and to display the numbers assigned to them.—People v. Schneider, 139 Mich. 671.

¶ 850. The provision of the amended Local Option Act (Pub. Acts 1899, No. 183), requiring druggists to report to the prosecuting attorney of the county sales of liquor, is not in violation of Const., art. 6, § 32, providing that no person shall be compelled to be a witness against himself in a criminal case nor be deprived of life, liberty or property without due process.—People v. Henwood, 123 Mich. 317.

¶ 851. The Local Option Law (Pub. Acts 1899, Act No. 183) in force in Eaton county requiring druggists to make weekly reports of sales of liquor to the prosecuting attorney, is not violative of Const., art. 6, § 32, as compelling a party to be a witness against himself.—People v. Shuler, 136 Mich. 161.

§ 202. Punishments and fines.

Double punishment, see post § 205.
Denials of equal protection, see post § 224, ¶ 956.
Ex post facto laws, see post § 233.

Imprisonment for debt, see ante § 193.
Propriety or excessiveness of the fine imposed or sentence given, see Crimes, I, E; Indictment, XI.
Provision as to excessive fines and cruel and inhuman punishments, see Const., art. II, § 15.

¶ 852. Laws of 1881, Act No. 159, How. St., §§ 1987-1994, providing that justices of the peace may commit disorderly persons to the Ionia Reformatory from other counties is invalid, the practical effect of it being to confine the convict for an indefinite period, and away from the court to which he must apply, and so to prevent him from giving the proper recognizance.—In re Fowler, 49 Mich. 234.

¶ 853. Upon the legislature alone is conferred the power to fix the minimum and maximum of the punishment for all crimes; and the penalties fixed for violation of the so-called Local Option Law (How. St., § 2283b5) are not excessive fines or cruel or unusual punishments.—People v. Whitney, 105 Mich. 622.

¶ 854. Where the punishment prescribed by statute for crime committed by a convict confined in prison is the same as if the crime had been committed outside the prison walls, it is not cruel or unusual.—People v. Huntley, 112 Mich. 569.

¶ 855. The Fraudulent Debtors' Act (How. St., ch. 304) does not contravene Const., art. 6, § 31, prohibiting the imposition of cruel and unusual punishment; for under section 11 of the act the debtor may secure his release from imprisonment by paying the debt, by giving security for its payment, by assigning his property and obtaining a discharge under How. St., ch. 306, or by giving security that he will obtain such discharge.—Dummer v. Nungesser, 107 Mich. 481.

¶ 856. How. St., § 9180, which imposes a severer penalty for horse-stealing than is imposed under other statutes for larceny of property of the same value, is not unconstitutional as inflicting a cruel and unusual punishment (Const., art 6, § 31) since it is not so disproportionate to the offense as to shock the moral sense of the people.—People v. Morris, 80 Mich. 634.

¶ 857. How. St., § 9142, providing a maximum penalty of five years' imprisonment for receiving stolen property, cannot be regarded as imposing a "cruel and unusual punishment," even though the maximum penalty for larceny of the same property is imprisonment for only one year.—People v. Smith, 94 Mich. 644.

¶ 858. The provision of the Liquor Law (Laws 1887, Act No. 313) to the effect that a druggist, upon failure to keep a public record of purchasers and purposes of purchase, in any single instance, shall be subject to a fine of not less than $100, and not more than $500, and imprisonment for not less than ninety days, nor more than one year, and, for a second offense, shall be debarred from selling liquor for five years, violates Const., art. 6, § 31, relating to cruel and unusual punishments so far as the disability to do business is concerned.—Robison v. Miner, 68 Mich. 549.

¶ 859. The provision of Laws 1887, Act No. 313, to the effect that one who has furnished bond and paid tax shall, upon any violation of the law, in addition to the penalties for such violation, forfeit the tax paid, and be debarred from continuing business or from becoming surety on any bond under the act for one year, is obnoxious to the constitution as imposing unusual punishment.—Robison v. Miner, 68 Mich. 549.

¶ 860. Act No. 64, Public Acts of 1907, defining the crime of burglary with high explosives and providing a minimum sentence of fifteen years as punishment therefor, is not unconstitutional as providing a punishment unusual and cruel and disproportionate to the offense.—People v. Mire, 173 Mich. 357.

¶ 861. Comp. L. 1897, § 11653, which provides that any person negligently or wilfully permitting fire to escape from his premises to those of another to the injury of such other person shall be deemed guilty of a misdemeanor, and shall also be liable to the party injured in double the amount of damages sustained, is not unconstitutional as inflicting unusual punishment; since the statute seeks to prevent the negligent use of a dangerous element.—Allen v. Bainbridge, 145 Mich. 366.

§ 203. ——Excessive fines.

¶ 862. Any fine or penalty is excessive, within the prohibition of Const., art. 6, § 31, if it seriously impairs the capacity of gaining a business livelihood.—Robison v. Miner, 68 Mich. 549.

¶ 863. Pub. Acts 1895, No. 200, which fails to fix a maximum penalty for the violation of the statute, is not repugnant to Const., art. 6, § 31, prohibiting the imposition of excessive fines, but is to be read in connection with the constitutional provision; and the power of the court that imposes sentence is limited thereby.—In re Yell, 107 Mich. 228.

¶ 864. Any fine or forfeiture is "excessive" which has not some limitation of value, and any punishment is "unusual" which forfeits any civil rights. So held of the dis-

abilities imposed by the Liquor Law of 1887 (Laws 1887, Act No. 313) in regard to transacting business and receiving credit as a surety.—Robison v. Miner, 68 Mich. 549.

¶ 865. Laws 1887, Act No. 313, is constitutional in so far as it imposes upon druggists a punishment by a fine of from $100 to $500 and imprisonment from ninety days to one year for sale of liquors to be used as a beverage, though another section was invalid.—Luton v. Newaygo Circuit Judge, 69 Mich. 610.

§ 204. ——Indeterminate sentences.

Effect of amendment of the constitution to make legislative action permissible, see also ante § 33.

Effect of indeterminate sentence laws to confuse distinct functions of government, see ante II, A, B.

Ex post facto operation and validity, see post § 233.

¶ 866. Const., art. 4, § 47, providing that the legislature may provide for indeterminate sentences expressly authorizes an indeterminate sentence law such as Pub. Acts 1903, No. 136, and by the adoption of this amendment the people so changed their fundamental law as to do away with constitutional objections which had been found insurmountable by the Supreme Court.—In re Manaca, 146 Mich. 697.

§ 205. Double jeopardy or punishment for same offense.

What constitutes jeopardy or former bar, see Crimes, I, D.

Operation of provision against double jeopardy as rule in second prosecution or trial, see Crimes, I, D.

Double jeopardy clause, see Const., art. II, § 14.

¶ 867. Pub. Acts 1893, No. 118, § 64, which provides punishment for crime committed by a convict confined in prison, is not rendered invalid—as providing a second punishment for a single offense—by the fact that the warden of the prison may by section 40 of the same act punish convicts for misconduct, said section 40 being designed merely to aid the authorities in maintaining discipline, and not to provide a punishment for crime.—People v. Huntley, 112 Mich. 569.

¶ 868. Comp. Laws, § 5395, relating to saloons kept open in violation of law, declaring persons violating any of its provisions guilty of a breach of the peace, and providing that the punishment therein prescribed shall be in excess of all other punishment provided for violation of the section, is repugnant to the constitutional provision that no person shall twice be put in jeopardy for the same offense. (Per Brooke, J.; Montgomery, Hooker and McAlvay, JJ., concurring; Blair, C. J., Ostrander and Montgomery, JJ., concurring in the result; Grant, J., dissenting.)—Gowan v. Smith, 157 Mich. 443.

§ 206. Right to appeal or review.

In civil cases, see ante § 191.

Application of constitutional provisions in favor of liberty on writ of error without previous objection, see Indictment, XVI.

¶ 869. No person has a constitutional right, after having been duly convicted before a court of competent jurisdiction, to an appeal to another tribunal; neither is there an inherent right of appeal from a judgment of an inferior court to a court of superior jurisdiction for the purpose of securing a second trial upon the merits.—Sullivan v. Haug, 82 Mich. 548.

¶ 870. How. St., § 6591h, limiting the right of appeal in criminal cases determined in the police court of Detroit to cases where the sentence of imprisonment exceeds twenty days, or the fine imposed exceeds $25, is constitutional.—Sullivan v. Haug, 82 Mich. 548.

§ 207. Courts and jurisdiction.

Distinctions denying equal protection, see post § 224.

¶ 871. A city police court constituted with powers like those of justices of the peace in criminal cases cannot have its jurisdiction extended by statute so as to include all misdemeanors committed within the city, unless the statute furnishes the means indispensably requisite to the exercise of such enlarged power; that is, not unless it provides for preliminary examinations, for the lodging of indictments, the filing of informations, the separation of the functions of court and jury, and the securing generally, of the full right of trial by jury.—People v. Mangold, 71 Mich. 335.

§ 208. Grand jury.

¶ 872. It is within the power of the legislature to provide that a grand jury may be summoned from any portion of the county, either in an emergency or in the first instance.—People v. Reigel, 120 Mich. 78.

§ 209. Juries and jury trial.

Denial of equal protection, see post § 224.

As to grand jury, see ante § 208.

In civil cases, see ante § 192.

Nature of the right to trial by jury under the constitution, see Jury, I.

Right to have general verdict in criminal cases, see Indictment, IX, G.

Jury provisions, see Const., art. II, §§ 13, 19.

¶ 873. The legislature cannot deprive one accused of crime of the right to a trial by jury.—Stephens v. People 38 Mich. 739.

¶ 874. The right being constitutional, no substantial change in its character can be made by the legislature.—Underwood v. People, 32 Mich. 1; Swart v. Kimball, 43 Mich. 443.

¶ 875. The constitutional right of jury trial requires substantial equality throughout the state in methods of prosecution.—People v. Mangold, 71 Mich. 335.

¶ 876. One of the substantial features of the right of trial by jury in criminal cases is the jury's right of giving a general verdict on the merits.—People v. Marion, 29 Mich. 31; Underwood v. People, 32 Mich. 1.

¶ 877. Choosing jurymen is a matter of statutory regulation; and any mode of choosing them is constitutional that obtains good and lawful men of defendant's vicinage from the body of the county.—People v. Reilly, 53 Mich. 260.

¶ 878. Jurors in criminal action must be electors (How. St., §§ 7554, 7555) and live in the vicinage; but the legislature can prescribe other qualifications and change the mode of choosing them and the officer by whom and the lists from which they are chosen.—People v. Harding, 53 Mich. 48.

¶ 879. The constitutional right of trial by jury is not infringed by Laws 1881, Act No. 160 (How. St., §§ 7623-7630), which authorizes jurors to be drawn by a board of jury commissioners appointed by the governor.—People v. Harding, 53 Mich. 48.

¶ 880. Under Const., art. 6, § 27, and art. 4, § 46, which provide respectively that "the right of trial by jury shall remain," and that "the legislature may authorize a trial by a jury of a less number than twelve men," How. St., § 7622, which provides for the continuance of a trial with less than twelve jurors if any of the jurors, after the impaneling, is unable to attend, is unconstitutional; for the legislature, though empowered to fix a certain definite number of less than twelve which shall constitute a jury, cannot provide for contingencies in which a jury may, in the discretion of the trial court, consist of less than twelve.—McRae v. Grand Rapids, L. & D. R. Co., 93 Mich. 399.

¶ 881. The determination of the status of the child and his commitment to the custody of a probation officer, or to the custody of the keeper of one of the industrial schools for the purpose of education and reformation, upon a verdict of a jury of six, provided for by the Wayne County Juvenile Court Act (Local Acts 1907, No. 684), is not such a criminal proceeding as would of itself make the act unconstitutional; but placing delinquent children on trial and imposing a fine of not to exceed twenty-five dollars with costs, etc., makes the proceeding criminal and renders the entire act unconstitutional within the meaning of section 28, art. 6 of the Constitution, providing for a trial by a jury of twelve men.—Robison v. Wayne Circuit Judges, 151 Mich. 315.

§ 210. ——Place or vicinage.

¶ 882. Because of the constitutional right of one charged with crime to be tried by a jury of persons chosen from his vicinage, Comp. L. 1871, § 7605 (How. St., § 9176), which authorizes embezzlement by various public agents or by private agents under written instructions or agreements as to the disposal of property to be prosecuted in the county where the complainant's principal place of business may be, is unconstitutional so far as it authorizes prosecution outside of the county where the offense was committed.—Hill v. Taylor, 50 Mich. 549.

¶ 883. Comp. L. 1897, § 11633, providing that larceny in a railroad car may be prosecuted in any county through which the car passes, is invalid as in conflict with Const., art. VI, § 27, guaranteeing trial by jury.—People v. Brock, 149 Mich. 464.

¶ 884. Comp. L. 1897, § 2450, How. St., 2nd Ed., § 917, giving to organized or subsequently organized counties bordering on Lake Huron concurrent jurisdiction of all offenses committed on that part of the lake lying within the limits of the state, is not unconstitutional as depriving an offender of the right of trial by a jury of the vicinage, as the fixing of the boundaries of a vicinage is a legislative function.—Andrews v. Ellsworth, 190 Mich. 157.

§ 211. Unreasonable searches and seizures.

Due process in seizure and destruction of fishing nets, see ante § 167.

Due process in search for and seizure of liquors, see ante § 168.

Laws for search without making known what accusation is made, see ante § 198.

Operation of constitution and laws respecting searches and seizures, see Search and Seizure.

Statutory proceedings to require production of things or papers in evidence as search and seizure, see also Discovery, II.

Search and seizure clause, see Const., art. II, § 10.

¶ 885. The summary process of execution, authorized by Comp. L. 1871, § 1029, How. St., § 1064, for the collection of tax moneys from the township treasurer and his sure-

ties, does not violate Const., art. 6, § 26, forbidding unreasonable searches and seizures; that prohibition does not refer to an open levy upon property under process having the apparent sanction of law.—Weimer v. Bunbury, 30 Mich. 201.

¶ 886. The provision of the amended Local Option Act (Pub. Acts 1899, No. 183), requiring druggists to report sales of liquor to the prosecuting attorney of the county, is a valid police regulation not obnoxious to Const., art. 6, § 26, prohibiting unreasonable searches and seizures.—People v. Henwood, 123 Mich. 317.

¶ 887. The Local Option Statute (Act 207, Pub. Acts 1889, as amended) is not unconstitutional as providing for unreasonable searches and seizures.—People v. Eberle, 167 Mich. 477; affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

¶ 888. Const., art. VI, § 26, forbidding unreasonable searches is not violated by an ordinance requiring motor vehicles to be registered and to display the numbers assigned to them.—People v. Schneider, 139 Mich. 671.

X. LOCAL, SPECIAL AND CLASS LEGISLATION; PRIVILEGES AND IMMUNITIES OF CITIZENS.

§ 212. Local and private legislation.

The general doctrine that statutes must, if possible, be general in their application (Const., art. V, §§ 30, 31) is fully treated in Statutes, II.

Necessity that laws establishing new courts be general in operation, see Statutes, II.

§ 213. Equality before the law.

Class legislation and discrimination, see post § 214 et seq.

Equal justice, see post § 223.

Equal protection clause under the Federal XIVth Amendment, see post § 224 et seq.

Inequality in representative districts, see post § 259.

Discrimination in private schools, see Civil Rights, ¶ 2.

Equality clause in state constitution, see Const., art. II, § 1, and see art. V, § 30, as to local and special acts.

¶ 889. The principle underlying all constitutions "that all men are equal before the law, and that life, liberty and property are secured to all alike" is no broader in its scope and effect than the provisions of the Fourteenth Amendment of the United States Constitution, and no law which can be sustained under such provisions of the Federal Constitution can be held, in those respects, to violate either the letter or the spirit of our State Constitution.—In re Fox's Estate, 154 Mich. 5.

§ 214. Class legislation and discrimination.

Equal protection of the laws (Federal XIVth Amendment), see post §§ 224-227.

Abridgment of privileges and immunities of citizens, see post §§ 228-231.

Differing degrees of punishment for similar crimes as cruel and unusual, see ante §§ 202-204.

Giving special classes of officers vacations and furloughs, see ante ¶ 388.

Discrimination in right to vote by registration laws, see post § 253.

Basis for classification, see post § 215.

Persons entitled to raise class question, see ante § 28.

Discrimination affecting interstate commerce adversely, see Commerce.

¶ 890. Class legislation is such as denies rights to one which are accorded to others, or inflicts upon one individual a more severe penalty than is imposed upon another in like case offending.—People v. Bellet, 99 Mich. 151.

¶ 891. Class legislation is unconstitutional only when shown to be unreasonable, arbitrary and capricious, and if reasonable and for a beneficial public purpose, it is constitutional.—Lundstrom v. Township of Ellsworth, 196 Mich. 502.

¶ 892. Legislation which, in carrying out a public purpose for the common good, is limited by reasonable and justifiable differentiation to a distinct class or type or class of persons is not for that reason unconstitutional, because class legislation, if germane to the object of the enactment and made uniform in its operation upon all persons of the class to which it naturally applies, but if it fails to include and affect alike all persons of the same class and extends immunities or privileges to one portion and denies them to others of like kind by unreasonable or arbitrary subclassification it comes within the constitutional prohibition against class legislation.—Haynes v. Lapeer Circuit Judge, 201 Mich. 138.

¶ 893. No such underlying principle as that the legislature shall not enact laws for a particular locality different from those applicable to other portions of the state, or shall not suspend the operation of general laws as to any particular locality, has ever been recognized in this state.—Feek v. Township Board of Bloomingdale, 82 Mich. 368.

¶ 894. It is not competent for the legislature to exempt one class of citizens from legal liability for wrongs for which other classes are liable, nor is it competent to au-

thorize any person, natural or artificial, to do wrong to others without answering fully therefor.—Park v. Detroit Free Press Company, 72 Mich. 560.

§ 215. Basis for classification.

In taxation, see also post § 227.
Declination of courts to question wisdom of classification, see ante § 21.

¶ 895. The legislature has power to declare that certain acts committed in a particular locality shall constitute a criminal offense and be punished as a felony, although such acts, if committed in another locality or section of the state, would not be criminal acts at all.—People v. Hanrahan, 75 Mich. 611; see St. Ignace v. Snyder, 75 Mich. 649.

¶ 896. A general law is not unconstitutional because based upon the classification of school districts according to population. —MacQueen v. Huron City Commission, 194 Mich. 328.

¶ 897. The fact that Act No. 251, Public Acts 1913, pertaining to the election of members of school boards, applies only to cities having a population of 250.000 and upwards. does not render it unconstitutional.—Burton v Koch, 184 Mich. 250. (Brooke, C. J., and McAlvay, J., dissenting.)

¶ 898. Classification under a tax law is not arbitrary and invalid if it is based upon some difference which bears a reasonable and just relation to the attempted classification. —Michigan Telephone Cases, 185 Fed. 634; affirmed 229 U. S. 322, 57 L. ed. 1206, 33 Sup Ct. Rep. 833; 229 U. S. 335, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

¶ 899. There is basis for the classification of property taxed and that untaxed under Pub. Acts 1909, No. 49, How. St., 2nd Ed., § 1955 et seq., providing for the assessment of property of telephone companies on the ad valorem basis, but exempting from taxation companies having receipts less than $500, where the property exempted is only a trifling portion of the whole, and it further appears that the cost of assessing and collecting in this class would be disproportionate to the amount realized; that this property is in the incipient or development stage, while the taxed property is in the fully developed form; that the use of the untaxed property is predominantly private, while the use of the taxed property is correspondingly public, and that the exempted property is used for the personal convenience and economy of the owners, while the taxed property represents commercial investments for profit-making purposes.—Michigan Telephone Cases, 185 Fed. 634; affirmed in 229 U. S. 322, 57 L. ed. 1206. 33 Sup. Ct. Rep. 833; 229 U. S. 335, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

¶ 900. Pub. Acts 1909, No. 49, How. St., 2nd Ed. § 1955 et seq., providing for the assessment of property of telephone companies on the ad valorem basis, but exempting from taxation companies having receipts of less than $500, and affording a basis for classification resulting in the taxation of the public use, profit-bearing property, while exempting the private-use, co-operative property, may be sustained as to its classification, even though the practical application of the law results in the taxation of some small portion of the co-operative companies, and the exempting of some small portion of the profit-making companies, since, in classification for governmental purposes, there cannot be an exact exclusion or inclusion of persons or things.—Michigan Telephone Cases, 185 Fed. 634; affirmed in 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; 229 U. S. 335, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

§ 216. Validity of particular laws.

Due process in taxation, see ante §§ 152-155.

¶ 901. Pub. Acts 1895, Act No. 198, as amended by Pub. Acts 1897, Act No. 118, relating to adulteration, was not rendered unconstitutional by the proviso "that nothing in this act shall prevent the coloring of pure butter."—People v. Hinshaw, 135 Mich. 378.

¶ 901a. The provision of Detroit Charter of 1883, chap. 4, § 13, reducing bribery to a misdemeanor when a city officer is bribed and providing a special procedure in the recorder's court, is invalid as making a local distinction in a general matter of state concern.—People ex rel. Robinson v. Swift, 59 Mich. 529.

¶ 902. The provision of the General Tax Law, § 127 (Pub. Acts 1893, No. 206, as amended by Pub. Acts 1899, No. 107), that the former owner in possession of state tax homestead lands may be deprived of acquiring the right to redeem which his neighbor similarly situated on state tax lands does acquire does not render it unconstitutional; this discrimination has been authorized by the legislature.—Griffin v. Kennedy, 148 Mich. 583.

¶ 903. Pub. Acts of 1915, No. 81, providing that in all cities having full-paid members of fire departments, all officers and men receiving such pay shall be entitled without any deduction of pay to a leave of absence of one day of twenty-four hours off duty every four days and a furlough of twenty days once each year, is unconstitutional as constituting class legislation, as it applies only to a class of cities having only

full-paid members of fire departments, all others, including those having only part-paid members of their fire departments, being omitted, and relates only to a particular class of employees in the cities to which it applies, confining its application only to such officers and men of the fire department as receive full pay.—Simpson v. Paddock, 195 Mich. 581.

¶ 904. The Wayne County Juvenile Court Act (Act No. 684, Local Acts of 1907) is objectionable as class legislation because it excepts children who are inmates of other institutions which are subject to the visitorial powers of the State Board of Corrections and Charities.—Robison v. Wayne Circuit Judges, 151 Mich. 315.

¶ 905. Pub. Acts 1913, No. 34, relating to the sterilization of mentally defective persons maintained wholly or in part by public expense in public institutions in the state, is unconstitutional as constituting class legislation in that it carves a class out of a class, placing only those defective and incompetent persons under its provisions who are already under public restraint.—Haynes v. Lapeer Circuit Judge, 201 Mich. 138.

¶ 906. Pub. Acts 1883, No. 39, as amended, providing for the organization of companies for the use of water of the St. Mary's river for the development of power, and conferring the privilege of a special tax, is not class legislation and therefore void, although such act is local in character; since it is a public act and it cannot be determined that it was passed in the sole interest of the particular company organized thereunder.—Attorney General ex rel. Beadle v. Arnott, 145 Mich. 416.

¶ 907. The charter of the city of Marquette, ch. 7, § 1, subd. 16 (Local Acts 1895, No. 409), providing that "the city shall never be liable for any damage sustained by any person in consequence of the neglect of any person to keep any such sidewalk clear from snow, ice, dirt, wood or other obstructions" is not invalid as being class legislation.—Maclam v. City of Marquette, 148 Mich. 480.

¶ 908. Pub. Acts 1913, No. 257, regulating the operation and construction of theaters and moving picture shows, and providing for inspection by the state fire marshal, and for the issuance of licenses is not obnoxious to the prohibition of local or special legislation.—Jeup v. State Fire Marshal, 182 Mich. 231.

§ 217. ——Trade and business regulations and laws.

See also ante ¶ 908.
Denials of equal protection, see post § 225.
Privileges and immunities affected by Bulk Sales Law, see post ¶ 984.

¶ 909. Laws 1893, Act No. 148, prohibiting the business of conducting a barber shop on Sunday under penalties more severe than those provided for the conduct of other legitimate business on that day is not class legislation.—People v. Bellet, 99 Mich. 151.

¶ 910. As the general insurance laws of this state contain no discrimination against non-residents, Laws 1893, Act No. 74, prohibiting the solicitation of insurance for any non-resident person, etc., without first obtaining the prescribed certificate of authority from the commissioner of insurance, is valid.—People v. Gay, 107 Mich. 422.

¶ 911. Comp. L. 1897, ch. 136, governing the licensing of peddlers is not unconstitutional as class legislation because section 22 thereof provides that farmers, manufacturers, mechanics or nurserymen may sell their own work or production by sample or otherwise without license, and that wholesale merchants may sell to dealers without license, since this provision treats all persons in the same class alike under like circumstances and conditions.—People v. DeBlaay, 137 Mich. 402.

¶ 912. Pub. Acts 1899, No. 251, requiring commission merchants engaged in selling farm products upon commission to give bond conditioned upon the faithful performance of the trust reposed in them, and to pay over to the proper parties the money coming to their hands, is invalid as class legislation and also as an unjustifiable interference with the right of citizens to carry on legitimate business.—People ex rel. Valentine v. Berrien Circuit Judge, 124 Mich. 664.

¶ 913. Pub. Acts 1905, No. 223, relating to the sale in bulk of stocks of merchandise, is not unconstitutional, as limited to a particular calling or relation; since it is well known that the business of retailing goods, wares and merchandise is conducted largely upon credit, and furnishes an opportunity for the commission of frauds upon creditors not usual in other classes of business.—Spurr v. Travis, 145 Mich. 721.

¶ 914. The apparent purpose of Pub. Acts 1905, No. 223 (the Bulk Sales Act), to protect creditors is sufficient reason for not including within its provisions merchants who owe no debts.—Spurr v. Travis, 145 Mich. 721.

¶ 915. Pub. Acts 1911, No. 206 How. St., 2nd Ed., § 4909 et seq., forbidding merchants, or dealers in merchandise, from issuing trading stamps with an agreed redemption value to their customers as evidence of trade, unless redeemable by themselves, and making it a

crime punishable by heavy fine and imprisonment for third parties to participate in the transaction by any arrangement to redeem them according to the terms under which they are issued, while manufacturers may freely issue them, either redeemable by themselves or any other person, is invalid as making discriminating classification.—People ex rel. Attorney General v. Sperry & Hutchinson Co., 197 Mich. 532.

¶ 916. It is within the legislative power to provide (Laws 1887, Act No. 50, § 9), that payments of principal and interest and fines by borrowing stockholders of building and loan associations may be enforced against their securities on default without deducting premiums paid or interest thereon accrued.—People's Building & Loan Ass'n v. Billing, 104 Mich. 186.

§ 218. ——Labor and service regulations.

¶ 917. The statute requiring emery wheels in continuous use to be provided with blowers to carry away the dust arising from their operation, is not open to the objection that it is class legislation, since all persons who are given continuous employment over dry wheels are within its provision.—People v. Smith, 108 Mich. 527.

¶ 918. Act No. 285, Pub. Acts 1909, provides that women shall not be employed in factories, mills, etc., to exceed an average of nine hours a day or fifty-four hours a week, nor for more than ten hours in any one day, except those engaged in preserving perishable goods. Held, said statute is not unconstitutional as being class legislation.—Withey v. Bloem, 163 Mich. 419.

§ 219. ——Corporation laws.

Abridging privileges and immunities, see post § 230.

¶ 919. Laws 1887, Act No. 50, providing for the incorporation and regulation of building and loan associations is not such class legislation as to be unconstitutional.—People's Building & Loan Ass'n v. Billing, 104 Mich. 186.

¶ 920. The fact that § 10 of Act No. 91, Public Acts 1911, How. St., 2nd Ed., § 1988, does not apply equally to incorporated and private banks does not render it unconstitutional.—Bank of Tustin v. Township of Burdell, 184 Mich. 131.

¶ 921. How. St., § 3923a, which provides for the distribution among the patrons of log-running companies of surplus receipts after deducting therefrom actual and necessary expenses, as specified in said section, and a certain dividend to be paid stockholders, subject, however, to certain conditions and provisions therein set forth, is class legislation and unconstitutional.—Stimson v. Muskegon Booming Co., 100 Mich. 347.

¶ 922. Laws of 1877, Act No. 141 (How. St., §§ 4886-4889), providing for the enforcement of the individual liability of stockholders, is not rendered unconstitutional by the section which exempts claims for labor from its operation; said section does not make the statute class legislation.—Ripley v. Evans, 87 Mich. 217.

§ 220. ——Fish and game laws.

Privileges and immunities of citizens, see post § 288, ¶ 983.

¶ 923. An act regulating the catching of fish in the waters of the state is not void as class legislation because the closed season is shorter in the waters adjoining a particular county than elsewhere.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 655.

¶ 924. Pub. Acts 1897, No. 151, impliedly allowing until 1900 the use of small mesh nets then owned, is not open to the objection that it discriminates during the interim years in favor of those fishermen who, at the time of the passage of the act, owned gill nets with a mesh of a less extension than that prescribed therein, since the presumption in favor of the constitutionality of legislation authorizes an interpretation that the term "lawful size," as used in the exception to section 2, forbidding possession of fish below a fixed weight unless caught in nets of "lawful size," means the size prescribed in the statute itself.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 655.

¶ 925. Pub. Acts 1897, No. 151, fixing a lawful size mesh for gill nets, but allowing use until 1900 of smaller size meshes then owned and forbidding possession of fish of certain weight unless caught in "lawful size" nets, even if construed as allowing fishermen using the lawful size meshes to keep fish which others may not keep does not make the legislation discriminatory, since the use of gill nets of lawful size is open to all fishermen.—Osborn v. Charlevoix Circuit Judge, 114 Mich. 655.

¶ 926. No. 153, Pub. Acts 1907, makes it unlawful to use for the purpose of commercial fishing any kind of a boat, tug or launch without registering the same and taking out a license. Held, such act is not unconstitutional as discriminating against fishermen who use gasoline boats in favor of those using sailboats by reason of different license fees imposed by it on these classes of boats, since the statute applied to all citizens.—People v. Setunsky, 161 Mich. 624.

§ 221. ——Liquor Laws.

Unequal liquor taxes, see post § 227.
Abridgment of privileges and immunities, see post § 231.

¶ 927. How. St., § 2283d8, which provides that it shall not be lawful to allow a minor to remain where intoxicating liquors are sold, unless such minor is accompanied by his father or legal guardian, does not unconstitutionally discriminate against minors not so accompanied.—People v. Japinga, 115 Mich. 222.

¶ 928. The provision of the liquor law (Laws 1887, Act No. 313), which allows the local boards to refuse approval of the bond of any person "whose character and habits would render him an unfit person to conduct the business of selling liquor," is unconstitutional because it lays down no uniform standard, and allows the local boards to deprive any person of the right of selling on their private judgment as to his unfitness.—Robison v. Miner, 68 Mich. 549.

¶ 929. The provision of How. St., § 2283d1, prohibiting a man's becoming surety on more than two liquor bonds, is constitutional, all persons being treated alike by the statute.—Wolcott v. Superior Court Judge, 112 Mich. 311.

¶ 930. The constitutionality of Pub. Acts 1899, Act No. 183, § 25, requiring druggists in local option counties to file reports with the prosecuting attorney, appears to be sustained by authorities, as against the contention that it creates a discrimination between druggists doing business in such counties and others residing in other counties where prohibition has not been adopted.—People v. Robinson, 135 Mich. 511.

¶ 931. The Local Option Law (Pub. Acts 1899, Act No. 183), by requiring the making of weekly reports of sales to the prosecuting attorney, is not unconstitutional as discriminating against druggists doing business in a local option county, as compared with druggists of counties in which that law is not in force.—People v. Shuler, 136 Mich. 161.

¶ 932. The Michigan Local Option Law of 1889, making it unlawful to manufacture or sell malt, vinous, spirituous or intoxicating liquors, in any county where a majority of the electors vote in favor of prohibition, but not applying to sales by druggists for medicinal, mechanical or scientific purposes, is not invalid as making an unlawful discrimination in favor of druggists.—Eberle v. Michigan, 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464; affirming 167 Mich. 477.

§ 222. ——Procedural and remedial laws.

See also ante ¶ 922.
Denial of equal protection of the laws in procedure, see post § 224.

¶ 933. A statute (Laws 1893, Act No. 208) requiring a judge of one circuit to hold the terms of court of another circuit when the resident judge of the latter is disqualified, or whenever additional assistance is required to expedite business, is not open to the objection that it imposes upon one circuit judge duties not imposed upon others and that it therefore is class legislation. Const. 1850, art. 6, § 2, provides that circuit judges may hold courts for each other, and that they shall do so when required by law.—Toll v. Jerome, 101 Mich. 468.

¶ 934. Laws 1881, Act No. 150 (How. St., § 978), providing for the enrolment of not more than one hundred and fifty contributing members in each company and battery of state troops, and exempting such members from jury duty, is not objectionable as class legislation.—Hall v. Burlingame, 88 Mich. 438.

¶ 935. How. St., § 7317, permitting service in adjoining counties in actions for trespass to lands and for labor performed by a person or company, is invalid as class legislation, in that it gives special privileges to suitors upon specified classes of claims, and also excludes corporations, and, so far as the jurisdiction of justices of the peace is concerned, associations of individuals, from the benefit of its provisions.—O'Connell v. Menominee Lumber Co., 113 Mich. 124.

¶ 936. How. St., § 7717e, which provides that, "in any suit brought to recover for the personal work and labor of the plaintiff, security for costs shall not be ordered in case the plaintiff shall make and file with the court an affidavit that he has a good and meritorious cause of action, and is unable to procure security for costs," is not unconstitutional, as discriminating in favor of one class of persons at the expense of another.—Jones v. Shiawassee Circuit Judge, 105 Mich. 664.

¶ 937. Pub. Acts 1897, No. 25, § 1, providing for suit against an unincorporated voluntary association in its own name is not unconstitutional as aimed at organized labor; there is nothing in the law to connect it with such organizations alone.—United States Heater Co. v. Iron Molders' Union of North America, 129 Mich. 354.

¶ 938. No unconstitutional discrimination between suitors is made by a statute (Pub. Acts 1895, No. 181) permitting the deposition of a party to an action at law, taken

at the instance of the adverse party, to be introduced on the trial at the option of the party taking the same, and not allowing the other party to introduce it.—Mulhern v. Kent Circuit Judge, 111 Mich. 528.

¶ 939. Laws 1885, Act No. 234, authorizing an attorney's fee of $25 to be taxed against a railroad company in case of judgment against it for injuries to stock on account of its failure to fence its track as required by the statute, is unconstitutional and void for granting special advantages to one class of suitors at the expense of another.—Wilder v. Chicago & W. M. R. Co., 70 Mich. 382; Schut v. Chicago & W. M. R. Co., 70 Mich. 433; Rinear v. Grand Rapids & I. R. Co., 70 Mich. 620; Lafferty v. Chicago & W. M. R. Co., 71 Mich. 35.

¶ 940. Laws 1887, Act No. 147 (How. St., § 7091a), which provides that upon recovering judgment in justice's court for personal services plaintiff shall have an attorney's fee of $5 taxed in his favor, is unconstitutional, being an attempt to give special advantages to one class of suitors at the expense of another.—Grand Rapids Chair Co. v. Runnels, 77 Mich. 104.

¶ 941. Pub. Acts 1885, No. 14, § 1 (How. St., § 1717a), limiting the right of exemption to the articles therein enumerated, not exceeding $500 in value, in cases where the execution is issued upon a judgment for personal labor, is invalid as class legislation.—Burrows v. Brooks, 113 Mich. 307.

¶ 942. Comp. L. 1897, §§ 10756-10770, providing for a lien on logs, shingles, etc., although construed to authorize the recovery of costs in justice court in excess of the limit of ten dollars fixed by Comp. L. 1897, § 838, is not unconstitutional as class legislation.—Lagoo v. Seaman, 136 Mich. 418.

¶ 943. Pub. Acts 1909, Act No. 307, How. St., 2nd Ed., § 12865, giving either party the right to call the opposite party or his agent or employee for cross-examination, is not unconstitutional as conferring unequal privileges with no distinction relating to the parties or the witnesses which could justify the classification.—Maki v. Mohawk Min. Co., 176 Mich. 497.

§ 223. Equal justice.

Particular laws considered, see ante §§ 216-222.

Right of nonresidents to sue in state, see post § 228.

¶ 944. Pub. Acts 1897, No. 25, § 1, providing for suit against an unincorporated voluntary association in its own name is not unconstitutional as giving a right against both the organization and the individuals, while it suing could have but one.—United States Heater Co. v. Iron Molders' Union of North America, 129 Mich. 354.

¶ 945. Laws 1885, Act No. 234, allowing plaintiff in an action for the value of cattle killed by a railroad company to tax as costs an attorney fee of $25, is unconstitutional; since the law must be administered as to corporations with the same equality and justice that are bestowed upon other suitors.—Wilder v. Chicago & W. M. R. Co., 70 Mich. 382.

§ 224. Equal protection of the laws.

Equality clause under state constitution, see ante § 213.

Particular laws considered, see post §§ 225-227.

Equal protection in contempt proceedings, see also ante ¶ 608.

¶ 946. As a general rule equal protection of the law is not denied by a state in contravention of the Federal Constitution, 14th Amendment, where the law operates alike upon all persons, corporations or property similarly situated.—People v. Gansley, 191 Mich. 357.

¶ 947. It is questionable whether a statute —e. g., the Assignment Law of 1883 (How. St., §§ 8749a-8749l)— can legislate upon the claims of foreign creditors and place them on a better footing than domestic ones.—Risser v. Hoyt, 53 Mich. 185.

¶ 948. Even if a state statute has for years been construed by the courts of the state as requiring that the jury in condemnation cases be one of inquest, a subsequent decision in a particular case that a common-law jury subject to be controlled by a presiding judge is proper does not deny to the landowner the equal protection of the laws contrary to U. S. Const., amend. 14.—Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445; affirming 103 Mich. 556.

¶ 949. How. St., § 8086, as amended by Laws 1889, Act No. 266, relating to service upon foreign corporations of writs of garnishment, does not conflict with U. S. Const., amend. 14, in denying to such corporations equal protection of law.—Shafer Iron Co. v. Iron Circuit Judge, 88 Mich. 464.

¶ 950. The provision of Local Acts 1883, No. 280, increasing the jurisdiction of justices of the peace in Detroit to $500 is authorized by Const., art. 6, § 18, fixing their jurisdiction "with such exceptions and restrictions as may be provided by law;" and the act is not thereby rendered repugnant to the Fed-

eral Constitution, Amend. XIV, as denying equal protection of the law by differing from the jurisdiction of other justices.—Messenger v. Teagan, 106 Mich. 654.

¶ 951. Inasmuch as Comp. Laws of 1897, § 10721, How. St., 2nd Ed., § 13777, relating to attorney's fees in actions to foreclose mechanic's liens, permits the allowance of discretionary attorney's fees to the successful party, whether complainant or defendant, such statute is not class legislation in violation of the 14th Amendment of the United States Constitution.—Grace Harbor Lumber Co. v. Ortman, 100 Mich. 429.

¶ 952. For a discussion on the equal protection of the laws as guaranteed by the Fourteenth Amendment in its application to criminal procedure, and especially to the right to have a jury find specifically the degree of homicide and the trial judge pass sentence, as against a contention that the Supreme Court might correct an error by imposing such a sentence as the law requires, see People v. Farrell, 146 Mich. 264, per Hooker, McAlvay and Blair, JJ., in separate opinion specially concurring in the result at page 283 et seq.

¶ 953. The benefit of equal protection of the law clause of the 14th Amendment to the federal constitution was not denied to accused persons and other litigants in Wayne County by the Wayne County Jury Law of 1893, as amended in 1895 (Pub. Acts 1893, p. 337; id. 1895, p. 69), providing that the jury lists shall be made up and returned by a board of seven jury commissioners, appointed by the governor, with the consent of the senate, and that the names of the persons to be returned need not appear on the assessment rolls, although by the general laws of the state the officers authorized to make and return the jury list are elected by the people in their several townships and in city wards and it is required that the jurors be of those who are assessed on the assessment roll.—Gardner v. Michigan, 199 U. S. 325, 50 L. ed. 212, 26 Sup. Ct. Rep. 106; affirming 136 Mich. 698.

¶ 954. Laws 1887, Act No. 31, providing that no saloon shall be maintained or any liquor sold or given away to any inmate of the Soldiers' Home within one mile of such home, is not a denial of the equal protection of the laws (U. S. Const., Amend. XIV) as applied to one who had a building and premises within one mile devoted to such trade and in use for the liquor traffic before the home was established.—Whitney v. Grand Rapids Township Board, 71 Mich. 234.

¶ 955. Local Acts 1905, No. 668, making it a penal offense for any person to keep a saloon where spirituous or intoxicating liquors are sold within 100 rods of any public school in Berrien county does not violate the Fourteenth Amendment of the Constitution of the United States.—White v. Bracelin, 144 Mich. 332.

¶ 956. Act 64, Public Acts 1907, providing for the punishment of burglary with high explosives, does not violate the "equal protection" clause on the ground that there are other statutes providing a less punishment for the same crime under which accused could have been punished, since the earlier statutes are repealed in so far as they conflict with the later statute.—People v. Mire, 173 Mich. 357.

§ 225. ——Trade, business and transportation laws.

Bulk Sales Law, see also ante ¶ 703.
Blue Sky Law, see post § 226.

¶ 957. Pub. Acts 1899, No. 212, § 5, which provides that no one who is an alien can receive a certificate from the barbers' board of examiners violates the Fourteenth Amendment of the U. S. Const. and is void.—Templar v. State Board of Examiners of Barbers, 131 Mich. 254.

¶ 958. A state cannot under its police power require that barbers' licenses can be granted only to citizens, since all persons are entitled to the equal protection of the laws, and such business is in no wise injurious to the morals, the health or even the convenience of the community, provided the applicant has the requisite skill to practice his calling.—Templar v. State Board of Examiners of Barbers, 131 Mich. 254.

¶ 959. Comp. L. 1897, § 7246, providing who shall be the agent or agents of a foreign insurance company doing business in the state, does not violate the Fourteenth Amendment to the Constitution of the United States.—Pollock v. German Fire Ins. Co., 132 Mich. 225.

¶ 960. The Bulk Sales Law does not deny the equal protection of the laws.—Kidd, Dater & Price Co. v. Musselman Grocery Co., 217 U. S. 461, 54 L. ed. 839, 30 Sup. Ct. Rep. 606; affirming 151 Mich. 478.

¶ 961. Pub. Acts 1905, No. 214, providing for licensing transient merchants, which authorizes a village or city council to suspend the provisions of the act in any specific case, is unconstitutional as violating U. S. Const., Amend. 14, and Const., art. VI, § 32, guaranteeing equal protection of the laws to all persons.—Brown v. Grand Rapids Superior Court Judge, 145 Mich. 418.

¶ 962. Equal protection of the laws is not denied by Comp. L. 1897, § 5324, which provides that no person shall be authorized to travel from place to place within this state for the purpose of carrying to sell, or exposing to sale, any goods, wares or merchandise, or to take orders for the purchase of goods, wares or merchandise by sample lists or catalogues unless he shall have obtained a license as a hawker and peddler.—People v. Stewart, 167 Mich. 417; reversed in 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

¶ 963. A statute (Comp. L. 1897, § 6234, subd. 9) requiring railroad companies to keep on sale at specified prices less than the maximum rates previously established by the legislature for the carriage of passengers, 1,000-mile tickets valid for two years, and to be issued, whenever required by the purchaser, in the name of the purchaser, his wife and children, is a discrimination in favor of a few of the persons having occasion to travel on the railroads, and deprives the companies affected by it of the equal protection of the laws, contrary to the federal constitution.—Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565; reversing 114 Mich. 460.

¶ 964. Act No. 104, Public Acts 1909, providing that common carrier railroads are liable to employees injured by the negligence of the company, its officers, agents or employees, or by defects in equipment, and that contributory negligence does not bar recovery if the employee's negligence was of a lesser degree than that of the company, and no contract of employment, etc., is a defense to the action, is discriminatory but does not violate the provision of the Fourteenth Amendment of the federal Constitution prohibiting inequality in protection of the laws.—Sonsmith v. Pere Marquette R. Co., 173 Mich. 57.

¶ 965. The equal protection of the law clause of the federal Constitution was not violated by the Railroad Commission Act, Pub. Acts 1909, No. 300, § 7, as amended by Pub. Acts 1911, No. 139, How. St., 2nd Ed., § 6530, regulating intra-city transportation on railroads because imposing such severe penalties for disobedience of its provisions as to deter parties affected thereby from testing its validity in the courts, since, irrespective of whether the penalties provided by the act are so excessive as to be void, they are embraced in a section by themselves, and thus plainly separable from the provisions involved, and the question of the constitutionality of the penalty clause may properly be left to be determined should an effort be made to enforce the same.—Grand Trunk R. Co. of Canada v. Michigan Railroad Commission, 198 Fed. 1009; affirmed in 231 U. S. 457, 58 L. ed. 310, 34 Sup. Ct. Rep. 152.

¶ 966. The equal protection of the laws was not denied a street railroad company by an order of the railroad commissioner under Pub. Acts 1893, No. 171, § 5 (How. St., 2nd Ed., § 6868), requiring it to pay a portion of the expense of constructing and operating safety appliances at a grade crossing of a steam railroad, although such latter railroad was built across the street after the street railroad had built its tracks in the street and had occupied them.—Detroit, Ft. W. & B. I. R. Co. v. Osborn, 189 U. S. 383, 47 L. ed. 860, 23 Sup. Ct. Rep. 540; affirming 127 Mich. 219.

§ 226. ——Blue Sky Law.

¶ 967. The Blue Sky Law, Pub. Acts 1913, No. 143, providing for the regulation and supervision of foreign and domestic investment companies, their agents and other persons selling their securities, and making some violations of the act felonies punishable by not more than $5,000 fine and imprisonment for not exceeding five years, and others misdemeanors punishable by not more than $1,000 fine and ninety day's imprisonment, is not invalid as depriving investment companies of the equal protection of the laws because the statutory penalties are so excessive that persons interested dare not make a test case in the ordinary way, since, while such penalties furnish a reason why a court of equity may have jurisdiction to enjoin the enforcement of the law temporarily, until its validity is determined, yet, the penalties being separable, their possible invalidity may be a defense against their direct enforcement, but does not furnish ground for pronouncing the whole law invalid.—Alabama & N. O. Transp. Co. v. Doyle, 210 Fed. 173.

¶ 968. The equal protection clause of the 14th Amendment to the federal Constitution is not violated by the Blue Sky Law, Pub. Acts 1915, No. 46 (Comp. L. 1915, § 11945 et seq.), providing for the regulation of the sale and disposition of bonds, stocks or other securities within the state by the Michigan Securities Commission and the issuance of licenses, although certain securities are exempted from the operation of the law under § 3, including securities which are listed in any standard manual of information issued by the commission, and the commission may call for additional information than that contained in the manuals, and may, pending the filing of the information, suspend the sale of the securities, and may also suspend, either temporarily or permanently, the sale of any securities listed in such manuals, after a hearing upon notice, if the commission shall find that the sale of such securities would work a fraud upon the purchasers thereof.—Merrick v. N. W. Halsey Co., 242 U. S. 568, 61 L. ed. 498, 37 Sup. Ct. Rep. 227; reversing 228 Fed. 805.

§ 227. ——Unequal taxation.

See also ante ¶ 902.
Basis for classification, see also ante § 215.
Taxing foreign corporation and its domestic owned shares, see ante ¶ 653.

¶ 969. Comp. L. 1897, § 5379, providing for a tax of $500 on the business of selling brewed or malt liquors at wholesale, and a tax of $65, on the business of manufacturing such liquors and also providing that no person paying the manufacturer's tax should be liable to pay a wholesale dealers' tax, is not discriminatory against nonresidents so as to be void under the Constitution of the United States.—People v. Voorhis, 131 Mich. 398.

¶ 970. Equal protection of the laws is denied by a tax law when, upon one of two parties engaged in the same kind of business and under the same conditions, burdens are cast which are not cast upon the other. —Michigan Telephone Cases, 185 Fed. 634; affirmed 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833, 229 U. S. 335, 57 L. ed. 1215, 33 Sup. Ct. Rep. 837.

¶ 971. Pub. Acts 1909, No. 49 (How. St., 2nd Ed., § 1955 et seq.), providing for the assessment by the state board of assessors of the property of telephone companies on an ad valorem basis, does not offend the equal protection clause of the 14th Amendment of the federal Constitution because it taxes the business of the large companies showing receipts of more than $500 each and exempts the companies having receipts amounting to less than such sum where the practical application of the statute results mainly in the taxation of companies organized on a commercial basis for profit and exemption merely of co-operative or farmers' mutual associations, usually unincorporated, conducted at estimated costs, and organized primarily for the purpose of obtaining cheap service, although some small portion of the co-operative companies will be taxed and some small portion of the profit making companies will be exempt.—Citizens' Tel. Co. v. Fuller, 229 U. S. 322, 57 L. ed. 1206, 33 Sup. Ct. Rep. 833; affirming 185 Fed. 634.

¶ 972. A legislature is not bound to impose the same rate of tax upon one class of property that it does upon another, it being sufficient if all of same class are subjected to the same rate and the tax is administered impartially upon them.—Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; affirming 138 Fed. 223.

¶ 973. It was not designed by the 14th Amendment to the federal Constitution to prevent a state from changing its system of taxation in all proper and reasonable ways, nor to compel the states to adopt an iron rule of equality, to prevent the classification of property for purposes of taxation, or the imposition of different rates upon different classes. It is enough that there is no discrimination in favor of one as against another of the same class, and the method for the assessment and collection of the tax is not inconsistent with natural justice.—Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; affirming 138 Fed. 223.

¶ 974. The benefit of the equal protection of the laws clause of the 14th Amendment to the federal Constitution is not denied railroad companies merely because a statute provides for a separate classification of railroad property for the purpose of taxation. —Michigan Railroad Tax Cases, 138 Fed. 223; affirmed in 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

¶ 975. It is within the power of a state, without violating the federal Constitution, to separate a particular class of property, subject it to assessment and taxation in a mode and at a rate different from that imposed upon other property, and apply the proceeds to state, rather than to local purposes.—Michigan Cent. R. Co. v. Powers, 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459; affirming 138 Fed. 223.

¶ 976. Pub. Acts 1901, No. 173, How. St., 2nd Ed., § 1933 et seq., providing for the assessment by the state board of assessors of the property of railroad companies at the average rate of taxation of the current year levied upon other property upon which ad valorem taxes are assessed for state, county, township, school and municipal purposes, upon receipt of reports from each of the taxing districts, and for taxation of the properties of the companies as assessed by it, distinctly states the tax and object to which it is to be applied and hence does not constitute a denial of the equal protection of the laws as violating Michigan Const., art. 14, § 14, requiring every law imposing a tax to state the tax and object to which it is to be applied. —Michigan Railroad Tax Cases, 138 Fed. 223; affirmed in 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

¶ 977. The equal protection of the law is not denied by a tax statute providing that in the taxation of the personal property of railroad companies the credits of the companies shall be taxed at their cash value without any deduction of indebtedness owed by them, although under other statutes applicable to personal property, debits are required to be deducted from credits.—Michigan Railroad Tax Cases, 138 Fed. 223; affirmed in 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

¶ 978. A statute which provides for a different method of taxation of railroads incorporated under statutes authorizing the incorporation of railroad companies from that of logging roads owned by manufacturing companies or individuals does not violate the 14th Amendment to the federal Constitution.—Michigan Railroad Tax Cases, 138 Fed. 223; affirming 201 U. S. 245, 50 L. ed. 744, 26 Sup. Ct. Rep. 459.

¶ 979. Pub. Acts 1911, No. 95, How. St., 2nd Ed., § 1989 et seq., providing for the taxation upon the stocks, bonds and other indebtedness of specially chartered railway companies, of which there is only one and can be no more under the Constitution of 1908, in addition to the regular tax imposed pursuant to the charter of the company on the company itself, while other railroad companies are taxed under the ad valorem tax law, is invalid as constituting class legislation, in violation of the 14th Amendment to the federal Constitution.—Detroit, G. H. & M. R. Co. v. Fuller, 205 Fed. 86.

§ 228. Abridgment of privileges and immunities of citizens.

See also ante ¶ 892.
General comity of states, see Conflict of Laws, I.

¶ 980. A citizen of another state who goes into Michigan can claim under the federal constitution no more than the privileges and immunities of citizens of Michigan.—Detroit v. Osborne, 135 U. S. 492, 34 L. ed. 260, 10 Sup. Ct. Rep. 1012; reversing 32 Fed. 36.

¶ 981. The state into which stolen property is brought is bound, not only as a matter of comity, but as one of constitutional obligation in recognition of the privileges of citizens to render the aggrieved party all proper remedies for its recovery.—People v. Williams, 24 Mich. 156.

¶ 982. The right of a citizen of another state to bring suit in any court of this state which has jurisdiction is guaranteed by Const. U. S., art 4, § 2, which declares that "citizens of each state shall be entitled to all the privileges and immunities of citizens in the several states."—Cofrode v. Wayne Circuit Judge, 79 Mich. 332.

¶ 983. Prosecution of a person for having in his possession and under his control wild ducks with intent to ship them out of the state, does not infringe the privileges and immunities granted to citizens by the Fourteenth Amendment to the federal Constitution, though the ducks were taken on his own premises, wild game being the property of the state.—People v. Van Pelt, 130 Mich. 621.

¶ 984. Pub. Acts 1905, No. 223, pertaining to the sale or assignment of a stock of merchandise in bulk, is not a violation of U. S. Const., Amend. XIV, § 1, by discriminating between citizens of different states; since the terms of such act are equally applicable to residents and nonresidents. —Spurr v. Travis, 145 Mich. 721.

¶ 985. The Supreme Court of Michigan having held that the word "agent," in How. St., § 9151, applied to attorneys at law, having convicted a person of embezzlement under that statute upon his plea of guilty of embezzlement as attorney at law, held, that such court did not exceed its jurisdiction or deliver a judgment abridging respondent's privileges or immunities, or deprive him of the law of the land of his domicile. —In re Converse, 137 U. S. 624, 34 L. ed. 796, 11 Sup. Ct. Rep. 191; affirming 42 Fed. 217.

§ 229. ——Licensing laws.

See also ante ¶¶ 957-959.

¶ 986. The state has the power to prescribe the conditions upon which individuals shall have the right to transact the business of insurance within its borders, so long as it does not violate the provisions of the federal constitution by discriminating against the citizens of other states.—People v. Gay, 107 Mich. 422.

¶ 987. Laws 1883, Act No. 167, enacting that no person shall practice medicine or surgery who is not a graduate of a medical college, unless he has practiced in this state five years previously to the act's taking effect, does not infringe U. S. Const., art. 4, § 2, providing that citizens of each state shall be entitled to all the privileges of citizens in the several states; nor does it violate U. S. Const., Amend. 14, § 1, providing that no state shall enforce any law abridging the privileges of any citizen of the United States. —People v. Phippin, 70 Mich. 6.

¶ 988. The privileges and immunities of citizens are not denied by a law requiring that persons selling goods and merchandise by traveling around exposing them for sale or by taking orders from lists or catalogues (Comp. L. 1897, § 5324) shall obtain license as hawkers and peddlers.—People v. Stewart, 167 Mich. 417; reversed in 232 U. S. 665, 58 L. ed. 786, 34 Sup. Ct. Rep. 476.

§ 230. ——Corporate rights and privileges.

See also post ¶ 999.
As class legislation, see ante § 219.

¶ 989. The Federal Constitution, 14th Amendment, protects the privileges and im-

munities of citizens and not of corporations. —People v. Gansley, 191 Mich. 357.

¶ 990. Imposing terms and conditions upon foreign corporations doing business in the state which are not imposed upon domestic corporations, does not violate the Fourteenth Amendment to the Constitution of the United States.—Pollock v. German Fire Ins. Co., 132 Mich. 225.

¶ 991. An objection that a statute imposing conditions upon foreign insurance corporations doing business within the state, violates the Fourteenth Amendment to the Constitution of the United States because not imposed upon domestic corporations, is not valid where the courts have virtually imposed the same rule upon domestic corporations.—Pollock v. German Fire Ins. Co., 132 Mich. 225.

¶ 992. The authority of a state to impose conditions upon the privilege of doing business by foreign corporations is well established, and is not affected by the Fourteenth Amendment to the federal Constitution.—Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 993. Pub. Acts 1899, No. 255, does not infringe the Fourteenth Amendment to the federal Constitution, in that the limit to which it will permit interference with foreign corporations is to punish or prevent unlawful acts, but the state may exclude a foreign corporation from the right of doing business under said act.—Attorney General ex rel. Wolverine Fish Co. v. A. Booth & Co., 143 Mich. 89.

¶ 994. The General Building Association Act, as amended in 1895, making it unlawful for any corporation organized under the laws of any other state to engage in the business of a building and loan association until it shall comply with certain requirements of the act, including filing a copy of its act of incorporation, and filing a franchise fee, and providing that the secretary of state may, at any time, for reasonable causes, with the concurrence of the attorney general, revoke the authority of any foreign corporation to do business in the state, that a receiver may be appointed for the assets of such foreign corporation in the state, that stockholders and creditors in the state shall have a first lien on all assets of such foreign corporation in the state, and that its business in the state shall be closed by the receiver and its assets converted into money, to satisfy the claims of such stockholders and creditors, is invalid as violating the federal Constitution, art. 4, § 2, providing that the citizens of each state shall be entitled to all the privileges and immunities of the citizens in the several states. —Maynard v. Granite State Provident Ass'n, 92 Fed. 435.

§ 231. ——Liquor laws and regulations.

Denials of equal protection, see ante § 224. Police regulation as to admitting women to saloons, see also ante ¶ 512.

¶ 995. The privileges and immunities of citizens are not abridged (U. S. Const., Amend. XIV) by Laws 1887, Act No. 31, prohibiting maintenance of any saloon within one mile of the Soldiers' Home or the furnishing of liquor to inmates thereof, though such law was enacted and the home was established after the objecting person had acquired property within one mile and devoted it to that business.—Whitney v. Grand Rapids Township Board, 71 Mich. 234.

¶ 996. Act No. 183, Pub. Acts 1899, amending section 15 of the Local Option Statute (Act 207, Pub. Acts 1889) and excepting the sale of wine or cider from home-grown fruit in quantities not less than five gallons from the operation of said statute, and Act No. 170, Pub. Acts 1903, amending said section 15 of said Local Option Statute, and excepting the manufacture of wine and cider to be sold to persons outside of the county, are unconstitutional as discriminating against the products and citizens of other states.—People v. Eberle, 167 Mich. 477; affirmed in 232 U. S. 700, 58 L. ed. 803, 34 Sup. Ct. Rep. 464.

¶ 997. The Local Option Act, Pub. Acts 1889, No. 207, as amended by Pub. Acts 1899, No. 183, and Pub. Acts 1903, No. 170, How. St., 2nd Ed., § 5017 et seq., in so far as it provides that the sale of wine or cider from home-grown fruit in quantities of not less than five gallons, and the sale at wholesale of wine or cider manufactured in a county to parties residing outside the county may be made, is invalid under Art. IV, § 2 of the federal Constitution providing that the citizens of each state shall be entitled to all privileges and immunities of citizens in the several states, but the rest of act is valid. —People v. Lankton, 197 Mich. 470.

¶ 998. U. S. Const., Amend. 14, § 1, which provides that no state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, etc., does not forbid police regulations in protection of the weaker members of society, such as legislation (How. St., § 2283d3) making it unlawful to allow minors in places where intoxicating liquors are sold.—People v. Japinga, 115 Mich. 222.

¶ 999. Comp. Laws, § 5379, as amended by Act No. 291, Pub. Acts 1909, making it a crime for the agent of a foreign corporation to solicit of wholesalers in Michigan orders for liquor to be accepted by the home office of the corporation, is not unconstitutional as unjustly discriminating against nonresidents.—People v. Swenson, 162 Mich. 397.

XI. EX POST FACTO AND RETROACTIVE LAWS, AND VESTED RIGHTS.

§ 232. Ex post facto laws.

Ex post facto clause, see Const., art. II, § 9.

¶ 1000. The constitutional inhibition of ex post facto laws does not refer to any but criminal cases or offenses.—Scott v. Smart's Ex'rs, 1 Mich. 295.

¶ 1001. Const., art. 4, § 43, which prohibits the legislature from passing any ex post facto law, is not violated by Pub. Acts 1889, No. 149, § 8016a, authorizing the commencement of suit by attachment before the maturity of the debt.—Mosher v. Bay Circuit Judge, 108 Mich. 503.

¶ 1002. Pub. Acts 1899, No. 237, How. St., 2nd Ed., § 5108 et seq., relating to the determination of qualifications of persons to practice medicine and the issuance of certificates of registration, and requiring all persons engaged in the practice of medicine to obtain such a certificate, is not an ex post facto law, it simply requiring continuing evidence of the qualifications as a physician of one already engaged in, and licensed to, practice.—Reetz v. People, 188 U. S. 505, 47 L. ed. 563, 23 Sup. Ct. Rep. 390; affirming 127 Mich. 87.

§ 233. ——Increasing or diminishing imprisonment.

¶ 1003. Laws 1893, Act No. 118, § 33, which impliedly provides for estimating the credits of convicts in the state prison upon a schedule less favorable than the one in force when they were sentenced, diminishes the right given them by How. St., § 9704, to earn by good behavior a certain reduction of sentence, and is to that extent ex post facto, its effect being to increase, not to mitigate, punishment. —In re Canfield, 98 Mich. 644.

¶ 1004. A statute (Pub. Acts 1893, No. 118) denying to convicts under sentence for a second offense the same reductions from their sentence for good behavior that are allowed to other convicts is not ex post facto as applied to the punishment of an offense subsequently committed, although the offender had been convicted of his first offense before the passage of the act.—In re Miller, 110 Mich. 676.

¶ 1005. The indeterminate Sentence Act (Pub. Acts 1903, No. 136), if retroactive, is void since the minimum punishment provided by it is greater than the minimum under the former law.—In re Lambrecht, 137 Mich. 450.

§ 234. Retroactive legislation in general.

See also note and cross-references post under § 241.

Prospective construction of the constitution, see ante §§ 16, 17.
Ex post facto laws, see ante § 232.
Operation of laws on existing contracts to impair their obligation, see ante VI.
Changing duties or compensation of office during term, see post §§ 268, 269.

¶ 1006. There is nothing in the national constitution forbidding congress from passing retrospective statutes, except when they are of the class technically known as ex post facto; and congress may pass them, even though private rights are affected thereby, unless they are invalid for some other reason than their retrospective character.—Gibson v. Hibbard, 13 Mich. 214.

[The foregoing case contains an explanation of the limitations on the power to pass retrospective laws, pointing out that such limitations are not based on the fact that vested rights are affected retroactively but on their being either technically ex post facto, or else having the effect to deprive of life, liberty or property without due process of law, or else on some other specific limitation. —Gibson v. Hibbard, 13 Mich. 214, at page 219, per Cooley, J.]

¶ 1007. Retrospective laws, or laws affecting rights and remedies in pending proceedings, are not necessarily invalid. Unless they bear injuriously upon some private or vested right, or fall without the domain of general legislative power, or violate some constitutional interdict, they are valid.—Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

¶ 1008. The Legislature cannot make valid retrospectively what it could not originally have authorized.—People ex rel. Butler v. Saginaw County Sup'rs 26 Mich. 22.

§ 235. Remedial legislation.

Remedial laws questioned for want of due process, see ante § 145.
Remedial laws operating on existing contracts as impairment of obligation, see ante § 179.
Conferring or withdrawing remedial rights, see post §§ 236, 237.
Statutes of limitation, see post §§ 238, 239.
Vested rights respecting procedure or remedy, see post § 244.
Curing errors in proceedings, see also post §§ 249-251.

¶ 1009. A statute which does not confer new rights or create new liabilities, but which affects the remedy merely, is not given retroactive effect by being applied to transactions which took place before its passage. —Heineman v. Schloss, 83 Mich. 158.

¶ 1010. As funds received on a sale of goods by fraudulent mortgagees could pre-

viously have been reached in equity, a statutory amendment (How. St., §§ 8059, 8091) rendering such mortgagees liable in garnishment for such funds affects the remedy merely, and is applicable to transactions which took place before the amendment was passed.—Heineman v. Schloss, 83 Mich. 153.

¶ 1011. Existing statutes and common-law remedies may be changed or abolished by the legislature except as to vested rights.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8.

§ 236. ——Taking away all remedy.

By imposing limitation on action, see also post ¶ 1019.
Right of action or defense as vested right, see post § 242.
Rights in remedies, see post § 244.

¶ 1012. It is within the power of a legislature to change the formalities of legal procedure, but it is not competent to make such changes as to impair the enforcement of rights.—Brown v. Kalamazoo Circuit Judge, 75 Mich. 274.

¶ 1013. A remedy created by the legislature in derogation of the common law can be taken away by repealing the statute.—John Hanes & Co. v. Wadey, 73 Mich. 178.

¶ 1014. The legislature has the constitutional authority, having provided a plain, adequate and complete remedy at law to recover back taxes illegally assessed and collected, to take away the remedy by injunction to restrain their collection as is done by Laws 1885, Act No. 153, § 107.—Eddy v. Township of Lee, 73 Mich. 123.

¶ 1014a. The legislature may take away from the circuit courts the power to issue injunctions to restrain the assessment or collection of taxes, where a remedy by suit to recover taxes paid under protest has been provided. So held of the Tax Law of 1889.—Lake Superior Ship Canal Ry. & Iron Co. v. Aplin, Auditor General, 79 Mich. 351.

§ 237. ——Granting new or additional remedy or procedure.

Granting lien and procedure to enforce same, see post § 248.

¶ 1015. A statute which merely gives a new remedy, where none existed before, is not objectionable as depriving a party of vested rights.—Whipple v. Farrar, 3 Mich. 436.

¶ 1016. Sess. L. 1851, p. 68, amending R. S. 1846, chap. 79, How. St., § 6140, whereby one who had, previously to the passage of the act, become equitably vested with the title which the purchasers at an execution sale acquired by the expiration of the time to redeem, is entitled in equity to a conveyance from the successor of the officer who made the sale—is not liable to the objection that it creates any new, or divests any pre-existing, rights for, although restrospective in its operation, it is only so in providing a remedy where none existed before, without in any way affecting the judgment debtor's rights.—Whipple v. Farrar, 3 Mich. 436.

¶ 1017. A statute giving the creditors of a corporation a new remedy against stockholders cannot affect those who took shares in the corporation before its passage; nor can it, so far as existing claims are concerned, supersede the remedies in force when they arose and in reliance upon which they were contracted.—Grand Rapids Sav. Bank v. Warren, 52 Mich. 557.

¶ 1018. Plaintiff was injured in Canada by defendant foreign corporation, prior to the passage of Act No. 3, Pub. Acts 1909. At that time, under the law of Michigan, he had no right to serve process on defendant in Michigan. Held, that said Act No. 3, which is retroactive and gave plaintiff the right to serve defendant in a cause of action arising before its passage, is not unconstitutional, since it extends only plaintiff's remedy and not his cause of action.—Daniels v. Detroit, G. H. & M. Ry. Co., 163 Mich. 468.

§ 238. ——Changing or imposing limitations of actions.

Retrospective laws of limitations as lacking due process, see ante § 146.
Acts requiring possessor to bring action to vindicate his right, see post § 239.

¶ 1019. The legislature has general power to pass limitation laws prescribing the time within which parties shall assert their rights by suit; but this power is not so unlimited as to enable it, under the form of a limitation law, to take away all remedy.—Price v. Hopkin, 13 Mich. 318.

¶ 1020. The legislature can limit the time for bringing suit against an adverse holder even if his possession began under void proceedings.—Toll v. Wright, 37 Mich. 93.

¶ 1021. A statute of limitation may be given a retroactive effect, but it must fix a definite time within which all suits where the right of action had accrued prior to the passage of the act must be brought. It cannot be left to the courts to fix the limitation.—Ludwig v. Stewart, 32 Mich. 27.

¶ 1022. Laws 1871, Act No. 145 (How. St., § 8718) amended the statute of limitations so as to run against Canadian as well as

domestic creditors, but allowed one year from the time when the act would take effect for bringing suit on all claims that it would otherwise bar at once. Held valid, because it clearly fixed the date of limitation.—Krone v. Krone, 37 Mich. 308.

¶ 1023. Laws 1869, Act No. 89 (How. St., § 8736), requiring actions on judgments to be instituted within ten years from their entry, could be applied to causes of action already existing, because it expressly fixed the period of limitation.—Parsons v. Wayne Circuit Judge, 37 Mich. 287.

§ 239. ——Limitations against person in possession.

¶ 1024. One who is in actual or constructive possession of property cannot be compelled to take measures against an opposing claimant; and a statute depriving him of his rights for a failure to do so is in no sense a limitation law, but an unlawful confiscation.—Groesbeck v. Seeley, 13 Mich. 329.

¶ 1025. The statute of 1858 (Sess. L. p. 192, § 135), which undertakes to make deeds given by the auditor general of the lands bid off by the state and remaining undisposed of for five years conclusive evidence of an absolute title in fee-simple in the grantee, even against the original owner who has remained in undisturbed possession of the lands, is not valid as an act of limitation.—Groesbeck v. Seeley, 13 Mich. 329; Case v. Dean, 16 Mich. 12.

§ 240. Tax and assessment laws.

Imposing limitations on person in possession disputing tax title, see ante § 239.
Denying right to defend against tax deed by making it conclusive, see post ¶ 1038.
Adding burden of interest or mode of enforcement, see also post § 248.
Curative laws, see post § 250.

¶ 1026. The power vested by the liquor law (Laws 1887, Act No. 313) in the county treasurer to require new bonds "in any other contingency that he shall determine requires it," is void because it works a forfeiture of the rights obtained by paying the taxes imposed for the year's business, as well as the breaking up of the business.—Robison v. Miner, 68 Mich. 549.

¶ 1027. It was competent to provide, under the Tax Law of 1889, for the sale of lands for taxes assessed and returned unpaid prior to 1889; said statute, though providing a new method for collecting taxes, protects the rights of delinquent taxpayers, giving each a day in court to show the invalidity of the tax.—Aplin, Auditor General v. Roberts, 83 Mich. 471. See Humphrey v. Auditor General, 70 Mich. 292.

¶ 1028. The right, under the Act of 1858, (How. St., § 5394), of the counties to the interest on sales of swamp lands, is not vested, but is merely an unexecuted and revocable gift from the state; and Laws 1887, Act No. 141, which requires the taxes that had been collected under Laws 1885, Act No. 222, to pay the sums due the counties to be credited back to the counties where they were levied, is valid, and prevents the issue of a mandamus to the auditor general to issue a warrant for the interest money collected under the Act of 1885.—Sanilac County Sup'rs v. Auditor General, 68 Mich. 659.

§ 241. Vested character of rights affected.

[Note. The protection of "vested rights" is derived from the various guaranties and limitations treated of ante IV-X. If vested and if affected by subsequent legislation, then there may be an infringement of the due process clause, or of some other clause. If there is no vested right, then the statute must be assailed, if at all, under some provision which does not depend on injury to vested rights of persons. For this reason the following sections do not purport to be exhaustive of the cases, but merely to collect decisions passing on whether or not certain rights are "vested."]

¶ 1029. Where a bounty offered under a law of the state is actually earned, the reduction of the bounty by a subsequent amendment of the law does not deprive the party who has earned it of the full bounty given by the original act.—People ex rel. East Saginaw Salt Mfg. Co. v. Board of State Auditors, 9 Mich. 327.

¶ 1030. A soldier's right to a state bounty of $100 under the provisions of Laws 1864, Act No. 23, being a vested one, could not lawfully be taken away by the legislature.—Smith v. Aplin, Auditor General, 80 Mich. 205.

¶ 1031. A physician made a contract with the board of health of a township for the care of indigent persons affected by contagious disease, at a certain price per visit and mileage. The law in force made the county liable to pay for such services upon allowance by the local board. After the services were rendered but before the amount was allowed, the law was changed so as to give county boards authority to pass upon the reasonableness of claims for such services, and under this law, the amount allowed by the local board pursuant to the contract, was reduced by the supervisors. Mandamus was brought to compel the supervisors to allow the full amount. Held, that the physician had a vested right to payment under the contract and the law as it existed, and the change in the law could not affect the right to recover for services rendered prior

to its enactment.—Kapp v. Board of Auditors of Washtenaw Co., 137 Mich. 431.

¶ 1032. A physician, though registered under the Act of 1883, cannot claim to have any vested right to compound or sell drugs and medicines to one not his patient, contrary to the act to regulate the practice of pharmacy, Laws 1885, Act No. 134.—People v. Moorman, 86 Mich. 433.

¶ 1033. Laws of 1885, Act No. 134, which prohibits those who do not comply with its requirements from keeping "open shops for the retailing, disbursing and compounding of medicines and poisons," does not interfere with the vested rights of registered physicians.—People v. Moorman, 86 Mich. 433.

¶ 1034. The legislature may prescribe rules of evidence to govern orders of the probate court for admission of insane persons to asylums where no vested rights are affected, and hence a rule safeguarding the rights of an alleged insane person cannot be held void on the ground that it impairs a vested right since no one can have any vested right to have a person confined in an asylum.—Grinky v. Wayne Probate Judge, 137 Mich. 49.

§ 242. ——Rights of action or defenses.

Taking away all remedy, see ante § 236.
Limitations on rights of possessor of land, see ante § 239.
Passage of curative act pending suit based on defect, see post § 251.

¶ 1035. The right of one who had paid money for liquors sold to him in violation of the prohibitory liquor law, to recover it back as paid without consideration, was a vested right which subsequent amendments or changes in the statute could not affect.—Peters v. Goulden, 27 Mich. 171.

¶ 1036. No one has a vested right in a remedy for a tort which has not yet occurred.—Mackin v. Detroit-Timkin Axle Co., 187 Mich. 8.

¶ 1037. Inasmuch as Pub. Acts 1905, No. 280, extended the right of action for wrongful death to persons who had entered the marriage relation in good faith, whereas formerly it extended only to the lawful spouse, it is invalid as to cases where the death occurred before its passage, because it constitutes an attempt to create a cause of action where none existed before.—Philip v. Heraty, 147 Mich. 473.

¶ 1038. It is not within the power of the legislature to deny the right to defend against a tax deed by declaring that it shall be conclusive evidence of title in fee in the grantee.—Taylor v. Devenux, 100 Mich. 581; McKinn v. Meston, 104 Mich. 642.

§ 243. ——Verdicts and judgments.

¶ 1039. A statute authorizing judgments to be entered for double the damages found by the jury for certain injuries was repealed after verdict but before judgment in a pending case. Held, that plaintiff's right to a judgment for double damages was not a vested one which the repeal could not take away.—Bay City & E. S. R. Co. v. Austin, 21 Mich. 390.

¶ 1040. Pub. Acts 1905, No. 15, providing that appeals dismissed, "either before or after the passage" of such act, for nonpayment of the register's fee, may be reinstated upon such terms as may be just, upon the appellant satisfying the Supreme Court that such fee has been paid, and that justice requires a revision of the case upon the merits, is unconstitutional as to an appeal from a decree of divorce dismissed before the passage of such act; since vested rights have been conferred by the decree appealed from.—Lohrstorfer v. Lohrstorfer, 140 Mich. 551.

¶ 1041. Pub. Acts 1913, No. 379, relating to the facilitation of the collection of temporary or permanent alimony ordered to be paid in divorce suits is not given ex post facto effect so as to impair vested rights of the defendant in a divorce suit where the court renders a modified order for the payment of alimony to the register of court after such law goes into effect, although such law was not in effect at the time the original decree was rendered.—Gittings v. Gittings, 197 Mich. 446.

§ 244. ——Procedure and remedies.

¶ 1042. There is no vested right in a mode of procedure.—Backus v. Fort Street Union Depot Co., 169 U. S. 557, 42 L. ed. 853, 18 Sup. Ct. Rep. 445, affirming 103 Mich. 556.

¶ 1043. The right to a particular remedy is not a vested right.—John Hanes & Co. v. Wadey, 73 Mich. 178.

¶ 1044. The lien given by the mechanic's lien law is no part of the contract, but a means of enforcing the payment of the debt arising from its performance; and, being a remedy given by law, not of the essence of the contract, it is not a vested right, but may be taken away by the legislature.—John Hanes & Co. v. Wadey, 73 Mich. 178.

¶ 1045. A statute extending the right to gain service on a foreign corporation disturbs no vested right of a defendant, since it does not extend the cause of action.—Daniels v. Detroit, G. H. & M. Ry. Co., 163 Mich. 468.

§ 245. ——Corporate charters and franchises.

Statutes allowing service in stated mode, see also ante ¶ 1045.

¶ 1046. It seems that an act subsequent to the charter of a corporation, and not assented to by it, which subjects the corporation to a total forfeiture for that which under the charter was cause for partial forfeiture only, is unconstitutional.—People v. Jackson & M. Plank Road Co., 9 Mich. 285.

¶ 1047. If a statute carries a new and additional term into the charter, and imposes a forfeiture of the franchise for a violation thereof, it is invalid.—People v. Jackson & M. Plank Road Co., 9 Mich. 285.

¶ 1048. A majority of the stockholders of a corporation have no vested right to elect the directors which is infringed by the stockholders' minority law (How. St., § 4885a), giving the minority of the stockholders the power, by cumulative voting, to elect a representative membership in the board of directors.—Attorney General v. Looker, 111 Mich. 498; affirmed in 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. Rep. 21.

§ 246. ——Expectancies and rights in succession.

¶ 1049. The legislature has power to cut off the right of curtesy initiate before it becomes vested.—Hathon v. Lyon, 2 Mich. 93; Hill v. Chambers, 30 Mich. 422.

¶ 1050. The mere expectancy of the husband to curtesy created by R. S. 1846, p. 340, and Const. 1850, art. 16, § 5, and which, in consequence of the wife's continuance in life never ripened into a vested right or interest, was not protected against legislative abrogation.—Hill v. Chambers, 30 Mich. 422.

¶ 1051. No vested rights were disturbed by the act of March 29, 1871 (see How. St., § 5875), taking away from administrators the power of taking or holding the possession, rents and profits of the estates of their intestates.—Campau v. Campau, 25 Mich. 127.

¶ 1052. The estate by curtesy, as created by the Revised Statutes of 1846, did not interfere with or limit any rights of the wife, but left her in the full enjoyment of them; hence it was within the power of the legislature to subject existing estates thereto, such power being the same as that modifying the rules of descent for the subsequent transmission of property.—Brown v. Clark, 44 Mich. 309.

¶ 1053. The legislature has the power, among others in that connection, under the Revised Statutes of 1846, to subject any existing estate to prospective curtesy.—Brown v. Clark, 44 Mich. 309.

§ 247. ——In or affecting highways.

¶ 1054. How. St., § 1315, declaring that highways by user "shall be four rods in width, and that where such highways are situated on section or quarter-section lines such lines shall be the center of said roads, and the land belonging to said roads shall be two rods in width on each of said lines," cannot affect vested rights so as to include in the bounds of a highway that had already become such by user any land not actually used.—Coleman v. Flint & P. M. R. Co., 64 Mich. 160; McKay v. Doty, 63 Mich. 581.

¶ 1055. Persons, the value of whose property might be affected by the discontinuance of a highway not running through it, have no such vested interest in the right to pass and repass in the highway as can preclude the legislature from taking it away.—People ex rel. Bristol v. Ingham County Sup'rs, 20 Mich. 95.

¶ 1056. Although a city which grants to an individual by a contract in writing the privilege of constructing a private sewer in its streets, with the right to the builder to charge abutting owners for connecting therewith, may superintend the construction of the sewer, see that connections are properly made, and regulate its use so that other citizens shall not be injured, the builder obtains by such grant a vested right, and not a mere license, and it cannot unreasonably be interfered with.—Stevens v. City of Muskegon, 111 Mich. 72.

§ 248. ——Imposing liens and statutory charges.

Mechanics' lien proceedings, see also ante ¶ 1044.

¶ 1057. It is competent for the legislature to provide a remedy additional to one previously existing, e. g., to give a statutory lien for services where the common law provides one.—Phillips v. Freyer, 80 Mich. 254.

¶ 1058. Laws 1887, Act No. 229 (How. St., §§ 8427a-8427p), establishing a lien for labor and services upon shingles, etc., cannot be applied to a contract for the manufacture of shingles, made before the act took effect.—Bourgette v. Williams, 73 Mich. 208.

¶ 1059. It is doubtful whether it would be competent for the legislature, by increasing the rate of interest charged, to increase the burden provided by the law under which a tax was assessed.—Jackson Fire Clay, Sewer Pipe & Tile Co. v. Snyder, 93 Mich. 325.

¶ 1060. The Drain Law of 1885 is not valid in so far as it provides that drain taxes levied under the Drain Law of 1881 shall be a personal claim against the land owner.—Mogg v. Hall, 83 Mich. 576.

§ 249. Curative and validating laws.

Attempted cure pending suit based on defect, see post § 251.

Operation and effect of curative laws, see specific topics involving them, e. g., Acknowledgments, §§ 22, 23; Taxes, XII.

¶ 1061. Curative statutes may cover any mere irregularity in the cause of proceeding for a lawful demand, but they can never cure a want of jurisdiction.—Hart v. Henderson, 17 Mich. 218.

¶ 1062. The legislature cannot validate acts that are void for jurisdictional defects. —Houseman v. Kent Circuit Judge, 58 Mich. 364.

¶ 1063. An act cannot be sustained as a curative statute which does not purport to be such or to validate the previous proceedings, and which recites no error or irregularities, but which merely seeks, by directing the supervisors to levy certain taxes, to avoid the effect of judicial decisions.—People ex rel. Butler v. Saginaw County Sup'rs, 26 Mich. 22.

¶ 1064. On the change from the territorial to the state government the legislature of the state abolished the Supreme Court of the territory, and transferred certain causes pending therein to the Supreme Court and court of chancery of the state; but owing to a defect in the law certain other causes were not transferred to any court. Held, that it was competent for the legislature in the following year to pass an act transferring these cases to the Supreme Court of the state.—Scott v. Smart's Ex'rs, 1 Mich. 295.

¶ 1065. When the legislature, by a valid exercise of its authority, has conferred a power to act, and prescribed the mode of action, a substantial compliance with the mode will be essential to a valid exercise of the power. But if the power be defectively or irregularly exercised, and for that reason invalid, the legislature may, by subsequent action, cure any such defect or irregularity, the requirement of which was originally within its discretion, and if its power over the subject was plenary its power of confirmation will be absolute.—People ex rel. Bristol v. Ingham County Sup'rs, 20 Mich. 95.

¶ 1066. A retrospective statute curing defects in legal proceedings, where they are in their nature irregularities only and do not extend to matters of jurisdiction, is not unconstitutional unless expressly forbidden.—Hall v. Perry, 72 Mich. 202.

¶ 1067. Whether the legislature can legalize proceedings taken under a void act, quære.—Taylor v. Youngs, 48 Mich. 268.

¶ 1068. Whether the state can so legalize a bridge as to cut off pre-existing claims for injuries resulting from its maintenance, quære.—Maxwell v. Bay City Bridge Co., 46 Mich. 278.

§ 250. ——Tax, assessment or drain proceedings.

See also ante ¶ 1063, post ¶ 1077.

Retrospective tax laws, see ante § 240.

¶ 1069. The legislature has power to cure irregularities in the proceedings for the assessment and collection of any taxes authorized by law, and to perpetuate their lien upon the land until paid; but where an original tax is void, the legislature has no power to validate it, and compel the owner of the land taxed to pay it as a condition to the recovery of his land from one who has bought it at tax sale.—Hart v. Henderson, 17 Mich. 218.

¶ 1070. Whatever the legislature can dispense with in advance it can dispense with retrospectively by enacting that its omission shall not prejudice; so held of certificates to assessment rolls.—Sinclair v. Learned, 51 Mich. 335.

¶ 1071. The legislature cannot pass a curative statute, retroactive in its effect, so as to affect rights of parties that have already become vested; hence Laws 1885, Act No. 247, cannot legalize an assessment roll bearing a defective certificate when sale has already been made and suit therefor begun.—Daniells v. Township of Watertown, 61 Mich. 514.

¶ 1072. How. St., § 1730, is invalid in so far as it seeks to authorize the enforcement of a drain tax that is void for want of jurisdiction to levy it.—Houseman v. Kent Circuit Judge, 58 Mich. 364.

¶ 1073. How. St., § 1740g3, which confers authority upon a drain commissioner to relay a drain where former proceedings to establish such drain have been declared void "for any cause other than that such drain is unnecessary and not conducive to the public health," etc., is constitutional as applied to a case where the application was declared void; it is not an attempt to validate proceedings jurisdictionally defective without giving the parties concerned an opportunity to be heard.—Hauser v. Burbank, 117 Mich. 463.

¶ 1074. It is entirely within the power of the legislature to correct any error in a local assessment which does not in effect work an injury to the taxpayer, as is done by Local Acts 1901, No. 846, the Charter of Flint.—W. F. Stewart Co. v. City of Flint, 147 Mich. 697.

¶ 1075. Since the legislature cannot make good that which was void when done, a statute (Laws 1887, Act No. 17, § 2) which seeks to validate tax sales, void because made under a prospective tax law for taxes of earlier years, is unconstitutional.—Hall v. Perry, 72 Mich. 202; McNaughton v. Martin, 72 Mich. 276.

§ 251. ——Effect of pendency of suit for relief.

¶ 1076. The pendency of proceedings to reverse irregular action of supervisors will not preclude their confirmation by legislative act.—People ex rel. Bristol v. Ingham County Sup'rs, 20 Mich. 95.

¶ 1077. The legislature cannot reverse judgments directly or indirectly, and a legislative act legalizing a tax roll and healing defects therein will be so construed as not to affect an existing judgment for trespass against the officers for seizing and selling property to pay the illegal tax. Nor would the pendency of a writ of certiorari from the circuit court to review the rulings of the justice by whom the judgment was rendered so affect the force of the judgment as to change this construction of the statute.—Moser v. White, 29 Mich. 59.

XII. ELECTIONS, SUFFRAGE AND PUBLIC OFFICES.

§ 252. Right of suffrage in general.

Relative legislative power as to elections and suffrage, see also ante § 46.

As affected by various laws regulating elections, see post §§ 253-257.

Apportionment of the state, see post §§ 258-260.

Right to hold office, see post § 261 et seq.

Qualifications and eligibility of voters, see Elections, III.

Right of inmate of Soldiers' Home or asylum to vote, see Elections, III.

Liability of officers denying constitutional right to vote, see Elections, X.

General provisions as to elective franchise, see Const., art. III, §§ 1-8.

¶ 1078. The elective franchise is substantially the same in all parts of the state, and cannot be essentially changed in any locality by legislation to regulate the mode of exercising it.—Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 1079. The right of voting cannot be taken away by direct law or impossible conditions.—Warren v. Board of Registration, 72 Mich. 398.

¶ 1080. The constitution authorizes the legislature to enact laws "to preserve the purity of elections, and to guard against abuses of the elective franchise"; but this does not authorize, by direction or indirection, the disfranchisement, without his own fault or negligence, of any elector under the constitution.—Attorney General ex rel. Conely v. Common Council of Detroit, 78 Mich. 545.

¶ 1081. The legislature may regulate but cannot destroy the enjoyment of the elective franchise; whether such regulation be reasonable or unreasonable is for the legislature, not for the courts, to determine so long as such regulation does not become destruction. —Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 1082. Laws of 1889, Act No. 254, providing for cumulative voting in districts entitled to more than one representative in the state legislature, is unconstitutional (a) because the constitution by implication prohibits any elector from casting more than one vote for any candidate for office, (b) because it impairs the equality of electors throughout the different districts, and (c) because it violates the constitutional requirement that representatives in districts entitled to more than one representative shall be elected by a general ticket.—Maynard v. Board of Canvassers of Kent County, 84 Mich. 228.

§ 1083. As the electorate is provided for by the constitution, and as the qualifications of the electors must be uniform throughout the state, Laws 1893, Act No. 138, providing that in all school, village and city elections "women . . . . shall be allowed to vote for all school, village and city officers," etc., is unconstitutional, as granting a franchise not conferred by Const., art. 7, § 1, notwithstanding Const. art. 15, § 14, which provides that officers of cities and villages "shall be elected . . . . at such time or in such manner as the legislature may direct." The word "manner" refers to the details for holding the election for which the constitution has already provided electors.—Coffin v. Board of Election Com'rs of Detroit, 97 Mich. 188.

¶ 1084. Local Acts 1905, No. 536, authorizing the city of Flint to borrow money and issue bonds for the purposes therein mentioned is not unconstitutional because it authorizes only "taxpaying electors" to vote on the submission of the proposition to the electors, the submission not being an election within the contemplation of the Const., art. 7, § 1.—Menton v. Cook, 147 Mich. 540.

¶ 1085. The Act of May 1, 1891, relating to election of presidential electors by districts does not violate the XVth federal Amendment.—McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; affirming 92 Mich. 377.

§ 253. Registration laws.

¶ 1086. The act (Local Acts of 1889, No. 468, p. 994), relating to the registration of voters in Detroit, conflicts with Const., art. 7, § 1, because it recognizes only native-born citizens and naturalized voters, while the constitution recognizes as qualified voters certain additional classes of persons.—Attorney General ex rel. Conely v. Common Council of Detroit, 78 Mich. 545.

¶ 1087. The registration act, Local Acts 1889, No. 468, is unreasonable and void in that it unfairly discriminates between electors; for though permitting a native-born citizen to prove his standing as a voter by his own oath, it requires a naturalized voter to produce his certificate of naturalization, or to show by evidence other than his own oath that such certificate was issued.—Attorney General ex rel. Conely v. Common Council of Detroit, 78 Mich. 545.

¶ 1088. The registration act, Local Acts 1889, No. 468, which has provided for only five registration days during the year, at one of which the elector must personally apply for registration, is unreasonable and void, because making no provision whereby electors who were sick or absent on registration days could vote on election days.—Attorney General ex rel. Conely v. Common Council of Detroit, 78 Mich. 545.

§ 254. Nominations and conduct of elections.

Police regulations of campaign contributions, see ante § 100.
Times for elections, see Elections, I.
Application of constitution in conduct of nominations and election, see Elections, IV-VII.

¶ 1089. It is within the legislative discretion to regulate the elective franchise, and when a legislature has exercised its discretion, as in Pub. Acts of 1913, No. 118, § 17, providing that under certain conditions no primary election need be held, the question whether the regulation is an unreasonable one is a defect for the legislature to remedy and not for the courts.—North v. Cady, 194 Mich. 561.

¶ 1090. The Primary Law, Pub. Acts 1913, No. 118, § 17, providing that where, upon the expiration of the time of filing petitions in any primary for city or county, it appears that there is no opposition to any candidate for any office, a primary election for such office, upon the fulfillment of certain conditions, shall be unnecessary, does not destroy the right of franchise, as the voter may write the name of the candidate for whom he wishes to vote on the ballot.—North v. Cady, 194 Mich. 561.

¶ 1091. Act 281, P. A. 1909, § 37, providing that no candidate at a primary election shall be deemed nominated if his political party at such election casts less than 15 per cent. of the vote cast by such party for Secretary of State at the last preceding November election, and in such case such party shall not be entitled to have the names of its candidates printed on the official ballot does not destroy the right of franchise, but merely regulates it and does not contravene the Federal Constitution or the State Constitution, art. III, §§ 1, 7 and 8.—Brown v. Board Election Com'rs Kent Co., 174 Mich. 477. (Brooke and McAlvay, JJ., dissenting.)

¶ 1092. Laws of 1889, Act No. 263, regulating the method of conducting elections, does not prevent persons who are blind or otherwise disabled from receiving assistance in preparing their ballots, or from being conducted to the polls when unable to go alone; the statute does not deprive any one of his constitutional right to vote, and is valid.—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 1093. Laws 1891, Act No. 190, prescribing the manner of conducting and to prevent fraud and deception at elections, is not unconstitutional as putting unreasonable restrictions upon the right to vote by its provisions as to the manner of voting and as to the way in which votes may be received and placed in the ballot box.—Attorney General v. May, 99 Mich. 538.

¶ 1094. Pub. Acts 1913, No. 109, regulating and limiting nomination and election expenses and forbidding contributions for election expenses by corporations is not unconstitutional as unduly and unreasonably restraining the political activities of the people.—People v. Gansley, 191 Mich. 357.

§ 255. Voting place or district.

Apportionment of state, see post §§ 258-260.
Change as effecting change of apportionment districts, see post § 260.
Place for voting under the constitution, see also Elections, III.

¶ 1095. The legislature cannot lawfully deprive qualified voters of a county of their right of suffrage by organizing townships in only a portion of it, leaving the remainder unorganized.—People v. Maynard, 15 Mich. 463.

¶ 1096. Local Acts 1905, No. 577, disorganizing the township of Atkinson and incorporating it in the township of Iron River is not void as contravening Const., art. 7, § 1, in that it operated to disfranchise the electors of Atkinson, by providing for its disorganization one day previous to the annual township election without providing any machinery or method for the electors for the

voting of the taxes, and without providing for the registration of the voters, the voters of Atkinson having the right to exercise as inhabitants of the new township the same rights as other citizens of the township.—Attorney General ex rel. Scott v. McColeman, 144 Mich. 67.

¶ 1097. Local Acts 1905, No. 596, entitled "an act to provide for a new voting precinct to be known as voting precinct number two, in the township of Iron River, in the county of Iron," passed before Local Acts 1905, No. 597, providing for the disorganization of a township and adding it to Iron River, is not unconstitutional in that it operated to disfranchise the voters of the disorganized township; because when the townships were consolidated under the second act the voters of the disorganized township acquired the same rights as the electors of the old township and if they were not in the new voting precinct number two they could vote in the precinct number one.—Attorney General ex rel. Scott v. McColeman 144 Mich. 67.

¶ 1098. The military suffrage bill of Feb. 5, 1864, which authorized polls to be opened and ballots cast out of the state, was held unconstitutional as violating art. 7, § 1, of the constitution, which permits no one to vote except in the township or ward where he resides.—People v. Blodgett, 13 Mich. 127.

¶ 1099. Electors cannot be residents of one district and vote in another, and a law which transfers them from one district to another by a change of city boundaries is an alteration of representative districts, and contrary to Const., art. 4, § 4.—People ex rel. Attorney General v. Holihan, 29 Mich. 116.

¶ 1100. Such a statute as Local Acts 1889, No. 468, p. 994, which would have the effect of requiring an elector to reside in his precinct more than ten days before election to entitle him to vote, violates Const., art. 7, § 1.—Attorney General ex rel. Conely v. Common Council of Detroit, 78 Mich. 545.

§ 256. Ballots and voting machines.

Machine voting as secret, see post § 257.
Right to go on "general ticket," see Elections, IV.

¶ 1101. The ballot is a constitutional method of voting and cannot be changed; and its perpetuation is meant to secure the right to vote without having the voter's opinion of men or measures inquired into.—Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 1102. A voter's rights are not abridged or restricted by a statutory requirement that all ballots shall be of uniform color and size.—Common Council of Detroit v. Rush, 82 Mich. 532.

¶ 1103. Laws 1895, Act No. 17, which makes it unlawful for the board of election commissioners to cause to be printed in more than one column on the official ballot the name of any candidate who shall have received the nomination by two or more parties or political organizations for the same office, is valid, and within the power of the legislature, acting under the provision of Const., art. 7, § 6, that "laws may be passed to preserve the purity of elections, and guard against abuses of the elective franchise."—Todd v. Board of Election Com'rs of Kalamazoo, 104 Mich. 474.

¶ 1104. Comp. L. 1897, §§ 3750-3758, as amended by Pub. Acts 1903, No. 234, authorizing the use of voting machines is not void as infringing upon Const., Art. VII, § 2, which provides that all votes shall be by ballot.—City of Detroit v. Board of Inspectors of Election, 139 Mich. 548.

§ 257. Secrecy of ballot or vote.

Right to assistance in voting, see also ante ¶ 1092.
Application of constitution in conduct of election, see Elections, XI.

¶ 1105. An act providing for the use of voting machines in elections, when applied to an election where a voter could not vote for a certain combination of candidates without applying for a separate paper ballot, he thereby being required to make known his want of party fealty, is unconstitutional as depriving the elector of his right to vote a secret ballot.—Helme v. Board Election Com'rs Lenawee Co., 149 Mich. 390.

§ 258. Apportionment into representative or electoral districts.

Power of judiciary in respect to apportionment acts, see also ante § 43.
Formation, equality and change, see post §§ 259, 260.
Apportionment provisions, see Const., art. V §§ 2-4.

¶ 1106. Const., art. IV, § 4, provides that "Each apportionment and the division into representative districts by any board of supervisors shall remain unaltered until the return of another enumeration." Held, that the enumeration referred to is an enumeration of the population by either state or federal authority.—Bay County v. Bullock, 51 Mich. 544.

¶ 1107. Except as prohibited by the restriction of Const., art. 4, § 4, the legislature has power to alter the boundaries of representative districts, and this power is not lodged exclusively with boards of supervisors.—People ex rel. Attorney General v. Bradley, 36 Mich. 447.

¶ 1108. The Michigan Act of May 1, 1891, relating to the election of presidential electors and providing that the manner of appointment shall be the election of an elector and an alternate elector in each of the twelve congressional districts into which the state is divided, and of an elector and an alternate elector at large in each of the districts defined by the act, does not contravene the 14th and 15th Amendments to the federal Constitution.—McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3; affirming 92 Mich. 377.

¶ 1109. Each apportionment act remains in force until it is supplanted by a subsequent valid act; hence apportionment Acts of 1891 and 1885 being invalid, the secretary of state was directed to issue notices of election of senators and representatives under Act of 1881, unless a special session of the legislature should be called to make a new apportionment.—Board of Supervisors of Houghton County v. Blacker, Secretary of State, 92 Mich. 638; Giddings v. Secretary of State, 93 Mich. 1.

§ 259. ——Formation, equality and contiguity of districts.

¶ 1110. Const., art. IV, § 2, providing that "no county shall be divided in the formation of senate districts, except such county shall be equitably entitled to two or more senators," indicates, not that the county is made the basis of apportionment, but that portions of different counties must not be included in the same district.—Williams v. Secretary of State, 145 Mich. 447.

¶ 1111. Const., art. IV, § 2, providing that "no county shall be divided in the formation of senate districts, except such county shall be equitably entitled to two or more senators," indicates that when a county is entitled to two or more senators the obligation is upon the legislature to make such apportionment within the county according to population upon the basis of the last enumeration of the state.—Williams v. Secretary of State, 145 Mich. 447.

¶ 1112. To give to a county with less population than another a greater representation in the legislature is not a constitutional exercise of legislative discretion; the representative apportionment acts of 1885 and 1891 (Laws 1891, Act No. 109) are void accordingly.—Board of Supervisors of Houghton County v. Blacker, Secretary of State, 92 Mich. 638.

¶ 1113. Where the population of a state entitles each 65,000 inhabitants to a senator, the constitutional provisions (art. 4, §§ 2, 4) that no county shall be divided in the formation of districts unless it be equitably entitled to two or more senators, and that senatorial districts shall be arranged according to the number of inhabitants, are violated by an act dividing a county of 82,000 into two districts, while nine counties having a population of 97,000 are united into a single district.—Giddings v. Secretary of State, 93 Mich. 1.

¶ 1114. Pub. Acts 1905, No. 245, providing for the division of the state into senatorial districts, being a re-enactment of Pub. Acts 1901, No. 189, is unconstitutional as violating the provisions of Const., art. IV, § 2, which requires that such division shall be equitably made in accordance with the population as determined by the last enumeration of the state; since according to the state enumeration of 1904 the unit or basis to be considered in arriving at a constitutional apportionment of senate districts is 79,063, while under such act the apportionment was such that the population of the different districts varied from 116,083, in the first, to 52,731, in the fifteenth.—Williams v. Secretary of State, 145 Mich. 447.

¶ 1115. As Act 336 of Mich. Pub. Acts 1913, reapportioning the representative districts of the state joins counties having a moiety or more of the ratio of representation with counties having less population, it contravenes § 3 of art. V, of the Michigan Constitution of 1910, providing that each county, with such territory as may be attached thereto, shall be entitled to a separate representative when it has attained a population equal to a moiety of the ratio of representation.—Stevens v. Secretary of State, 181 Mich. 199. (Ostrander and Kuhn, JJ., concurring, but holding that there is now no valid, existing apportionment act.)

¶ 1116. Under Const., art. 4, § 3, which provides that each representative district shall consist of convenient and contiguous territory, contact by land is not required, and an island county may be united with a county from which it is separated by wide and deep navigable waters.—Board of Supervisors of Houghton County v. Blacker, Secretary of State, 92 Mich. 638.

§ 260. ——Change of districts by changing local political divisions.

Indirect change of apportionment districts by annexations to municipalities, see also ante ¶ 526.

¶ 1117. The legislature cannot enlarge the boundaries of a city by annexing parts of adjoining townships when by so doing they alter the boundaries of representative districts in violation of Const., art. 4, § 4. A result absolutely interdicted cannot be accomplished by indirection. The act of April 12, 1873, enlarging Detroit, held void.—People ex rel. Attorney General v. Holihan, 29 Mich. 116.

¶ 1118. The legislature at its first session after a new enumeration may enlarge a city's limits so as to take in territory before belonging to another representative district, though the new apportionment has not yet been actually made. The act of April 22, 1875, held valid.—People ex rel. Attorney General v. Bradley, 36 Mich. 447.

¶ 1119. The division of the state into representative districts is not necessarily altered by an act so setting off a new county from an old one as to carve the new county out of one of the districts in the old one.—Bay County v. Bullock, 51 Mich. 544.

¶ 1120. An act (Local Acts 1889, No. 455) consolidating two cities lying in separate representative districts into one municipality, which by express provision does not change the boundaries of the districts or the manner of electing representatives therein, does not violate Const., art. 4, §§ 3 and 4, which provide for the division of the state into representative districts that shall remain unaltered until another state or national census.—Smith v. Mayor, etc., of City of Saginaw, 81 Mich. 123.

¶ 1121. The provisions of Const., art. 4, § 3, regulating legislative apportionments, and of Const., sched., § 22, preserving existing representation negative the power of the legislature to dismember a county in the formation of representative districts. A county is not to be divided unless entitled to two or more representatives, and in such case the division must be made by the board of supervisors. The representative apportionment act of 1891 (Laws 1891, Act No. 109) is therefore void for dividing Houghton county.—Board of Supervisors of Houghton County v. Blacker, Secretary of State, 92 Mich. 638.

¶ 1122. Local Acts 1905, No. 627, providing for the annexation of certain territory to the city of Detroit is not unconstitutional because its effect is to place the inhabitants of the annexed territory outside the limits of all senatorial and congressional districts, thus depriving them of the right to be represented in the Senate and Congress, the act having no effect on the boundaries of either a senatorial or congressional district.—Attorney General ex rel. Battishill v. Township Board of Springwells, 143 Mich. 523.

¶ 1123. Local Acts 1905, No. 627, providing for the annexation of certain territory to the city of Detroit cannot be said to be in violation of Const., art. 4, § 4, where it was passed and given approval by the governor and went into effect on June 8, 1905, although Pub. Acts 1905, No. 244, an act to apportion anew the representatives of the state legislature among the several counties and districts of this state, was approved on June 16 and took effect Sept. 17, 1905, and in accordance with the constitution and laws of the state an enumeration of the inhabitants had been made in 1904, the election under Act No. 627 having been held on July 31, 1905, before the board of supervisors of Wayne county had made a division of the county into legislative districts.—Attorney General ex rel. Battishill v. Township Board of Springwells, 143 Mich. 523.

§ 261. Creation and abolishment of offices.

Power of legislature to alter existing constitutional offices or to create new ones affecting distribution of powers, see ante §§ 46, 66.

Legislative interference with local self government in matter of elections and officers, see ante § 67 et seq.

Encroachment on constitutional offices, see also post § 262.

Construction and operation of the Schedule as to existing offices, see ante § 14.

"Officer" defined and distinguished from public employee, see Officers, I.

Class legislation respecting officers, see ante § 216.

Protection of existing offices and officers on adoption of constitution, see Const., Schedule, §§ 5-7.

¶ 1124. The office of circuit court commissioner is a constitutional county office, and can only be constituted as declared in the constitution.—McClintock v. Laing, 19 Mich. 300.

¶ 1125. It is a matter of serious doubt whether the legislature can create offices which are special in the constitution, and limited by that instrument as to the number to be elected, without some authority, express or implied, in the constitution.—Donough v. Dewey, 82 Mich. 309.

¶ 1126. Act 76 of 1879 purported to establish the police court of Grand Rapids and repealed the act under which the police justice was acting, but continued him in office to the end of his term under the title of "police judge." Held, that it did not confer a judicial office by legislation, but only abstained from legislating the police justice out of office.—Coon v. Attorney General, 42 Mich. 65.

¶ 1127. The office of supervisor in cities, not being created by the constitution, may be abolished by the legislature at will, and its functions conferred upon other municipal officers.—Attorney General v. Cogshall, 107 Mich. 181.

¶ 1128. A justice of the peace in a city cannot be legislated out of office before the expiration of the term for which he was elected under Const., art. 6, § 17, by an act

reincorporating the city, and reducing the number of justices therein.—Gratopp v. Van Eps, 113 Mich. 590.

§ 262. Encroachment on constitutional offices.

Changes encroaching on constitutional distribution of powers and functions of government, see ante II, B, C.

Changing or affecting courts and judges, or creating new ones, see ante §§ 51-65.

Executive officers under the constitution, see Const., art. VI.

Judicial officers under the constitution, see Const., art. VII.

Constitutional county officers in general, see Const., art. VIII, §§ 3-7.

School officers under the constitution, see Const., art. XI, § 2 et seq.

¶ 1129. Officers named in the constitution are there contemplated as having a known legal character, and though their duties may sometimes be varied by legislation, they cannot be so changed as to destroy the powers of the office or essentially alter it.—Allor v. Wayne County Auditors, 43 Mich. 76.

¶ 1130 The constitution empowers the Supreme Court to appoint a reporter. The legislature of 1881 enacted that the judges should file head-notes with their opinions. Held, that as the duties of reporter were well known when the constitution was adopted, they were inseparable from the office, and as his principal duty was to prepare head-notes to the decisions of the court, the act deprived the office of one of its essential duties, and was unconstitutional.—In re Head-Notes, 43 Mich. 641.

¶ 1131. A provision of Manistee City Charter (Local Acts 1882, p. 53, chap. 12, § 4) which makes it the duty of policemen to serve and execute all process directed or delivered to them for service, and for that purpose gives to them all powers of constables, and which further provides that they may serve and execute, within the limits of the city, any other process which by law a constable may serve, is constitutional. It does not trench on a constitutional office of constable.—White v. Manistee County Sup'rs, 105 Mich. 606.

¶ 1132. Under Const., art. IV, § 49, adopted as an amendment in 1899, which provides that the legislature may modify, change or abolish the duties of township highway commissioners, Local Acts 1901, No. 303, which authorized a certain township to grade, pave, etc., and otherwise improve certain highways, is not unconstitutional because it withdraws from the highway commissioner, who is a constitutional officer, his functions, since this is expressly authorized by the amendment.—Campau v. Highway Commissioner of Grosse Pointe, 132 Mich. 365.

¶ 1133. Pub. Acts 1899, No. 154, giving the board of state tax commissioners power to supervise assessments, is not open to the objection that the constitutional duties of the state board of equalization are thereby interfered with.—Board of State Tax Commissioners v. Board of Assessors of Grand Rapids, 124 Mich. 491.

¶ 1134. Const., art. 6, § 19, making certain officers, to wit, justices of the peace conservators of the peace does not prevent the legislature from making other officers like conservators, as is done by Local Acts 1905, No. 392, which established for Battle Creek a municipal court with like powers to the justices of the peace whom the court by that act was to supplant, saving and preserving the jurisdiction of all incumbent justices.—Attorney General ex rel. Hooper v. Loomis, 141 Mich. 547.

¶ 1135. Local Acts 1871, No. 408, creating the union school district of the township of Rogers, is not unconstitutional because it takes away most of the authority of the school inspector, an officer provided for by Const., Art. XI, § 1, and places it in a new board of education.—Board of Supervisors of Presque Isle Co. v. Thompson, 61 Fed. 914.

§ 263. Conferring public powers on private persons.

¶ 1136. As no public office can be obtained or exercised without either election or appointment, a statute allowing persons organized into a voluntary corporation to assume a police power is unconstitutional. So held of the act of 1855, providing for the incorporation of rafting, etc., companies (Comp. L. 1857, § 1942).—Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139.

§ 1137. The Acts, 217 of 1859 and 55 of 1873, are invalid in giving the members of voluntary detective associations the powers of constables, and authorizing them to require the assistance of the regular police.—Abels v. Ingham County Sup'rs, 42 Mich. 526.

§ 264. Eligibility and test laws for office.

Eligibility in general under the statutes and application of constitutional principles, see Officers, II.

Ineligibility of incumbent of office to other civil appointment during term for which he was elected, see Officers, II.

Ineligibility of one holding existing office to be governor, see Officers, II.

¶ 1138. Matters of individual conscience, including opinions on political subjects, cannot affect a citizen in any of his legal and political rights.—Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 1139. Whether a "test" for office is made by the provisions in Laws 1871, Act No. 494 (establishing the Detroit board of public works), requiring the members of the board to be selected "in equal numbers from the two political parties represented in the common council," quære.—Purple ex rel. Le Roy v. Hurlbut, 24 Mich. 44.

¶ 1140. Laws 1885, Act No. 320, in providing for the appointment of election inspectors in Detroit by a board appointed by the mayor and council, and consisting of two persons from each of the two leading political parties, is unconstitutional: (1) as making particular political opinions a condition to holding office; (2) for sub-delegating the popular power of choosing officers; (3) for interfering with the municipal right to local self-government. —Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 1141. Laws 1893, Act No. 118, vesting the government of the house of correction at Ionia in a board of control to consist of three members, not more than two of whom shall be of the same political party, is constitutional.—Attorney General v. Parsell, 99 Mich. 381.

§ 265. Mode of appointment or selection.

Relative functions of executive and legislature, see ante § 46.

To fill out interim or for emergency, see post § 266.

Changing time for election as change of terms, see post § 270.

Primary election laws, see ante § 254.

Elections and conduct of them in general, see Elections.

Appointments or selection other than by election, see Officers, II.

¶ 1142. All officers and functionaries exercising powers of government and control over political action must derive their powers and office either from the people directly or from the agents or representatives of the people. —Attorney General v. Detroit Councilmen, 58 Mich. 213.

¶ 1143. The policy of the state inclines in favor of elections by the people of local officers, as against the appointment of the same by the governor or the legislature.—Lawrence v. Hanley, 84 Mich. 399.

¶ 1144. An express requirement of the constitution as to the mode of choice of officers not only precludes every other mode, but must be taken as a circumstance bearing upon the identity of the office.—McClintock v. Laing, 19 Mich. 300.

¶ 1145. The constitution requires all justices to be elected, and it is against public policy to have them chosen otherwise except for temporary purposes.—Edison v. Almy, 66 Mich. 329.

¶ 1146. No public office can be obtained or exercised without either election or appointment.—Ames v. Port Huron Log Driving & Booming Co., 11 Mich. 139; Abels v. Ingham County Sup'rs, 42 Mich. 526.

¶ 1147. Jury commissioners appointed by the governor under How. St., §§ 7623-30, are not judicial officers in the sense of the constitutional requirement (Const., art. XV, § 14) that "judicial officers of cities and villages shall be elected," and they are not county appointees.—People v. Reilly, 53 Mich. 260.

¶ 1148. Laws 1895, Act No. 10, establishing a board of health for Detroit, and vesting in the governor the appointment of the members thereof, does not infringe Const. 1850, art. 15, § 14, which provides that "judicial officers of cities and villages shall be elected, and all other officers shall be elected, or appointed, at such time and in such manner as the legislature may direct." While the members of the board are "officers" within the meaning of said section 14, their duties are not purely municipal, but the statute shows the legislative intent is to use the city through this board as its agent in preventing the spread of contagious disease.—Davock v. Moore, 105 Mich. 120.

¶ 1149. Though the general scheme of the constitution for selection of officers is elective, and includes judicial officers, yet under Const., art. 6, § 23, the legislature may establish courts of conciliation with such powers and duties as may be prescribed by law; and since the latter provision does not constitutionally require election of the judges as is required respecting the other constitutional officers, it is within legislative power to provide for selection of members of the State Board of Mediation and Arbitration otherwise than by election.—Renaud v. State Court of Mediation, 124 Mich. 648.

¶ 1150. In the State Constitution, art. 4, § 49, as amended in 1899, providing "The legislature may also prescribe the powers and duties of boards of supervisors in relation to highways, bridges and culverts, and may provide for one or more county road commissioners to be elected by the people, or appointed, with such powers and duties as may be prescribed by law," the words "the people" can refer to none other than those of the county.—Board of Road Com'rs of Wayne County v. Board of Auditors of Wayne County, 148 Mich. 255.

§ 266. ——Interim and provisional designations.

Executive power to appoint to vacancy in superior court, see ante ¶ 212a.

Interim or provisional appointment of local officers by or under state authority, see ante § 75.
Vacancy appointments of state officers, see Const., art. VI, § 10.
Appointment in lieu of suspended or removed officer, see Const., art. IX, § 5.
Grant of power to provide by law for filling vacancies, see Const., art. XVI, § 5.

¶ 1151. Const. art. 6, § 22, providing that whenever, by a change in the boundaries of a township a justice of the peace shall be placed without the same, he shall be deemed to have vacated his office, it was held that it was not competent for the legislature to provide, in organizing a city from portions of two townships, that the justices of the peace previously elected in the townships, but residing within the limits of the new city, should remain in the office until the expiration of the term for which they were elected.—People ex rel. Berry v. Geddes, 3 Mich. 70.

¶ 1152. Const., art. 4, § 37, which provides that the legislature may "declare the cases in which any office shall be deemed vacant, and also the manner of filling the vacancy, where no provision is made for that purpose in the constitution," refers to the mode of filling such vacancy, and not to the term of the appointee.—Attorney General v. Trombly, 89 Mich. 50.

¶ 1153. Vacancies in the office of judge of probate are to be filled by the governor's appointment (Const., art. 6, § 14). A circuit court commissioner was authorized by R. S. 1846 (ch. 91, § 16) to act as judge of probate while the vacancy lasted. Held, that the statute did not conflict with the constitution, and that it applied also to cases in which the judge was temporarily disqualified by interest, relationship, sickness or absence.—Kelley v. Edwards, 38 Mich. 210.

¶ 1154. Upon the adoption of a constitutional amendment empowering the legislature to provide for the election of more than one circuit judge in a certain circuit, it is competent for the legislature to create at once an additional judgeship, which office becomes vacant as soon as created, whether the act so declares or not; and the legislature may authorize the governor to fill such office by appointment until the next general election; but a statute (Laws 1889, Act No. 97) providing that the term of the governor's appointee shall not expire until a certain date beyond such election is void.—People ex rel. Attorney General v. Burch, 84 Mich. 408.

¶ 1155. Laws of 1857, Act No. 167 (How. St. § 667), which provides that, in case a vacancy in a county office is filled by appointment by the governor, the appointee shall hold the office during the unexpired portion of the regular term limited to such office, unless the appointment is sooner revoked or determined by the governor, is unconstitutional, in that it undertakes to deprive the electors of a county of their constitutional right to elect for such unexpired term.—Attorney General v. Trombly, 89 Mich. 50.

¶ 1156. The legislature in creating a new school district has no power to designate its officers for more than a temporary term, and the provision of Local Acts 1901, No. 315, creating a new district and naming its officers for terms of one, two and three years respectively is without authority, but officers may be elected under the general law to fill the offices and hence the act is not invalid.—Attorney General ex rel. Kies v. Lowrey, 131 Mich. 639, affirmed in 199 U. S. 233, 50 L. ed. 167, 26 Sup. Ct. Rep. 27.

§ 267. ——Presidential electors.

¶ 1157. The Michigan Act of May 1, 1891, relating to the election of presidential electors and providing that the manner of appointment shall be the election of an elector and an alternate elector in each of the twelve congressional districts into which the state is divided, and of an elector and an alternate elector at large in each of the districts defined by the act, does not contravene the provisions of the second clause of section one of Article II of the Federal Constitution, providing that each state shall "appoint" in such manner as the legislature thereof may direct, a number of electors equal to the whole number of senators and representatives to which the state may be entitled in congress, since the Constitution recognizes that the people act through their representatives in the legislature, and leaves it to the legislature exclusively to define the method of effecting the object.—McPherson v. Blacker, 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3, affirming 92 Mich. 377.

¶ 1158. Const. U. S., art. 2, § 1, so far as it allows the legislatures of the states to direct the appointment of presidential electors in any other manner than by the voters of the state at large, is not impliedly repealed by Const. U. S., amend. 14 and 15.—McPherson v. Secretary of State, 92 Mich. 377, affirmed 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

¶ 1159. Laws 1891, Act No. 50, providing for the election of presidential electors, cannot be regarded as invalid because it does not provide for filling a vacancy should both an elector and his alternate die.—McPherson v. Secretary of State, 92 Mich. 377, affirmed 146 U. S. 1, 36 L. ed. 869, 13 Sup. Ct. Rep. 3.

§ 268. Duties and compensation of officers.
Legislative or local power to fix salaries, see ante § 76.
Rights in office covered by due process clause, see ante § 140.
Alteration of salaries as impairment of contract, see ante § 173.
Character of office, state or local, see Officers, I.
County liability for fees and compensation of services, see Counties, IV.

Salaries of circuit judges and additional compensation by counties, see Const., art. VII, § 12.
Prohibition as to increase during term, see Const., art. XVI, § 3.

¶ 1160. The legislature has power to direct what officer shall bring any class of public actions, and what shall be done with sums collected therein.—Township of Denver v. White River Log & Booming Co., 51 Mich. 472.

¶ 1161. The legislature has no power, under the constitution, to clothe one or two supervisors of a county with authority to name a tribunal which shall have the right to assume and perform the duties devolving, under the law, upon the board itself.—Zimmer v. Board Sup'rs Bay Co., 159 Mich. 213.

¶ 1162. Under the constitution of 1850, and prior to the present organization of the Supreme Court, the office of judge of the Supreme Court was not a distinct office from that of circuit judge, but two sets of duties were attached to one office under the latter designation. And the salary of the circuit judges, as fixed by the constitution, was a remuneration for all duties attached to the office, and could not be increased by the legislature.—People ex rel. Whipple v. Auditor-General, 5 Mich. 198.

¶ 1163. Comp. L. 1871, § 535, How. St., § 558, empowered boards of supervisors to fix the compensation of the prosecuting attorney from time to time. Laws 1879, Act No. 154, provided that annual salaries should be fixed by the board on or before the 31st of October, before the officers' terms began, and should not be changed during the term. Held, that this would not prevent a board which had fixed a salary before Act 154 was passed from changing it for the second year of the prosecuting attorney's term. Such a construction does not make the act retrospective.—Knappen v. Barry County Sup'rs, 46 Mich. 22.

¶ 1164. Pub. Acts 1901, No. 171, providing compensation for the several state officers constituting the board of state auditors at $1,800 annually for services not contemplated by the constitution and reimbursement for traveling expenses, is unconstitutional as an attempt to raise the salaries of the secretary of state, the state treasurer and the state land office commissioner contrary to Const., art. 9, § 1, in which such salaries are specifically fixed. These officers are required to perform such duties as are prescribed by law (Const., art. 1, § 8) and ex officio comprising the board of state auditors are required to examine and adjust all claims against the state not otherwise provided for by general law (art. 8, sec. 4); and no duties have been imposed upon such board except such as are directly within the constitutional provision or germane to the duties of the office.—Warner v. Auditor General, 129 Mich. 648.

¶ 1165. The term "salary" as used in the Const., art. 6, § 6, has the same meaning as in section 1 of article 9, and contemplates "a fixed annual or periodical payment for services depending upon the time, and not upon the amount of services rendered." The salaries provided for therein are to be fixed and determined in advance, and when so fixed, each of the circuit judges in the particular county is equally entitled thereto.—Beach v. Kent, 142 Mich. 347.

¶ 1166. Under the Constitution of 1909, art. XVI, § 3, the salaries of public officers, except circuit judges, where the term is fixed by law, may not be increased directly during the term of appointment or indirectly after resignation of the officer and subsequent reappointment.—Kearney v. Board of State Auditors, 189 Mich. 666; Horton v. Board of State Auditors, 189 Mich. 666.

¶ 1167. A public office which does not carry a salary at the time of a person's election or appointment is within section 3, art. XVI, of the Constitution of 1909, prohibiting the increase of salaries of public officers during their terms of office.—Barrus v. Engle, 186 Mich. 540.

§ 269. ——Compensation of legislators.

¶ 1168. Under Const., art. 4, §§ 15, 17, the speaker of the house of representatives cannot, as speaker, receive any compensation or mileage beyond what he receives as a representative.—People ex rel. Thurber v. Whittemore, 2 Mich. 306.

§ 270. Fixing and changing term.

Provisions as to commencement of terms, see Const., art. XVI, § 1.

¶ 1169. The provision of the Detroit justices' act that justices elected thereunder shall hold office "for four years" does not shorten the term and thereby contravene Const., art. 6, § 17, which provides that justices of the peace shall hold their offices four years, and until their successors are elected and qualified; for, there being no statutory prohibition, a justice elected for four years would hold over until, etc.—Messenger v. Teagan, 106 Mich. 654.

¶ 1170. Local Acts 1901, No. 437, providing for biennial instead of annual elections in the city of Detroit and abolishing one election is not invalid as extending the term of existing officers an unreasonable time in that they continue in office another year until the election takes place, and that this amounts to a legislative appointment.—Common Council of Detroit v. Schmidt, 128 Mich. 379.

¶ 1171. The proviso in Local Acts 1895, No. 294, extending the term of the Wayne county treasurer elected in November, 1894, for six months after the term for which the then incumbent was elected, although of doubtful validity, does not control the act so as to

render it void, as the requirement that a vacancy shall be filled by election is in furtherance of the spirit of self government, and Comp. L. 1897, § 2537, provides, in case of vacancy or disability, for appointment by the supervisors until the vacancy is filled or the disability removed.—Hunt ex rel. Snow v. Buhrer, 133 Mich. 107.

§ 271. Removals from office.

Removals of officers, see Officers, V.
General provisions as to impeachments and removals from office, see Const., art. IX, §§ 1-8.

¶ 1172. Comp. L. 1871, § 618 (How. St. § 651), permitting the governor to remove any state or county officer except the state treasurer and judges, held void, because at the time it was adopted the governor had no judicial power under the constitution.—Dullam v. Willson, 53 Mich. 392.

¶ 1173. Section 18, c. 29, Act No. 648, Local Acts 1907, giving to the municipal court justice of Kalamazoo exclusive jurisdiction, as against the other justices of the county, of all cases where both parties reside in the city, is not unconstitutional as depriving a constitutional officer of his office, or as so limiting his jurisdiction as to deprive him of the emoluments of said office.—Strifling v. Baden, 155 Mich. 49.

¶ 1174. The charter of the city of Grand Rapids, Tit. 2, § 11, as amended in 1905, authorizing the removal of certain elective and appointive officers by the common council for misconduct in office is not invalid as unauthorized by the Constitution of 1850, art. 12, § 7, which was in effect at the time the charter was adopted.—Hawkins v. Grand Rapids Common Council, 192 Mich. 276.

XIII. SCHOOL AND EDUCATION.

§ 272. In general.

Power of legislature and local self government, see ante § 72.
Alteration of districts as impairment of contract, see ante § 173.
Power over school officers and offices, see ante XII.
Designation of officers and mode of selection, see ante §§ 265, 266.
Police power to prohibit liquor selling affecting schools, see also ante § 108.
Application of self executing provisions of constitution, see generally Schools.
General provisions of the constitution, see Const., art. XI, §§ 1-15.

¶ 1175. Local Acts 1871, No. 408, creating the union school district of the township of Rogers is not unconstitutional because creating too large a district, since Const., art. 13, §§ 4, 5, relating to the establishment and location of primary schools, contains no restriction as to the size of a school district, and it is immaterial that before and after the adoption of the constitution in general statutes provided for the organization of school districts by the people which were not to exceed nine sections in extent.—Board of Supervisors of Presque Isle Co. v. Thompson, 61 Fed. 914.

§ 273. State University and colleges.

Administration of provisions affecting University, see University of Michigan.
Constitutional provisions as to University, see Const., art. XI, §§ 4, 5, 10, 13.

XIV. TAXATION AND REVENUES.

§ 274. Taxing power in general.

All matters relating to the taxing power and the limitations especially applicable to it are treated in Taxes, I.
Respecting general limitations involved in tax laws, see cross-references which follow.
Relative powers of departments, see ante § 47.
Imposing nonjudicial functions on judges or courts, see ante § 39.
Local self government in taxation, see ante §§ 70, 71.
Tax laws as laws impairing contracts, see ante § 178.
Limitation on taxing power of city as impairing its contracts of indebtedness, see ante § 178.
Basis for classification in tax laws, see ante § 215.
Unequal taxation as denial of equal protection of law, see ante § 227.
Retrospective tax and assessment laws, see ante § 240.
Co-existence and distinctness of taxing power and police power, see ante § 99.
Operation of the rule of uniformity and equality, see Taxes, I; and see also Local Improvements, VI.
Delegation of power to local divisions, see ante § 87.
Charge imposed by statute as a license or a tax, see Licenses; Taxes, I.

¶ 1176. The sovereign powers of taxation and police may constitutionally be combined in the same statute.—Reithmiller v. People, 44 Mich. 280.

§ 275. Use and appropriation of public funds.

Debt limitations, see post §§ 276, 277.
Power to regulate deposits and keeping of public funds, see also ante § 49.
Use in aid of internal improvements, see post §§ 283, 284.
Tax to pay private claim as legislative audit, see post § 280.
Funds or purposes to which taxes and other revenues should be allotted, see Taxes, X, B; Counties, V; Municipal Corporations, XIII; Townships, VII.
Limitations respecting power to create or incur debt, see post XV.

¶ 1177. The action of a board of education in permitting the use of a book in the public schools known as "Readings from the Bible," made up of moral precepts enforcing the Ten Commandments, no instruction being given

from the said book, and no note or comment by teachers being allowed, is not in violation of Const., art. 4, § 40, providing that money shall not be appropriated for the benefit of religious sects or societies.—Pfeiffer v. Board of Education, 118 Mich. 560.

¶ 1178. Act No. 261, Pub. Acts 1907, providing for the appropriation of funds to the Michigan Corn Improvement Association, whose membership is limited to "persons actively interested in the improvement of corn," is unconstitutional, and mandamus will not issue to compel the auditor general to include such appropriation in a state tax levy.—Michigan Corn Improvement Ass'n v. Auditor General, 150 Mich. 69.

XV. PUBLIC CONTRACTS AND INDEBTEDNESS AND INTERNAL IMPROVEMENTS.

§ 276. In general; purposes and limitations.

Grants of extra compensation, see post § 278.
Debt limitations on state, see Const., art. X, § 10 et seq.
Debt limitations of counties, see Const., art. VIII, §§ 11, 12.
Bond and debt limitations on municipalities, see Const., art. VIII, §§ 24, 25.

¶ 1179. An act providing that the board of police shall prepare and submit to the city controller an estimate in detail of the expense of maintaining the police department, and that the common council shall raise the same by general tax, is not in conflict with Const., art. 15, § 13, by which the legislature must restrict the power of cities to tax, borrow money, etc.—People v. Mahaney, 13 Mich. 481.

¶ 1180. Whether Const., art. 15, § 13, requiring the restriction of municipal taxing and debt making power is mandatory in a sense that it would invalidate all charters of municipalities and acts relating thereto, which are wanting in the limitation upon municipal taxation therein required, quære.—People ex rel. Drake v. Mahaney, 13 Mich. 481.

§ 277. ——Necessity of approval by electors.

Power of legislature to provide for erection of bridge between townships, see also Bridges, § 29.
Power of local officers under the statutes and the constitution and elections for approval, see Counties, IV; Municipal Corporations, XI; Townships, III; Public Contracts; Municipal Bonds.

¶ 1181. Laws of 1889, Act No. 314, providing for the construction, etc., of stone, etc., roads in Saginaw county, violates Const., art. 10, § 9, which limits the amount which the board of supervisors of a county may borrow or raise by tax for constructing or repairing public buildings, highways, or bridges, in any one year, to the sum of $1,000, unless authorized by vote of the electors.—Davies v. Saginaw County Sup'rs, 89 Mich. 295.

¶ 1182. Const., art. 10, § 9, and Comp. L. 1897, § 2484, subd. 7, empowering the board of supervisors to borrow or raise by taxation $1,000 for public works, but requiring the electors to pass upon any greater sum, does not prohibit the delegation of power by Comp. L. 1897, §§ 4051-4056, permitting the board of supervisors to apportion the cost of a line bridge between the two townships alone concerned.—Ionia County Sup'rs v. Ionia Circuit Judge, 134 Mich. 412.

¶ 1183. Pub. Acts 1905, No. 306, providing for ordering the building of bridges between townships by boards of supervisors is constitutional and does not require the submission of the matter to the voters of the two townships, as in case of borrowing by the county itself (Const., art. 10, § 9).—Horner v. Board of Supervisors of Ionia County, 147 Mich. 581.

§ 278. Contracts and extra compensation.

Protection of public contracts from impairment by law, see ante §§ 172, 173.
Limiting taxing power as impairment of contracts of indebtedness, see ante § 178.
Prohibition of extra compensation, see Const., art. XVI, § 3.

¶ 1184. A statute providing for the payment of money to accomplish a purpose which the payees have already agreed to perform for a sum fixed by an independent contract is unconstitutional because it is a grant of extra compensation, which is prohibited (Const., art. 4, § 21).—Anderson v. Hill, 54 Mich. 477.

¶ 1185. A joint resolution authorizing the contractor in lieu of swamp lands in a given county, appropriated in the payment of his claim, to select an equal number of acres from any state swamp lands in the Lower Peninsula, is not a grant of extra compensation to a state contractor within the prohibition of State Const., art. 4, § 21, notwithstanding a gradation of price of the various swamp lands, where no distinction in price was in force when the resolution was enacted.—Olds v. Commissioner of State Land Office, 134 Mich. 442.

¶ 1186. Under a contract fixing the pay for the construction of a state road at a given number of acres of state swamp land in a given county, then valued at $1.25 per acre, the subsequent substitution of other state swamp land in lieu of land in the particular county is not in violation of Const., art. 4, § 21, which prohibits extra compensation for state contractors although the land substituted is valued at $8.00 per acre at the time of the substitution many years after the making of the contract.—Olds v. Commissioner of State Land Office, 134 Mich. 442.

§ 279. Contracts for state printing, laws or court reports.

Provisions as to state printing, see Const., art. V, § 25.

¶ 1187. A state contract made otherwise than as the constitution requires is not within the protection of the constitutional provision which forbids it to be varied.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

¶ 1188. The printing of the Supreme Court reports is not printing for the judicial department, and until 1871 it was not included in the "State printing" contract, nor classed as printing "ordered by the legislature" (Const., art. 4, § 22).—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

¶ 1189. It is within the discretion of the legislature to decide whether it will publish such reports at the expense of the state, but its decision will not bind its successors; if so published, it should be done by contract.—People ex rel. Ayres v. State Board of Auditors, 42 Mich. 422.

§ 280. Claims and audits.

Imposing nonjudicial functions by requiring audit of claims, see ante § 40.
Construction of statute for audit to avoid invalidity, see ante § 25.
Provisions against legislative audit of claims, see Const., art. V, § 34.

¶ 1190. The Act of March 25, 1867, enacted that a note recited to have been given by individuals to pay bounties to volunteers was a valid debt against the township of Onondaga, and that the supervisor levy a tax to pay it. Held, that such act was void, as being in effect the auditing of a private claim by the legislature, contrary to Const., art. 4, § 31.—People ex rel. Gale v. Onondaga Supervisor, 16 Mich. 254.

¶ 1191. Laws 1873, Act No. 387, providing for the raising by tax of money to reimburse a township treasurer for a sum paid by him to the township to make good an amount of the public money of which he had been robbed, was void as a legislative audit of a private claim.—Bristol v. Johnson, 34 Mich. 123.

¶ 1192. The joint resolution of the legislature (Pub. Acts 1901, pages 382-385) creating a board of auditors to audit the accounts against the disorganized county of Manitou and to apportion the claims of the former territory of said county, being unconstitutional on the ground of vesting judicial power in the board and precluding claimants from a proper review, was not sustainable on the alleged ground that the act was a legitimate exercise of legislative power to determine what debts a municipality shall pay, and to compel such payments; as Const., art. 4, § 31, denies the legislature the power to audit an account.—Fitch v. Board of Auditors of claims against Manitou County, 133 Mich. 178.

¶ 1193. A joint resolution authorizing the contractor in lieu of swamp lands in a given county, appropriated to the payment of his claim, to select an equal number of acres from any state swamp lands in the Lower Peninsula, is not an attempt to audit and allow a private claim within the meaning of Const., art. 4, § 31.—Olds v. Commissioner of State Land Office, 134 Mich. 442.

§ 281. Works of internal improvement.

Character or purpose of improvement as element in determining whether it is an "internal" improvement, see ante § 26, ¶ 128.
Local municipal improvements, see post § 285.
Local highway improvements, see post § 286.
Limitation on local divisions, see post § 282.
Making land grants to encourage private improvements, see post § 283.
Management of ship canal as work of internal improvement, see also Canals ¶ 5.
Inhibitions on engagement in works of internal improvements, see Const., art. X, § 14.

¶ 1194. The constitutional prohibition against engagement by the state in works of internal improvement was violated by Laws 1871, Act No. 414, empowering the governor to appoint commissioners to improve a highway in a township, and authorizing them and their successors similarly appointed to levy the expenses on adjacent lands, and afterward keep the road in repair by tolls and make up the deficiency by taxation.—People ex rel. Hubbard v. Springwells Township Board, 25 Mich. 153.

¶ 1195. The state, being forbidden to engage in works of internal improvement, cannot itself improve its navigable waters.—Manistee River Improvement Co. v. Sands, 53 Mich. 593, affirmed in 123 U. S. 288, 31 L. ed. 149, 8 Sup. Ct. Rep. 113; 123 U. S. 297, 31 L. ed. 152, 8 Sup. Ct. Rep. 117.

¶ 1196. Quære, whether an attempted contract for the removal of sunken logs and other obstructions from navigable waters under Comp. L. 1897, § 2494, is an attempted work of internal improvement when it covers other obstructions than mere regulation of the use of such streams arising from logging operations.—Gainer v. Nelson, 147 Mich. 113.

¶ 1197. The state is prohibited from engaging in drainage as a work of internal improvement.—Kinnie v. Bare, 68 Mich. 625.

¶ 1198. The Drain Law of 1885 does not violate Const., art. 14, § 9, prohibiting the state from engaging in works of internal improvement.—Gillett v. McLaughlin, 69 Mich. 547.

¶ 1199. The general drain laws of this state are constitutional, and the construction of drains thereunder do not contravene the Const., art. 14, § 9, prohibiting the state from engaging in works of internal improvement.

—Attorney General ex rel. Alexander v. McClear, 146 Mich. 45.

¶ 1200. A drain cannot be regarded as a prescribed work of internal improvement because it is so large that it involves the use of a stream, formerly but no longer capable of floating logs, by deepening and widening it.—Smith v. Carlow, 114 Mich. 67.

¶ 1201. Making a drain by cleaning out and deepening a running stream is not a work of internal improvement prohibited by Const., art. 14, § 9.—Brady v. Hayward, 114 Mich. 326.

¶ 1202. A street railway partly within and partly outside of city limits is a "work of internal improvement" within the meaning of Const., art. 14, § 9, which prohibits the state from being a party to, or interested in any work of internal improvement.—Attorney General ex rel. Barbour v. Pingree, 120 Mich. 550.

¶ 1203. A street railway is an "internal improvement" within Const., art. 14, § 9, limiting the power of the state in that matter. —Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

§ 282. ——Power exercised through local divisions.

¶ 1204. In view of the general prohibition of the state from engaging in works of internal improvement (Const., art. 14, § 9) it cannot authorize its cities to engage in works of "local" improvement, or in such works when they are not "acting as agents of and for the state" unless authorization thereto is found in the constitution.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

¶ 1205. Local Acts 1899, No. 338, authorizing the city of Detroit to appoint a commission to acquire, maintain and operate a system of street railways partly within and partly without the city, is void as being in violation of Const., art. 14, § 9, which prohibits the state from being a party to or interested in any work of internal improvement, the legislature having no power to authorize a city to do what the state had no power to do. —Attorney General ex rel. Barbour v. Pingree, 120 Mich. 550.

¶ 1206. The prohibition against the state's engaging in any work of internal improvement (Const., art. 14, § 9) rests upon the municipalities, which are a part of the state, as well as upon the state itself.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

¶ 1207. An agreement in a franchise granted by a city to a street car company, that in consideration of the consent of the company to a low fare, the city should repair, repave and maintain the pavement upon the streets upon which the railway was to be constructed, was not invalid on the ground of the city thereby engaging in a work of internal improvement.—City of Detroit v. Detroit United Ry., 133 Mich. 608.

¶ 1208. Act 323 of 1881, imposing a tax upon specified townships for the purpose of improving the channel of a stream, is void, because it conflicts with the constitutional provision that the state shall not engage in any work of internal improvement unless by granting land therefor.—Anderson v. Hill, 54 Mich. 477.

§ 283. ——Appropriation of public lands or property in aid.

¶ 1209. The constitutional provision forbidding the state to engage in works of internal improvement does not invalidate Pub. L. 1883, Act No. 133, in so far as it provides that swamp lands belonging to the state be appropriated to a particular county to aid in improving the channel of a designated stream, reclaiming adjacent lands, and improving their sanitary condition.—Sparrow v. State Land Office Com'r, 56 Mich. 567.

¶ 1210. Statutes appropriating swamp lands for public improvements are not void as engaging the state in works of internal improvement.—State v. Sparrow, 89 Mich. 263.

¶ 1211. A statute which, besides granting swamp lands to improve a river, authorizes a tax to complete such improvement, and in which the purpose of protecting the public health is merely incidental, is void as an attempt to engage the state in a work of internal improvement.—Wilcox v. Paddock, 65 Mich. 23.

¶ 1212. Local Acts 1897, No. 423, as to the improvement of Maple River, and appropriating to such improvement certain lands bid in to the state for delinquent taxes, and also providing for a tax for such improvement if the lands proved inadequate, is invalid as violating Const., art. XIV, § 9, prohibiting the state from being interested in works of internal improvement, as the lands sought to be appropriated are not lands granted to the state except in a technical sense.—Gibson v. Commissioner of State Land Office, 121 Mich. 49.

§ 284. ——Bonds and indebtedness in aid of railroads, etc.

¶ 1213. A law indirectly engaging in works of internal improvement by authorizing municipal aid to railroads by donation to be raised by tax is invalid.—People ex rel. Bay

City v. State Treasurer, 23 Mich. 499; Thomas v. City of Port Huron, 27 Mich. 320.

¶ 1214. A municipal corporation of this state has no authority to issue bonds in aid of a private corporation for building railroads and the legislature cannot under the constitution authorize an issue of such bonds.—Dodge v. Van Buren Circuit Judge, 118 Mich. 189.

¶ 1215. The Act of March 22, 1869, declaring it to be lawful within prescribed limits as to amount for any city or township—a majority of its electors voting, at a meeting called for that purpose, assenting—to pledge its aid, "by loan or donation, with or without conditions" in the construction of any railroad by a corporation organized under the laws of the state, a donation, by vote of the electors, of a specified amount of city bonds, upon condition that the railroad should have or continue its terminus within the city, or connect within the city limits with a certain other railroad, and that if any citizens of the city should subscribe and pay for any share in the stock of the company the latter should deliver to such citizens bonds to the amount so subscribed and paid for, not exceeding in all the amount of bonds issued by the city to the railroad company; and that citizens should have 30 days after voting of the aid within which to subscribe to such stock, is valid.—Taylor v. City of Ypsilanti, 105 U. S. 60, 26 L. ed. 1008.

¶ 1216. The Act of March 22, 1869, entitled an act to enable any township, city or village to pledge its aid, by loan or donation, to any railroad company now chartered or organized under and by virtue of the laws of the state of Michigan, in the construction of its road, does not conflict with the state Constitution of 1850.—Township of Pine Grove v. Talcott, 19 Wall. (86 U. S.) 666, 22 L. ed. 227.

§ 285. Municipal improvements of local character.

Municipal power under the constitution, see Const., art. VIII, §§ 22, 23.

¶ 1217. Const., art. 4, § 38, authorizing the legislature to confer upon municipalities "such powers of a local, legislative and administrative character as they may deem proper," is to be construed with and not in disregard of article 14, section 9, prohibiting engagement in works of internal improvement; and the legislature cannot confer local powers obnoxious to the latter section.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

¶ 1218. It is within the province of the legislature to confer upon municipalities, under proper restrictions, the right to install plants for municipal lighting and to furnish light to their citizens.—Mitchell v. City of Negaunee, 113 Mich. 359.

¶ 1219. While there is a difference between municipal ownership and municipal operation of street railways, there is no constitutional objection to municipal operation which does not apply to municipal ownership.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

¶ 1220. Parks, waterworks, sewers and public lighting systems are not primarily works of "internal improvement," prohibited by Const., art. 14, § 9, to the state and its cities, but have a governmental function, to-wit, that of serving the public health safety and protection; and the improvement of the community is incidental.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

§ 286. Highway improvement.

See also ante ¶ 1194.

General power of legislature as to highways and highway improvements, see Const., art. VIII, §§ 26, 27.

¶ 1221. The constitutional provisions (article 14, § 9) that the state shall not be interested in any work of internal improvement or vacate or alter any road laid out by commissioners of highways, or any street in any city or village, or in any recorded town plat, do not operate to take from the legislature, and confer upon local authorities, the supreme power over the public streets.—Detroit Citizens' St. R. Co. v. City of Detroit, 110 Mich. 384, affirmed in 171 U. S. 48, 43 L. ed. 67, 18 Sup. Ct. Rep. 732.

¶ 1222. The constitutional power of cities to construct and maintain roads for public travel (implied from Const., art. 11, § 1, and from article 4, section 49, and article 10, section 11) does not extend to the construction of street railway tracks upon their streets for hire.—Attorney General ex rel. Brotherton v. Common Council of City of Detroit, 148 Mich. 71.

XVI. EMINENT DOMAIN AND COMPENSATION.

§ 287. In general.

The nature, occasion and exercise of the right of Eminent Domain will be fully treated in that topic.

For applications of general limitations, such as the "due process" clause, to condemnations of property for public use, see cross-references following.

Distinction from the police power, see ante § 99.

Relative powers of several departments, see ante § 48.

Right to jury, see ante § 192.

¶ 1223. The exaction of money by means of a local assessment to pay for improvements is not an exercise of the right of eminent domain but of the power to tax.—Williams v. Mayor of Detroit, 2 Mich. 560; Woodbridge v. City of Detroit, 8 Mich. 274.

XVII. TITLES AND ENACTMENT OF STATUTES.

§ 288. In general.

Introduction of bills and votes thereon, see Statutes, I.
Restrictions on local or special laws, see Statutes, II.
Requirements as to titles and description of subject-matter, see Statutes, III.
Requirements as to amending acts, see Statutes, IV.
Initiative and referendum, see Statutes, VIII.
Necessity of two-thirds vote to enact laws creating courts, see Statutes, I.
Initiative and referendum of statutes, see Statutes, VIII.

¶ 1224. Const., art. 4, § 19, recognizes the use of joint resolutions which are given the force of law and used in this state to authorize a single act for a specific occasion.—Olds v. Commissioner of State Land Office, 134 Mich. 442.

XVIII. MISCELLANEOUS PROVISIONS OTHER THAN FOREGOING.

§ 289. Corporations.

Prospective operation of Const. 1909, relating to conferring charters and franchises, see ante § 16.
Due process in laws affecting corporations, see ante §§ 165, 166.
Alteration or amendment or repeal of charters or franchises as impairment of contract, see ante § 172.
Class corporation laws, see ante § 219.
Abridgment of privileges and immunities, effect on corporations, see ante § 230.
Constitutional period for corporate existence, see Corporations, II.
Creation of corporations by joint action of states, see Corporations, II, A.
Inhibition on local special and private acts, see Statutes, II.
Constitutional provisions as to corporations, see Const., art. XII, §§ 1-9.

¶ 1225. The state has the same power to authorize several existing corporations to associate themselves together and organize themselves into a new corporation as it has to incorporate individuals.—State Treasurer v. Auditor General, 46 Mich. 224.

¶ 1226. An act permitting the creditors of a chartered corporation to enforce their demands by sale of its franchises is remedial only, and does not violate the constitutional prohibition against creating new corporations with the old charter powers.—Attorney General v. Joy, 55 Mich. 94.

¶ 1227. An amendment to a general law that had been embodied in the charter of a private corporation cannot change such charter unless the charter is itself subject to amendment.—Tripp v. Pontiac & Lapeer Plank Road Co., 66 Mich. 1,

¶ 1228. The power reserved to the legislature by Const., art. 15, § 1, to amend or alter the charters of corporations, authorizes any reasonable amendment, regulating the mode in which the franchise granted shall be used and enjoyed, which does not defeat or essentially impair the object of the grant, or take away property or rights which have become vested under a legitimate exercise of the powers granted.—Attorney General v. Looker, 111 Mich. 498, affirmed in 179 U. S. 46, 45 L. ed. 79, 21 Sup. Ct. Rep. 21.

¶ 1229. Where, by legislative authority, the interests of two corporations which had been incorporated, one in 1848, the other in 1850, by special charters that reserved to the legislature the right of amendment, alteration or repeal only after thirty years, came under one management in 1857, under the name and charter of the earlier incorporation, the result was either the formation of a new corporation subject to the constitution of 1850, which reserved generally the right to amend, alter or repeal corporate charters, or else it was a sale to the earlier corporation of the property and franchises of the later one, in which case the thirty-year limitation would expire in 1878; and in either case amendatory legislation in 1879 was valid.—Township of Erin v. Detroit & E. Plank Road Co., 115 Mich. 465.

¶ 1230. That the legislature has power to repeal the charter of a railroad company, and thus to terminate the company's legal existence, does not render valid an exercise of legislative power that is neither necessary nor appropriate to carry into execution any valid power of the state over the conduct of the business of the company.—Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, reversing 114 Mich. 460.

¶ 1231. The power to alter or amend the charter of a corporation does not extend to the taking of the property of the corporation either by confiscation or by other means; and it does not authorize a statute requiring railroad companies to keep on sale at specified rates less than the maximum rates fixed by the legislature 1,000-mile tickets valid for two years.—Lake Shore & M. S. R. Co. v. Smith, 173 U. S. 684, 43 L. ed. 858, 19 Sup. Ct. Rep. 565, reversing 114 Mich. 460.

¶ 1232. The legislature may prescribe the

means of enforcing the constitutional liability of stockholders for labor debts.—Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231.

¶ 1233. How. St., § 3208e5 limiting the liability of stockholders in banks to depositors only, does not violate Const., art. 15, § 3, which provides that stockholders shall be liable for all debts, the constitutional provision relating to banks of issue only.—Foster v. Row, 120 Mich. 1.

§ 290. Exemptions and homesteads.

Restriction or change of right to execution as impairment of contract, see ante § 181.
Provisions as to homesteads and exemptions, see Const., art. XIV, §§ 1-4.

¶ 1234. How. St., § 7716, as amended by Laws 1885, Act. No. 159, § 2, subjecting to execution under judgment for purchase price certain personalty generally exempt, is constitutional.—Roberts v. McGur, 82 Mich. 221.

¶ 1235. Mechanic's Lien Law, § 2 (Pub. Acts 1891, No. 179, as amended by Pub. Acts 1893, No. 199), providing for a lien upon property of a married woman if services are performed or material furnished with her knowledge and consent, does not operate to deprive the wife of her homestead rights, under Const., art. 16, § 2, unless a promise in writing signed by her is obtained, and even though the contract for improvements is made with her knowledge and consent.—Jossman v. Rice, 121 Mich. 270.

§ 291. Navigable waters.

Direct application of provision concerning bridging of navigable waters, see Navigable Waters, II.
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§ 292. Military and naval affairs.

Military and naval establishment in general, see Military and Naval Affairs.
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§ 293. English language in public proceedings and records.

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Provision as to English language, see Const., art. XVI, § 6.

§ 294. Married women's separate estate.

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§ 295. Property rights of aliens.

Disabilities of aliens under the statutes and constitution, see Aliens and Citizens.
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§ 296. Agricultural leases.

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§ 297. Provisions of the schedule.

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CONSTRAINT to CONTEMPORANEOUS.

Cross-References.

Constraint—
See Duress; Fraud, II (undue influence); Gifts, IV; Wills, III.
Construction and interpretation—
See topics treating of the instrument or writing under construction, e. g., Contracts, VI; Deeds, III; Wills, VI; Statutes, V; Constitutional Law, I; and see also specific topics treating of the particular contracts.
Of pleadings, see Pleading, I; Equity, VII; Indictment, I.
Of instructions, see Instructions, II; Indictment, IX, E; and on appeal, see Appeal, XII, C; Indictment, XVI, D.
Of judgments, see Judgments, II, VII; Former Adjudication; and see also specific topics in those portions treating of the judgment.
Of verdicts and findings, see Verdicts and Findings, IV, VII; Indictment, IX; and on appeal, see Appeal, XII, C; Indictment, XVI, D.
Of appellate judgment as law of case on review or second trial, see Appeal, XII, G, XV.
Parol or extraneous evidence in aid, see Evidence, V; and see topics referred to ante.
Bills to construe wills, see Wills, VI, J.
Constructive—
See generally topics treating of the thing described as "constructive," e. g., Assignments, II; Appearance; Easements; Contempt, I; Fraud, II; Mortgages, II, C; Trusts, IV.
Delivery, see Gifts, III; Sales, V, B; Frauds, Statute of, II, C; Carriers, II, D; Execution of Instruments, III.
Eviction, see Covenants for Title, III; Landlord and Tenant, IV, A.
Notice, see Notice and Record of Title; Negotiable Instruments, XIII, A; and for notice through agents, see Agency, II, E; Attorneys, II, C; Corporations, XVII, E; Partnership, IV, A.
Notice to charge duty and negligence,

see Negligence, I; and specific topics treating of negligence, e. g., Highways, XII.
Possession, see Adverse Possession; Chattel Mortgages, I, D.
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Service, see Process; and as to effect of judgments on such service, see Judgments, VII; Former Adjudication; Divorce, VII, XI; Foreign Judgments.
Consuls—
See Ambassadors and Consuls.
Consummate dower—
See Dower.
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CONTEMPT.

TREATS of wilful disregard or disobedience of a public judicial or legislative authority and of the prodecure to punish them, but excludes the construction of judgments and decrees with respect to the acts required to be done by them (see Injunctions, VI; and like topics) and the duties of witnesses (see Witnesses, I; Examination of Witnesses, IV) and attorneys (see Attorneys; Argument of Counsel; Trial).

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§ 42. Indemnity and reparation.
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I. IN GENERAL; WHAT CONSTITUTES.

§ 1. Elements and kinds in general.

Particular acts see also post §§ 2-11.
Nonpayment of costs as criminal contempt, see also post ¶ 71.
Acts also amounting to crimes, such as bribery, obstructing justice, perjury, etc., see Crimes, II; Indictment.
Nature of the proceeding, see post § 18.
Statutes as affirmations of common law powers, see post ¶ 64.
Mode of commencing and carrying on proceedings dependent on character of the contempt, see post § 25 et seq.
Punishment dependent on civil or criminal nature, see post § 39.
Defenses and excuses, see post, II.

¶ 1. Wilful disobedience of an injunction makes one punishable as for a criminal contempt under Comp. L. 1898, § 1098, subd. 3. —Enterprise Foundry Co. v. Iron Molders' Union of North America, Local No. 186, 149 Mich. 31.

¶ 2. To publish of a circuit judge that he was responsible for a severe criticism of the prosecuting attorney which appeared in a report of a grand jury, and that he did it to "get even," constitutes a criminal contempt unless its truth can be shown.—In re Dingley, 182 Mich. 44.

§ 2. Acts or conduct in presence of court.

See Jud. Act, chap. V, § 1, ¶¶ 1, 2; Comp. L. 1915, § 12268, ¶¶ 1, 2.

¶ 3. The words "immediate view and presence," as used in How. St., § 7234 (subd. 1), are words of limitation, and exclude the idea of constructive presence. Such "immediate view and presence" does not extend beyond the range of vision of the presiding judge, and the term applies only to such contempts as are committed in the face of the court.—In re Wood, 82 Mich. 75.

¶ 4. In contempt proceedings against a coroner for presenting a fraudulent claim for an inquest upon the body of an alleged stranger, for allowance by the circuit court, it is immaterial whether or not the order allowing it was entered of record, since the contempt was complete upon the presentation of the claim.—In re Toepel, 139 Mich. 85.

§ 3. Misconduct by attorneys or officers.

See also ante ¶ 4.
See Jud. Act, chap. V, § 1, ¶¶ 1, 2; Comp. L. 1915, § 12268, ¶ 3.
Misconduct by jurors, see Jud. Act, chap. V, § 1, ¶ 8; Comp. L. 1915, § 12268, ¶ 8.

¶ 5. Under Comp. L. 1897, ch. 301, § 1, giving courts power to punish "Any neglect or violation of duty or any misconduct by which the rights or remedies of a party in any cause or matter depending in such court or triable therein, may be defeated, impaired, impeded or prejudiced, in the following cases: (1) All * * * coroners * * * for any misbehavior in such office or trust, or for any willful neglect or violation of duty therein," the circuit court may punish a coroner for presenting a bill for an inquest upon the body of a stranger, the expense of which is by virtue of Comp. L. 1897, § 11828, payable by the state when allowed by the circuit court when in fact the deceased was a local resident, this being a "matter depending in such court."—In re Toepel, 139 Mich. 85.

¶ 6. Respondents were attorneys to defend

a man accused of murder. They appeared on two occasions and asked for a continuance, and the court refused it, and set a day for trial. On the day set, respondents failed to appear, and sent in another attorney to make a motion for a continuance, and filed besides motions for change of venue, and to disqualify the trial judge. Respondents were in good health, took a trip to Canada, returning four days later. Held, respondents were guilty of contempt of court.—In re McHugh, 152 Mich. 505.

§ 4. Hindering or evading jurisdiction.

Evading or disobeying subpoena or process, see post § 5.
Tampering with witnesses or jurors, see post § 7.
Disobeying judgment or order, see post §§ 9-11.

¶ 7. One is guilty of contempt who files, in a circuit court other than that having jurisdiction of proceedings under an assignment for the benefit of creditors, a bill to enjoin a sale of the assigned property on the ground that the assignment is invalid; and the question of the assignment's validity will not be tried on an application for mandamus to vacate an order adjudging relator guilty of contempt.—Smith v. Wayne Circuit Judge, 84 Mich. 564.

¶ 8. The sale of property under levy and execution, the property being in the hands of a receiver, made without application to, and leave from the court, is a contempt of court and is illegal and void.—Campau v. Detroit Driving Club, 130 Mich. 417.

¶ 9. Where a partnership creditor commenced proceedings in a foreign state to enforce his claim prior to the appointment of a receiver on a bill for the dissolution of the partnership, it was held that such creditor was not in contempt in continuing such proceeding to final judgment although he knew of the appointment of the receiver.—Rickman v. Rickman, 180 Mich. 224.

§ 5. Evasion or disobedience of process or subpoena.

Failure to attend for examination in receivership proceedings, see also post ¶ 32.
See Jud. Act, chap. V, § 1, ¶¶ 4, 6, 7, Comp. L. 1915, § 12268, ¶¶ 4, 6, 7.
Failure to attend on subpoena as contempt, see also Jud. Act, chap. XVII, § 74; Comp. L. 1915, § 12562.
Arrest in violation of privilege as contempt, see Jud. Act, chap. XIII, § 44; Comp. L. 1915, § 12247.
Nonattendance on garnishment as contempt, See Jud. Act, chap. V, § 1, ¶¶ 4, 6, 7, Comp. L. 1915, § 13147.
Neglect to make return to mandamus, see Jud. Act, chap. XXXVI, § 1; Comp. L. 1915, § 13437.

¶ 10. Evading by concealment the service of a subpoena on himself is not a contempt which a court of record can punish under Pub. Acts 1899, No. 230, § 8, which after other contemptuous acts were enumerated, reads: "All other cases where attachments and proceedings as for contempts have usually been practiced in courts of record to enforce the civil remedies of any party, or to protect the rights of any such party."—Brodrick v. Genesee Circuit Judge, 125 Mich. 274.

¶ 11. Pub. Acts 1899, No. 230, § 4, empowering courts of record to punish for contempt the detaining of any witness, etc., and "any other unlawful interference with the process or proceedings in any action" does not cover the act of one who himself evades the service of a subpoena in an action between others.—Brodrick v. Genesee Circuit Judge, 125 Mich. 274.

§ 6. Attacking official conduct of court.

As criminal contempt, see also ante ¶ 2.
Disavowal of bad intent as purgation, see post § 17.
After judgment becomes final and irreversible, see post ¶ 68.
See Jud. Act, chap. V, § 1, ¶ 10; Comp. L. 1915, § 12268, ¶ 10.

¶ 12. A letter criticizing a decree, and charging the judge with submitting to private interviews with interested parties in regard to the case pending his decision, and intimating unfairness and partiality upon the hearing, is an attack upon the official conduct of the court, and constitutes a contempt, for which the writer is liable.—In re Chadwick, 109 Mich. 588.

¶ 13. Whether it is a contempt of court to indorse upon a check given to the clerk in payment of a fine for a previous contempt, a statement that such fine is illegal and unjust coupled with a protest, was questioned but left undecided.—In re Wood, 82 Mich. 75.

§ 7. Tampering with evidence, witnesses or jurors.

Which court has jurisdiction, see post § 19.

¶ 14. Under How. St., § 7234, which provides among other things that every court of record shall have power to punish as for a criminal contempt, persons guilty of acts tending to interrupt its proceedings, or to impair the respect due its authority, the circuit court may, upon its own motion, punish as for contempt of court, any person attempting to bribe jurors or witnesses in a cause,

although no party be aggrieved by such misconduct.—Langdon v. Wayne Circuit Judges, 76 Mich. 358.

¶ 15. To bribe or attempt to bribe a witness in a pending case is a most serious contempt of court and one which should be promptly dealt with, and the fact that it is also a crime does not take away the jurisdiction of the court to punish it as a contempt.—Nichols v. Judge of Superior Court of Grand Rapids, 130 Mich. 187.

¶ 16. An attempt to prevent the attendance as a witness of one who has not yet been subpoenaed is a contempt of court under How. St., § 7257, subd. 4, which provides for the punishment of any person guilty of unlawfully detaining any witness to a suit while going to, remaining at, or returning from the court where such suit shall be noticed for trial.—Montgomery v. Muskegon Circuit Judge, 100 Mich. 486.

§ 8. Refusal to answer as witness.

Excuse of immateriality, see post § 15.
See Jud. Act, chap. V, § 1, ¶ 7; Comp. L. 1915, § 12268, ¶ 7.
Before justices, see Jud. Act, chap. LXXIX, § 5; Comp. L. 1915, § 14446.

¶ 17. Under How. St., §§ 8061, 8063, a principal defendant who refuses to answer interrogatories as to the disposition of notes given him by a garnishee, and which are not in the latter's hands at the time of the service of the writ of garnishment, may be punished for contempt; and it is not necessary to allege that his refusal to answer or his secretion of the facts is fraudulent.—Barnes v. Wayne Circuit Judge, 81 Mich. 374.

¶ 18. A party to a suit in another state cannot be committed in this state for refusing to testify under a commission issued in said state to take his testimony here. Comp. L. 1857, § 4295, How. St., § 7488, applies to general witnesses only.—In re Adams, 7 Mich. 452.

§ 9. Disobedience or violation of order or judgment.

Burden of proof of disobedience or violation, see post § 34.
Delay in complying with order of purgation, see post § 17.
Effect of total or partial invalidity or defect in judgment, see post § 10.
Power to punish by contempt, availability of execution or other means of enforcement, see post §§ 22, 23.
Notice or demand to fix duty and disobedience, see post § 12.
Parties liable, see post § 13.
Excuses, such as poverty, sickness, etc., see post § 15.
Interpretation of the judgment or decree to determine whether obedience has been done, see Injunctions, VI.
See Jud. Act, chap. V, § 1, ¶¶ 3, 5; Comp. L. 1915, § 12268, ¶¶ 3, 5.
In judgment creditors' proceedings, see Jud. Act, chap. XXXIV, § 9; Comp. L. 1915, § 13386.
Of judgment on award, see Comp. L. 1915, § 13663.
Disobedience by minor courts and officers, see Jud. Act, chap. V, § 1, ¶ 9; Comp. L. 1915, § 12268, ¶ 9.

¶ 19. The failure of a carrier to comply fully and completely with a schedule of freight rates established by the Michigan Railroad Commission, when approved by the court and a writ of mandamus issued to compel the carrier to put such rates into effect, amounts to contempt of court.—Michigan Railroad Commission v. Detroit & Mackinac R. Co., 184 Mich. 242.

¶ 20. The imposition by a carrier in the first instance of an additional charge of fifty cents per thousand feet on all shipments of lumber under a tariff established by the Michigan Railroad Commission authorizing it on lumber not intendent for reshipment, held not sufficient to justify the imposition of a penalty on the carrier for failing to comply literally with an order of the court requiring the putting into effect of such tariff, since the terms of the tariff were ambiguous as to the time for making such charge.—Michigan Railroad Commission v. Detroit & Mackinac Ry. Co., 185 Mich. 649.

§ 10. ——Validity and effect of the judgment or order.

Ambiguity in order, see also ante ¶ 20.
Advice of counsel that order was void as excuse, see post § 16.
Exclusion on hearing of questions as to effect or regularity of anterior proceedings, see post § 33.
Record in the injunction case as proof of validity of order, see post § 36, ¶ 115.

¶ 21. There is no legal wrong in violating an order that was made without jurisdiction, but if an order is valid, the punishment for disobeying it will depend on whether such conduct is wilfully contumacious or not.—Haines v. Haines, 35 Mich. 138.

¶ 21a. An injunction, regularly issued, should be obeyed, and the court has power to punish for contempt disobedience thereof, though the proceedings to obtain such injunction were a fraud upon the court.—Holland v. Weed, 87 Mich. 584.

¶ 22. It is not a contempt for a police officer holding a prisoner under arrest to refuse to release him on a void order of re-

lease founded on an invalid recognizance.—Couzens v. Sellers, 199 Mich. 457.

¶ 23. In a case brought for divorce against the other spouse, who obtained a divorce in another state (How. St., § 6228 subd. 6), an order for alimony may properly be made over objection that there is no marriage; and nonpayment of such alimony may be punished as a contempt.—Van Inwagen v. Van Inwagen, 86 Mich. 333.

¶ 24. The fact that the case stands on a plea, which if true shows nonexistence of the marriage, does not make the order for alimony lacking in jurisdiction; hence contempt for nonpayment lies.—Filer v. Filer, 77 Mich. 469.

¶ 25. Contempt proceedings based on the noncompliance with a void order of the circuit court relative to a ruling of the Railroad Commission, are of no force.—Briggs v. Cass Circuit Judge, 178 Mich. 28.

¶ 26. The violation of a preliminary injunction in a patent case is not excused because the patent is invalid nor because the writ may have been improvidently granted. Such a writ must be obeyed until legally dissolved where the court issuing it had jurisdiction.—Phillips v. Detroit, 2 Flip, 92, Fed. Cas. No. 11101.

¶ 27. Where a decree of a supreme court directs that a trustee of a fund present her claim for costs and expenses to the lower court, and she considers herself aggrieved by the allowance there made by a decree, though taking the trust fund as therein directed, and afterwards refuses to distribute the trust fund as provided in the said decree, desiring to appeal from the allowance, but declaring no appealable order was entered, having accepted the fund upon direction of the court the trustee is not in a position to question the form of the order and ignore it as not final.—Ladies of the Modern Maccabees v. Daley, 173 Mich. 577.

¶ 28. Where the decree has not been enrolled but is subject to modification upon motion, where costs have not been taxed or execution issued, and where rehearing may be ordered or an appeal taken, the case cannot be said to have reached a stage where it is not pending in the circuit court so far as the right to punish for contempt is concerned.—In re Chadwick, 109 Mich. 588.

§ 11. ——Suspension or discharge of the order or judgment.

Power to punish vilification of court after judgment becomes final, see also post § 20, ¶ 68.

(1 Mich. Dig. 71.)

¶ 29. One will not be punished for disobeying an injunction which the parties have previously stipulated shall be dissolved, even though an order vacating the writ is needed to complete the record.—Ten Eyck v. Wing, 1 Mich. 40.

¶ 30. A suit for divorce was brought against relator and the court ordered him to pay temporary alimony and also a fee to the wife's solicitor, but before the latter was paid or any demand made therefor, the parties became reconciled and the suit was discontinued. The solicitor demanded payment of the fee and brought contempt proceedings against the husband and the court adjudged him in contempt. Held that such order should be vacated as the court had no power to make it.—Dillon v. Shiawassee Circuit Judge, 131 Mich. 574.

¶ 31. The death of complainant's husband, who, with another person, had been made defendant in a bill for divorce and for restraint from disposition of fraudulently transferred property until a bill for divorce is maintainable, does not, at least where it occurs after a violation of the injunction by the other defendant, abate the suit retained as an injunction suit, so as to relieve the latter from liability to punishment for contempt.—Smith v. Waalkes, 109 Mich. 16.

¶ 32. A contention that a defendant for whom a receiver has been appointed cannot be adjudged guilty of contempt for failure to attend hearing for examination, pending the hearing of his petition to stay the receivership proceedings, cannot be sustained where there is no temporary stay preventing the complainant from proceeding to a hearing before the circuit court commissioner.—Central Nat. Bank of Cleveland v. Graham, 118 Mich. 488.

§ 12. Notice or demand to fix contempt.

Duty of counsel to attend on court without special notice, see Indictment, IX, A.

Necessity of personal service of notice to put party in contempt of Supreme Court order, see Sup. Ct. Rule 21.

¶ 33. A commitment for nonpayment of money under Comp. L. 1857, § 4077, How. St., § 7260, must be preceded by demand and refusal to pay.—Brown v. Brown, 22 Mich. 299; Edison v. Edison, 56 Mich. 185.

¶ 34. Previous demand for payment is not required where the party had declared he would not pay.—Potts v. Potts, 68 Mich. 492.

¶ 35. One who has been ordered to execute, acknowledge and deliver a deed con-

taining a special covenant of warranty cannot be held guilty of contempt in disobeying such decree until such deed has been presented to him for execution, and he has refused; he is not bound at his peril to prepare it.—Berry v. Innes, 35 Mich. 189.

§ 13. Parties in contempt; privity and participation.

Joining with company of strikers with good intent, see also post ¶ 40.

¶ 36. Proceedings for contempt in not paying over a fund are not appropriate to try issues involving the title to the fund arising on a garnishment of it by one who was not a party to the proceeding out of which the contempt proceeding arose.—Baldwin v. Wayne Circuit Judge, 101 Mich. 119.

¶ 37. Upon the evidence both of two defendants were adjudged to have been guilty of contempt in violating an injunction by digging a drain.—Rummell v. Lamb, 110 Mich. 685.

¶ 38. A decree enjoining defendant from diverting water from a lake and requiring him to fill up a ditch through which the water was diverted, in two places, does not impose upon him a continuing duty so as to render him guilty of contempt because strangers without his knowledge removed the dams placed in the ditch.—Stock v. Township of Jefferson, 132 Mich. 96.

¶ 39. A decree enjoined defendant from diverting water from a lake and required him to fill up a ditch at two points, which was done, but the dams so constructed were shortly thereafter removed by parties unknown. Held, that defendant was not guilty of contempt for this act done by strangers without his privity or consent.—Stock v. Township of Jefferson, 132 Mich. 96.

II. DEFENSES, EXCUSES AND PURGATION.

§ 14. In general; justification.

Invalidity of order or defect therein as justification, see also ante § 10.

Suspension of judgment or discharge of it as justification, see also ante § 11.

Acquittal of civil contempt as bar to criminal, see Former Adjudication, III.

¶ 40. A person who in company with a hostile crowd of union men, followed and addressed a nonunion man, is guilty of contempt as having violated a decree of the court enjoining the union men of a company from interfering with the company's business; and a claim that his purpose was to peacefully solicit the nonunion man to join the union, is no justification when the act took place at a time and under such circumstances that peaceful solicitation was impossible.—Ideal Mfg. Co. v. Ludwig, 149 Mich. 699; In re Hamlyn, 149 Mich. 699.

§ 15. Excuses generally; good intent.

Acts done by strangers, see ante § 12.

Ambiguity in order disobeyed, see also ante ¶ 20.

Good purpose to accomplish impossible object, see also ante ¶ 40.

Injunction procured by fraud on court, see also ante ¶ 21a, post ¶ 135.

Official character of contemnor as relieving him from personal liability to indemnify other party, see post ¶ 141.

Disavowal of bad intent as purging contempt, see post § 17.

Excuse for delay in complying with order of purgation, see post § 17.

Sufficiency of excusing affidavit, see post § 36, ¶ 117.

¶ 41. Poverty, sickness and unfavorable weather may sufficiently excuse the failure to promptly comply with a decree requiring the removal of a building.—Scott v. Layng, 59 Mich. 43.

¶ 42. An order committing a male minor for contempt in refusing to comply with an order for payment of alimony, is erroneous where such minor has no property of any kind and has never been emancipated.—Austin v. Austin, 167 Mich. 164.

¶ 43. The fact that a witness, summoned to produce books before a grand jury, is not under investigation himself, will not excuse him from punishment for contempt on the ground that the evidence is immaterial and incompetent as it cannot be said that the books cannot be used against others.—In re Archer, 134 Mich. 408.

¶ 44. An attachment for contempt of court in failing to pay over temporary alimony to the wife during the pendency of a divorce suit is proper where the husband is in default, even though he has been put into involuntary bankruptcy, has been adjudged a bankrupt, the assignees in bankruptcy have taken charge of his property and he claims to be unable to pay the alimony, and has no means of earning any money, except as he is employed as a clerk for the assignees in bankruptcy, and that his compensation for such services has not been fixed.—Schroeder v. Schroeder, How. N. P. 63.

§ 16. Advice of counsel.

Effect to mitigate punishment or fine, see post § 40.

Purgation where disobedience was on advice of counsel, see post § 17.

¶ 45. That a party has acted under advice of counsel in violating an injunction will not relieve him from paying the actual damage sustained from such violation.—Chapel v. Hull, 60 Mich. 167.

¶ 46. Where a decree of the Supreme Court directs that the trustee of a fund present her claim for costs and expenses to the lower court, and she considers herself aggrieved by the allowance there made by a decree, though taking the trust fund as therein directed, and afterwards refuses to distribute the trust fund as provided in said decree, desiring to appeal from the allowance, but claiming no appealable order was entered, if she acted in accordance with advice of counsel she is not guilty of contempt.—Ladies of the Modern Maccabees v. Daley, 173 Mich. 577.

§ 17. Purgation and discharge.

Discharge on payment of judgment, see Jud. Act, chap. V, § 13; Comp. L. 1915, § 12280.

¶ 47. One guilty of publishing a report of a judicial proceeding, the only fair construction of which tends to defame and degrade the court in the eyes of the litigants and the public, cannot purge himself of the contempt by a denial of any intended wrong, and an assertion that he meant the publication to bear a different and harmless construction.—In re Chadwick, 109 Mich. 588.

¶ 48. In answer to an order to show cause why they were not guilty of contempt in the use of certain language in a respondents' brief, the respondents disclaimed any intent to use language which could be construed as contempt, and the court, though the language was improper, took no further action.—In re Jones and Clink, 120 Mich. 517.

¶ 49. A carrier which acts on the advice of reputable counsel in failing to comply literally with an order of the Michigan Railroad Commission establishing a schedule of freight rates, which have been upheld by the court and a writ of mandamus issued requiring the carrier to put them into operation, will be permitted to purge its contempt by forthwith putting such schedule into effect.—Michigan Railroad Commission v. Detroit & Mackinac R. Co., 184 Mich. 242.

¶ 50. The failure of a carrier to comply with an order of the court permitting it to purge itself from a contempt by filing with the Michigan Railroad Commission a freight tariff within five days after service of such order, held excused by negotiations between the carrier and the Commission tending to effect a settlement of the controversy.—Michigan Railroad Commission v. Detroit & Mackinac Ry. Co., 185 Mich. 649.

III. PROCEDURE AND PUNISHMENT AND INDEMNITY FOR INJURY.

§ 18. Nature of the proceeding.

Nature and kinds of contempts, see ante § 1.
As determining the punishment, see post § 39.
Inapplicability of provisions against imprisonment for debt, see post § 41.
Resort to contempt against officer as barring other remedy, see Sheriffs, VI.
Application of due process clause to statutes fixing contempt procedure, see Constitutional Law, § 142.

¶ 51. A proceeding to punish for contempt of court is not a criminal cause triable by jury.—In re Chadwick, 109 Mich. 588.

¶ 52. Contempt proceedings are criminal in their nature rather than civil.—Carnahan v. Carnahan, 143 Mich. 390.

¶ 53. Contempt proceedings are special summary proceedings, and a proceeding to punish for a criminal contempt is entirely independent and distinct from the suit in which the contempt is committed.—In re Smith, 144 Mich. 39.

§ 19. Power and jurisdiction of courts.

See also ante ¶ 14.
Inherent power of courts of record, see post § 20.
Contempts also amounting to crimes, see ante ¶ 15.
Affidavits or petition as conferring jurisdiction, see post ¶ 84.
Institution on court's own motion, see post § 32.
Sentences by justices of the peace, see also post § 38.
Power of judge to sit and disqualification to sit, see Judges, II, III.
Legislative power to regulate contempt procedure and punishment, see Constitutional Law, § 63.
Transfer of jurisdiction by error or appeal, see Appeal, IX.
Disobedience after dismissal of bill and appeal, see also Appeal, ¶ 599.
Effect of stay on appeal as transferring jurisdiction in part leaving other part to court below, see also Stay of Proceedings, II.
Power of examining magistrate to commit witness for refusal to testify, see also Arrest, ¶ 89.
General power under the statutes, see Jud. Act, chap. V, § 1; Comp. L. 1915, § 12268.
Power of probate courts to punish for contempts, see Comp. L. 1915, § 13765.
Power of justices and occasions for exercise, see Jud. Act, chap. LXXIX, § 1; Comp. L. 1915, § 14442.

¶ 54. Under Pub. Acts 1875, No. 49, §§ 13, 14 (Comp. L. 1897, §§ 630, 631), which, after

defining the jurisdiction of the superior court of Grand Rapids, gives it "power to issue all lawful writs and process, and do all lawful acts which may be necessary and proper to carry into effect the powers and jurisdiction given by this act, and especially to issue all writs and process and to do all acts which the circuit courts of this State, within their respective jurisdictions may in like cases issue and do by the laws of the state of Michigan," said superior court has the same power to punish for contempts as the circuit courts have under the constitution.—Nichols v. Judge of Superior Court of Grand Rapids, 130 Mich. 187.

¶ 55. An executor is a "person," within Comp. L. 1915, § 13765, providing that each probate judge shall have power to issue warrants for the apprehension and imprisonment of "any person" who shall refuse or neglect to perform any order, sentence or decree of a probate court, and a warrant of commitment is not illegal as in violation of § 12819, providing that execution "shall not issue against the body, nor against the goods and chattels, lands and tenements of any executor," unless in those cases provided by law.—In re Merrill, 200 Mich. 244.

¶ 56. Comp. L. 1897, chap. 301, giving jurisdiction, relates to "Proceedings as for Contempt to Enforce Civil Remedies," and does not apply to contempts in criminal proceedings.—In re Emery, 149 Mich. 383; City of Eaton Rapids v. Horner, 126 Mich. 52; In re Osborn, 131 Mich. 118.

¶ 57. Comp. L. 1897, § 1098, relating to criminal contempts, does not confer upon the circuit court the power to punish for contempt an interference with the people's witnesses on a preliminary examination pending before a justice of the peace, but by its terms excludes such authority.—In re Emery, 149 Mich. 383.

¶ 58. The circuit court has not the power to punish as a contempt an interference with the people's witnesses on a preliminary examination before a magistrate on a criminal charge, since such examination is not a matter depending or triable in the circuit court, but is for the purpose of determining whether an offense has been committed which would be triable in the circuit court.—In re Emery, 149 Mich. 383.

¶ 59. A decree entered by the Supreme Court requiring the defendants to remove poles, wires, etc., from the streets of a city and remanding the cause to the circuit court, under Comp. L. 1897, § 554, providing for remission of all files to the circuit court and for further proceedings necessary to enforce the decree, cannot be enforced by contempt proceedings in the Supreme Court on an original application where the circuit court has rendered the matter res adjudicata by acquitting the parties of the charge on petition for contempt in that court.—City of Eaton Rapids v. Horner, 126 Mich. 52.

¶ 60. Contempt proceedings were not properly brought in the Supreme Court against a board of canvassers who, after the affirmance on certiorari of mandamus proceedings to compel the issuance of a certificate of election, issued a certificate contrary to the order of the circuit court; as the circuit court had jurisdiction of the case and hence of the contempt proceedings.—Fitzsimmons v. Board of Commissioners of Detroit, 119 Mich. 147.

¶ 61. Under Pub. Acts 1907, No. 340, § 5, the enforcement of provisions for support contained in a decree for divorce, which are intended to be temporary, and to continue only until the decree for permanent alimony is complied with, rests with the circuit court until the jurisdiction of the Supreme Court attaches, which does not occur in such cases until the return is filed in said court.—Delor v. Wayne Circuit Judge, 157 Mich. 587.

¶ 62. Under How. St., §§ 8115, 8116, being sections 9 and 10 of the statute authorizing proceedings at law in the nature of a judgment creditor's bill, and which authorizes the "judge" to punish for contempt in the same manner as the circuit court might, the circuit court as well as the judge has power to punish as for contempt a debtor who refuses to appear before a circuit court commissioner, and make discovery on oath concerning his property, pursuant to the provisions of said act.—Shepard v. Kent Circuit Judge, 109 Mich. 606.

¶ 62a. The contention of the defendant in contempt proceedings, based on defendant's failure to appear before a circuit court commissioner and give testimony in receivership proceedings, that, until the commissioner had before him proof of service of the order appointing a receiver, such commissioner had no authority to issue the summons requiring defendant to appear will be ineffective against the order adjudging defendant guilty of contempt when the order appointing the receiver directed the commissioner to issue a summons on request and a copy of such order was before the commissioner.—Central Nat. Bank v. Graham, 118 Mich. 488.

§ 20. ——Inherent power to punish.

Statutory confirmation of inherent power, see Jud. Act, chap. V, § 1, ¶ 11; Comp. L. 1915, § 12268, ¶ 11.

¶ 63. Power to punish for contempt is inherent in, and as ancient as, courts themselves.—In re Chadwick, 109 Mich. 588.

¶ 64. Courts of record in this state have the same inherent power to hear and determine all contempts of court that the superior courts of England had at the common law. The statutes (How. St., § 7234 and chap. 256) are in affirmation of this power, and regulate procedure and punishment without curtailing it.—Langdon v. Wayne Circuit Judges, 76 Mich. 358.

¶ 65. Under Const. 1850, art. VI, § 1, providing that "The judicial power is vested in one Supreme Court, in circuit courts, in probate courts and in justices of the peace. Municipal courts of civil and criminal jurisdiction may be established by the legislature in cities" and article VI, sections 13, 18, providing that the jurisdiction and duties of probate and justices' courts may be limited and prescribed by the legislature, and section 8 providing that "The circuit courts shall have jurisdiction in all matters, civil and criminal, not excepted in this Constitution and not prohibited by law," the circuit courts have inherent power to punish for contempts which are not subject to control by the legislature.—Nichols v. Judge of Superior Court of Grand Rapids, 130 Mich. 187.

¶ 66. The right of a court to punish as for a criminal contempt is no longer an open question, and while power to do so is conferred by Comp. L. 1897, § 1098, How. Ann. St., 2nd Ed., § 12589, courts possess it independently thereof.—In re Dingley, 182 Mich. 44.

¶ 67. Under Comp. L. 1857, chap. 194, a magistrate had no power to commit a witness for refusing to testify on the preliminary examination of a person charged with crime. —In re Farnham, 8 Mich. 89.

¶ 68. The power of a court of record to punish for contempt persons guilty of vilifying the court in its judicial character is not limited to contempts arising out of pending proceedings where the judgment is still subject to modification on motion.—In re Chadwick, 109 Mich. 588.

§ 21. Power of nonjudicial bodies.

¶ 69. A board of supervisors has power to subpoena witnesses (Comp. L. 1871, § 469) but cannot arrest or commit them for contempt in refusing to appear.—In re Blue, 46 Mich. 268.

§ 22. Contempt for nonpayment of money; availability of execution.

Mode of procedure, see also post ¶ 85.

¶ 70. Process for contempt to enforce civil remedies cannot be resorted to where there is other adequate remedy, such as execution. —Haines v. Haines, 35 Mich. 138; North v. North, 39 Mich. 67.

¶ 71. One cannot be punished as for a criminal contempt because of his noncompliance with an order for the payment of costs, where, if the payment of costs had been made one of the conditions of the order and a part of the judgment in case of noncompliance, an execution could have been awarded for them.—Swartout v. Lucas, 102 Mich. 492.

¶ 72. Where execution may issue to collect a decree for the payment of money, contempt proceedings cannot be resorted to to enforce the civil remedy.—Carnahan v. Carnahan, 143 Mich. 390.

¶ 73. The fact that a void execution has been taken against a wife to enforce a decree in a divorce suit, and a void and ineffectual levy made does not affect subsequent contempt proceedings brought against her for the enforcement of the decree as one "where by law execution cannot be awarded"; where no benefit has been derived from it by the husband and no injury suffered by the wife.—Carnahan v. Carnahan, 143 Mich. 390.

¶ 74. A decree entered in a divorce suit ordering the wife to pay over to the husband the proceeds of a trust fund which she has in her control, but which is outside the jurisdiction of the court, is not a decree for the payment of money in the ordinary sense; and since the property is not subject to the exemption law, and the decree requires the delivery of the specific thing, it is not enforceable by a writ of execution, and it is therefore enforceable by contempt proceedings under Comp. L. 1897, § 10891, giving that remedy where by law execution cannot be awarded. —Carnahan v. Carnahan, 143 Mich. 390.

¶ 75. Where a husband had assigned to his trustee in bankruptcy a sum awarded him in a divorce proceeding, which his wife was found to hold in trust for him and directed to pay, the fact of the bankruptcy proceedings does not change the wife's obligation to a mere debt, and make the debt one enforceable only by execution; and therefore not by contempt.—Carnahan v. Carnahan, 143 Mich. 390.

§ 23. ——Noncompliance with alimony orders.

Which court has jurisdiction, see ante § 19.
Disobedience amounting to contempt, see ante §§ 9-11.
Divorce decrees other than for payment of alimony, see ante § 22.
Necessity of previous notice and demand, see ante § 12.
Necessity of hearing and opportunity for defense, see post § 81.

Excuse of poverty or inability to comply, see ante § 15.
Sufficiency of record in divorce proceeding to sustain commitment as one based on valid judgment, see post ¶ 124.
See Jud. Act, chap. V, § 1, ¶ 5; Comp. L. 1915, § 12268, ¶ 5.

¶ 76. Process of attachment as for contempt, though not allowable where there is any other adequate remedy, lies to enforce obedience to an order requiring payment of temporary alimony and expenses of litigation. Haines v. Haines, 35 Mich. 138; Palmer v. Palmer, 45 Mich. 150.

¶ 77. Pub. Acts 1899, Act No. 230, giving the court the power to punish for contempt for disobedience or refusal to pay alimony is retroactive, being remedial.—Judd v. Judd, 125 Mich. 228.

¶ 78. The payment of alimony may be enforced by contempt proceedings under Pub. Acts 1899, No. 230, How. St., 2nd Ed., § 12614.—Mesler v. Jackson Circuit Judge, 188 Mich. 195.

¶ 79. An order for the maintenance of children falls within the term "alimony," and such order may be enforced through imprisonment for contempt under Pub. Acts 1899, Act. No. 230, which is amendatory to Comp. L. 1897, § 10891.—Brown v. Brown, 135 Mich. 141.

¶ 80. The defendant was ordered in a decree of divorce made in Oklahoma, to pay the complainant certain alimony. Complainant brought a bill to enforce this decree in Michigan. Held, that Act No. 230, Pub. Acts 1899, giving courts power to punish as for contempt a refusal to comply with a decree to pay alimony, conferred no authority to punish defendant for contempt under the present proceeding.—Mayer v. Mayer, 154 Mich. 386.

§ 24. Who may institute proceedings.
Action on court's own motion, see post § 32.
Right of counsel to enforce alimony decree, see also ante ¶ 30.
Right of trustee in bankruptcy to join in contempt proceeding to reach assets, see also Bankruptcy, ¶ 101.

¶ 81. Contempt proceedings (How. St., chap. 256) to enforce a civil remedy cannot be instituted on the petition of a nonresident corporation which has not been served with process and has not voluntarily appeared in the suit; since a party which has not submitted itself to the jurisdiction cannot ask relief at the hands of the court.—Latimer v. Barmore, 81 Mich. 592.

§ 25. How commenced; affidavit.
Sufficiency of facts shown, see post § 27.

¶ 82. Contempts not committed in the "immediate view and presence" of the court must be brought before it by the affidavits of the persons who witnessed them, or have knowledge of their commission; and a rule is entered, based upon such affidavits, either that an attachment issue, or that the accused show cause at a certain time and place why he should not be punished for the alleged contempt.—In re Wood, 82 Mich. 75.

¶ 83. During an adjournment of court an attorney gave to the clerk, in payment of a fine imposed for a previous contempt of court, a certified check indorsed with a statement that the fine was illegal and unjust. Held, that the contempt, if any, not being committed "in the immediate view and presence" of the court, was not punishable summarily, but only in proceedings based upon affidavit and notice.—In re Wood, 82 Mich. 75.

¶ 84. In a proceeding under Comp. L. 1897, § 10891, for contempt of court in intimidating witnesses, in which a petition was filed based upon information and belief and accompanied by affidavits, the affidavits and not the petition conferred jurisdiction, and without the affidavits the proceeding would have been quashed.—Russell v. Wayne Circuit Judge, 136 Mich. 624.

§ 26. Notice or order to show cause.
Appearance as equivalent, see post § 29.
Interrogatories on order, see post § 30.
Sufficiency of proof of knowledge of order disobeyed, see post § 36.
Occasions for order to show cause, see Jud. Act, chap. V, § 5; Comp. L. 1915, § 12272.
Necessity for personal service, see 1916 C. C. Rule 12, § 1.

¶ 85. The sole purpose of Comp. L. 1915, § 13765, providing that each judge of probate shall have power to issue warrants for the apprehension and imprisonment of any person who shall refuse or neglect to obey any of its orders, is the enforcement of the orders, decrees and sentences of the probate court, and notice before issuance of the warrant, or an order to show cause why it should not issue before issuance is not required.—In re Merrill, 200 Mich. 244.

§ 27. Showing for attachment.
Sufficiency of showing against attachment, see also post ¶ 117.
Sufficiency of proof of the contempt, see post § 36.
Of notice and demand for payment of money, see Jud. Act, chap. V, § 4; Comp. L. 1915, § 12271.

¶ 86. The return of a master charged with the execution of an order of the court showing the failure of a person to appear and submit to an examination as required by the order is sufficient foundation for a rule to show cause why an attachment should not issue against him for contempt.—Whipple v. Brown, H. 436.

¶ 87. The rule which requires that the charges against a party alleged to have been guilty of contempt must be supported by positive statements, in affidavits made by persons having knowledge of the facts, does not exclude the drawing of inferences by the circuit judge from established facts, and his decision as to whether there was a sufficient basis for issuing an order to show cause can only be reversed in case of a total absence of a showing of facts justifying such action. —Montgomery v. Muskegon Circuit Judge, 100 Mich. 436.

¶ 88. Affidavits used on the hearing of a motion for a new trial, one of the grounds of which was the alleged action of an officer of the defendant corporation, in whose favor judgment had been rendered, in inducing witnesses for plaintiff to leave the state during the trial of the cause, may be made the basis of proceedings against the offending officer for contempt.—Montgomery v. Muskegon Circuit Judge, 100 Mich. 436.

¶ 89. Affidavits tending to show that a coroner presented a claim to the circuit court for an inquest, including charges for a post mortem, with a certificate that the deceased was a stranger not belonging in the state, and that deceased was in fact a resident, who had been removed from his home to a hospital and died there, and that no post mortem was held, present a prima facie case of misconduct which would warrant the commencement of contempt proceedings.—In re Toepel, 139 Mich. 85.

§ 28. Issuance of attachment and arrest.

When affidavits or notice are prerequisite, see ante §§ 25, 26.

For failure to return process, see Jud. Act, chap. V, § 6; Comp. L. 1915, § 12273.

Arrest and custody of contemnor, see Jud. Act, chap. V, §§ 12, 13; Comp. L. 1915, §§ 12279, 12280.

Return of attachment and compulsion of return, see Jud. Act, chap. V, § 17; Comp. L. 1915, § 12284.

Discharge or liberation on bail, see Jud. Act, chap. V, §§ 13-15; Comp. L. 1915, §§ 12280-12282.

Habeas corpus to bring person before court, see Jud. Act, chap. V, §§ 7-9; Comp. L. 1915, §§ 12274-12276.

¶ 90. An attachment issued by the register without any previous order of court is void. An express order of the court, based upon showing and authorizing the register to send out the writ, is required.—Thompson v. Ellsworth, 39 Mich. 719; In re Simons, 49 Mich. 511.

¶ 91. An attachment issued by the register upon affidavits is void. An express order of court is necessary.—Thompson v. Ellsworth, 39 Mich. 719; In re Simons, 49 Mich. 511.

§ 29. Appearance and bond.

Appearance in action as prerequisite to right to institute contempt proceedings ancillary thereto, see ante ¶ 81.

Alias attachment for nonappearance, see Jud. Act, chap. V, § 25; Comp. L. 1915, § 12292.

Bond to appear, see Jud. Act, chap. V, §§ 10, 11; Comp. L. 1915, §§ 12277, 12278.

Liability on bond for appearance, see Jud. Act, chap. V, §§ 27-30; Comp. L. 1915, §§ 12294-12297.

¶ 92. Where attorneys are cited for contempt for acts committed outside the presence of the court, formalities of procedure are waived by their voluntary appearance to answer the charge.—In re McHugh, 152 Mich. 505.

§ 30. Interrogatories.

¶ 93. Comp. L. 1897, §§ 198-203, and the 1897 C. C. Rules 50-57 do not abrogate the usual proceedings for contempt in courts of chancery, and Comp. L. 1897, § 10909, requiring interrogatories, etc., applies to such proceedings.—Metheany v. Kent Circuit Judge, 142 Mich. 628.

¶ 94. Contempt proceedings in chancery are fatally defective, where the statute (Comp. L. 1897, § 10909), requiring interrogatories to be filed where the defendant has been brought into and has appeared before the court which interrogatories must specify the facts and circumstances alleged against the defendant and require an answer thereto, has not been complied with.—Metheany v. Kent Circuit Judge, 142 Mich. 628.

¶ 95. One who is charged with contempt in a chancery proceeding in that he failed to produce certain books and papers does not waive his right to have the proceedings conducted according to Comp. L. 1897, § 10909, because of the fact that he had insisted that 1897 C. C. Rules 50-57 and Comp. L. 1897, §§ 198-203, applied.—Metheany v. Kent Circuit Judge, 142 Mich. 628.

¶ 96. A failure to file interrogatories, as required by How. St., § 7275, and to allow the party proceeded against an opportunity to produce his witnesses, is an irregularity calling for a reversal of the final order adjudging him guilty of the contempt charged.—Latimer v. Barmore, 81 Mich. 592.

¶ 97. Where the petition for an order to show cause why the defendant in an injunction bill should not be punished for contempt sets out at length the facts in the case, and defendant, in his answer, does not deny the correctness of the material facts as stated, but interposes a defense the sufficiency of which is purely a question of law, the court may dispose of the proceeding without the framing of interrogatories or making an order of reference, especially where defendant makes no request therefor.—Smith v. Waalkes, 109 Mich. 16.

¶ 98. Under How. St., § 7260, providing for contempt proceedings in case of refusal to obey an order to pay costs or other sums of money, a husband may be committed for contempt for refusal to obey an order requiring him to pay suit money to his wife's attorneys pending divorce proceedings, and the filing of interrogatories and opportunity to produce witnesses are not necessary in such proceeding.—Ervay v. Ervay, 120 Mich. 525.

¶ 99. Comp. L. 1897, § 10909, referring to civil contempt has no application to criminal contempt, so as to require opportunity of having interrogatories furnished to a witness summoned to appear and show cause and to produce books; his rights are regulated by Comp. L. 1897, § 1098.—In re Archer, 134 Mich. 408.

¶ 100. In a proceeding under Comp. L. 1897, § 10891, for contempt of court in intimidating witnesses, in which a petition was filed based upon information and belief and accompanied by affidavits, it was proper practice for the court, who treated the proceeding as a criminal one, to appoint an attorney to prepare interrogations based upon the affidavits filed; and the party charged having fully answered and the court having examined the affidavits and interrogatories, and determined that they were sufficient, he was not required to allow other interrogatories prepared by the petitioner.—Russell v. Wayne Circuit Judge, 136 Mich. 624.

§ 31. Hearing or summary commitment.

When done in presence of court, see post § 32.
Commencement by affidavit or summary commitment, see also ante § 25.
Necessity of prior notice or order to show cause, see ante § 26.
Record of summary commitment, see post § 37.
Time and opportunity for defense, see Jud. Act, chap. V, § 3; Comp. L. 1915, § 12270.
Affidavits in defense, see Jud. Act, chap. V, § 19; Comp. L. 1915, § 12286.
Before justices, see Jud. Act, chap. LXXIX, § 3; Comp. L. 1915, § 14444.
Of witnesses for refusal to answer, see Jud. Act, chap. XVII, § 75 et seq.; Comp. L. 1915, § 12563 et seq.

¶ 101. A hearing and opportunity for defense or excuse is necessary before one can be imprisoned under Comp. L. 1857, § 4077 (How. St., § 7260) for refusal to obey an order for the payment of temporary alimony, etc.—Steller v. Steller, 25 Mich. 159.

¶ 102. The refusal of a court to give the respondent in a proceeding, as for a criminal contempt after the return of an order to show cause, a reasonable time in which to prepare his defense, and to proceed forthwith to adjudge him guilty on his admission of the publication of the alleged contemptuous matter, is erroneous.—In re Dingley, 182 Mich. 44.

§ 32. ——Contempt in presence of court.

Provision for summary commitment, see Jud. Act, chap. V, § 2; Comp. L. 1915, § 12269.

¶ 103. A circuit judge may take cognizance of his own knowledge of contempts committed during the sitting of the court, and in its "immediate view and presence," and may proceed to punish summarily persons guilty of such contempts, basing his action entirely upon his own knowledge.—In re Wood, 82 Mich. 75.

¶ 104. The circuit court may on its own motion punish as for a contempt a person who attempts, by bribing a juror, to bring about a disagreement of the jury in a pending suit; and this though such attempt has not injured either party.—Langdon v. Wayne Circuit Judges, 76 Mich. 358.

¶ 105. Where criminal contempt is direct the court of its own motion acts summarily in its punishment; if constructive the court upon petition or affidavits present by warrant or attachment brings the offending party before it to answer the charges preferred against him.—In re Smith, 144 Mich. 39.

§ 33. Issues and questions considered.

See also ante ¶ 7.

¶ 106. Whether a freight tariff applies to the branch lines of a carrier held a question for the State Railroad Commission, and not for the court in a proceeding against the carrier for contempt in failing to obey a writ of mandamus requiring it to put the tariff into operation.—Michigan Railroad Commission v. Detroit & Mackinac Ry. Co., 185 Mich. 649.

¶ 107. On a proceeding for contempt in violating an injunction against interference with possession of land, it cannot be claimed that the bill did not show complainant in possession of the land where the bill expressly alleged that as a fact and on a motion to dissolve the possession was found in complainant; such question is for the chancery court on the hearing of the motion, and will not be reviewed.—Swett v. Thorkildsen, 115 Mich. 314.

¶ 108. The determination of the circuit court in chancery as to whether a creditor's bill should be dismissed on the ground that there was an adequate remedy at law cannot be attacked in a proceeding to adjudge the defendant guilty of contempt in refusing to comply with an order made requiring him to execute an assignment to a receiver.—Twombly v. Klersy, 146 Mich. 648.

§ 34. Evidence and burden of proof.

Interrogatories in chancery proceedings, see ante § 30.
Proof by admissions in open court, see post § 35.
Weight and sufficiency of proofs, see post § 36.

¶ 109. A party who alleges that an injunction has been violated, and proceeds for the contempt to punish the offender, must show with reasonable certainty the facts by which the charge may be established.—Verplank v. Hall, 21 Mich. 469, rehearing denied 22 Mich. 80.

¶ 110. In an application to punish a wife for contempt where she had refused to pay over to her husband a sum awarded him in divorce proceedings, and wherein the trustee in bankruptcy of the husband had joined, it was proper to admit evidence of the latter's relation to the case, where it had been alleged in the application, accompanied by a certified copy of the order of appointment, and the wife's answer admitted it.—Carnahan v. Carnahan, 143 Mich. 390.

§ 35. ——Confessions or admissions.

See also post ¶ 112.
Insufficiency of bare admission of fact, see also ante ¶ 102.

¶ 111. In a proceeding as for contempt to enforce a civil remedy a solicitor has no authority to make admissions for his clients; they can be bound only by written admissions, made part of the record, so as to be examinable on appeal; so held where a solicitor admitted the truth of the facts alleged as the basis for contempt proceedings, but denied their legal sufficiency.—Scott v. Chambers, 62 Mich. 532.

§ 36. ——Weight and sufficiency.

Sufficiency of showing for issuance of attachment, see ante § 27.
As to validity of judgment disobeyed, see also post ¶ 124.

¶ 112. Under How. St., § 7259, requiring "due proof" of the facts charged as contempt of court where the alleged misconduct is not committed in the immediate view and presence of the court, one is improperly adjudged guilty of contempt for violation of an injunction, where the case against him of interfering with possession of a church rests entirely upon his own testimony, and where such testimony, though in some respects evasive, fails, when taken as a whole, to make out the alleged violation and shows that he counseled against a riotous invasion and went on the premises afterwards at invitations of officers called to restore order.—Richter v. Kabat, 114 Mich. 575.

¶ 113. Decree adjudging defendants to have been guilty of contempt in violating an injunction, affirmed against a contention by one that he was not shown to have participated in the disobedient act.—Rummell v. Lam, 110 Mich. 685.

¶ 114. An order adjudging a defendant guilty of contempt for the failure to appear before a circuit court commissioner in a receivership proceeding, cannot be attacked because the commissioner had no proof of service of the order appointing the receiver, where it appears that such order directed the commissioner to issue a summons upon request, and such order was before the commissioner.—Central Nat. Bank of Cleveland v. Graham, 118 Mich. 488.

¶ 115. The bill and affidavit accompanying it make a prima facie case for injunction, where, in certiorari brought for the review of contempt proceeding under such injunction, they show that the complainant is the owner in fee of a certain island and the fishing rights pertaining thereto and has been for upwards of twenty years, that the fishing rights are worth $1,000 annually, that defendant had leased such rights for the year past but that his lease had expired, and that defendant was guilty of frequent trespasses both on the island and in the fishing grounds; and that defendant intends to continue these trespasses unless restrained, to the irreparable loss to complainant, and that defendant is wholly irresponsible financially.—Saginaw Lumber & Salt Co. v. Griffore, 145 Mich. 287.

¶ 116. Evidence held sufficient to justify an order adjudging a person guilty of contempt in violating an injunction restraining him from interfering with the complainant's possession of land as administrator.—

Michigan Trust Co. v. McNamara, 182 Mich. 424.

¶ 117. An affidavit filed by a defendant on an order to show cause why he should not be punished for contempt in failing to obey an order of the court to produce certain books and papers which recites that since the making of the order he had not had possession or control of the books or papers, and since the order was made he has made every effort to comply with it but was unable to do so, and he was informed that the books and papers were in the possession of a named person outside the jurisdiction of the court and beyond his own control, is insufficient as being too indefinite and evasive, and the court was justified in disregarding it.—Metheany v. Kent Circuit Judge, 142 Mich. 628.

¶ 118. On a bill to punish a member of defendant union for the violation of an injunction restraining interference with complainant's employees the court found that the lower court had jurisdiction to issue the injunction, and to determine in the contempt proceeding whether defendant was guilty of a wilful disobedience thereof, and that defendant had committed acts specifically forbidden by the injunction.—Enterprise Foundry Co. v. Iron Molders' Union of North America, Local No. 186, 149 Mich. 31.

§ 37. Judgment, commitment and record.

Necessity of finding to sustain sentence of reimbursement of injured party, see post § 42, ¶¶ 134, 139.

Requirement that admissions be of record, see also ante ¶ 111.

Adjudgment of contempt on appeal leaving punishment for court below, see Appeal, ¶ 614.

Specifying indemnity or reparation to be made, see Jud. Act, chap. V, § 23; Comp. L. 1915, § 12290.

¶ 118a. A sentence to pay a stated fine or in default to be imprisoned for a stated time of 24 hours is in the alternative and void under How. St., § 7235, which provides that the punishment may be by fine or imprisonment or both, and that on commitment for nonpayment of the fine the person shall be discharged at the end of 30 days.—Sloman v. Wayne Circuit Judge, 95 Mich. 264.

¶ 119. An order imposing a fine for contempt of court, to be paid within fifteen days, and directing that defendant in default of payment within such time shall be committed to jail for thirty days, without providing for his release on payment of the fine, is bad as an alternative sentence.—Swett v. Thorkildsen, 115 Mich. 314.

¶ 120. An order providing that a person who had refused to pay over a certain sum of money be imprisoned on the failure to pay the same until the further order of the court is not indefinite, although Comp. L. 1897, § 10915, limits the punishment to six months, and section 10913 provides that one shall be imprisoned only until he shall have performed such act or duty.—Carnahan v. Carnahan, 143 Mich. 390.

¶ 121. A finding, in a proceeding for contempt under How. St., ch. 256, that respondent brought a suit against receivers appointed upon the removal of assignees under an assignment for the benefit of creditors and prosecuted without leave of court, warrants an order restraining him from further prosecuting such suit, but does not authorize the court to impose a fine and imprisonment in default of payment thereof under How. St., § 7276, providing that if the court shall adjudge the defendant to have been guilty of the misconduct charged and such misconduct tended to or did impair or impede the rights of any party in a cause pending in the court, he may impose a fine or imprisonment.—In re Appeal of Smith, 86 Mich. 149.

¶ 122. A record of conviction of an attorney for contempt, punished summarily, may, perhaps, be comprehended in the single order and judgment.—Dickinson v. Dustin, 21 Mich. 561.

¶ 123. Under Comp. L. 1897, § 1101, requiring the particular circumstances of the offense to be set forth in the commitment, an order that "it appearing that J. has committed the offense of contempt of court, therefore it is ordered," etc., is defective and will be vacated.—Tweddle v. Grand Rapids Superior Court Judge, 134 Mich. 237.

¶ 124. A bill for divorce, alleging that complainant and defendant lived together as husband and wife until defendant deserted and abandoned complainant, and that, some years before such desertion, defendant informed complainant that he had a former wife living, but had obtained a decree of divorce from her, of which he showed a copy, and that, after consultation, they deemed it unnecessary to have another marriage ceremony performed, and continued to live together as husband and wife until the husband's desertion—does not show the nonexistence of the marital relation, so as to render illegal a commitment for failure to comply with an order for temporary alimony based thereon.—Flanagan v. Flanagan, 116 Mich. 185.

§ 38. ——By justices of the peace.

See Jud. Act, chap. LXXIX, § 4; Comp. L. 1915, § 14445.

For refusal to answer as witness, see Jud. Act, chap LXXIX, § 6; Comp. L. 1915, § 14447.

¶ 125. How. St., § 7107, which extends somewhat the authority of justices of the peace in imposing sentences, does not apply to How. St. § 7077, which governs the imposition of sentence in proceedings for contempt.—Turner v. Smith, 90 Mich. 309.

¶ 126. A sentence by a justice of the peace for contempt under How. St., § 7077, that the respondent pay a fine of $25 within one hour, and in default of such payment that he be imprisoned in the common jail for a period of five days, is an alternative sentence and void.—Turner v. Smith, 90 Mich. 309.

§ 39. Punishment.

Effect of contumacy on punishment, see also ante ¶ 21.
Judgments in alternative for fine or imprisonment, see ante §§ 37, 38.
Construction of judgment as to term, see ante § 37.
Incompatibility of fine and also reimbursement of injured party, see post ¶ 138.
Purgation and discharge, see ante § 17.
Modes of punishment and extent thereof and of fine, see Jud. Act, chap. V, § 20; Comp. L. 1915, § 12287.
When committed in presence of court, see Jud. Act, chap. V, § 2; Comp. L. 1915, § 12269.
By justices of the peace, see Jud. Act, chap. LXXIX, § 2; Comp. L. 1915, § 14443.

¶ 127. A contempt proceeding based upon a violation of an injunction issued in a suit brought by the attorney general to enforce a judgment of ouster against a foreign corporation, is a proceeding to enforce a civil remedy within the meaning of Comp. L. 1897, ch. 301, and hence the punishment is governed by the provisions of that chapter (Comp. L. 1897, § 10915).—In re Osborn, 131 Mich. 118.

¶ 128. Where the trial court gives a sentence for contempt of court not in excess of the penalties provided by statute, it is not that cruel and unusual punishment prohibited by the constitution.—In re McHugh, 152 Mich. 505.

¶ 129. Under How. St., §§ 7279, 7280, imprisonment can only be ordered until the fine is paid or the act performed, but not for a specific term.—Latimer v. Barmore, 81 Mich. 592.

§ 40. ——Extenuation and mitigation.

See also ante ¶ 20.
Of amount payable as indemnity, see post § 42.
Justification or excuse, see ante §§ 14-16.
Purgation by disavowal, see ante § 17.

¶ 130. Where it appeared that disobedience to a mandamus was due to bad advice of counsel rather than to wilful disregard of the order of the court, a severe fine was not inflicted upon the party guilty of contempt.—Burton v. Tuite, 80 Mich. 218.

¶ 131. Where in contempt proceeding to enforce a civil remedy, the court required respondent to pay into court a certain sum of money within forty days, or give bonds to produce it, or stand committed indefinitely, it was held that the statute did not permit such a vague sentence of imprisonment.—Scott v. Chambers, 62 Mich. 532.

¶ 132. How. St., § 7235, provides that contempts may be punished by fine not exceeding $250, or by imprisonment not exceeding thirty days, or both, at the discretion of the court, and that any one committed to prison for the nonpayment of any such fine shall be discharged at the expiration of thirty days, but this does not authorize a sentence imposing a fine to be paid within a specified time, and, in default of payment within that time, imprisonment for a certain number of days.—Sloman v. Wayne Circuit Judge, 95 Mich. 264.

§ 41. ——Immunity from imprisonment.

Constitutional immunity from imprisonment for debt, see Constitutional Law, §§ 193, 194.
Statutory exception of contempt proceedings from prohibition for imprisonment for debt, see Jud. Act, chap. XLIV, § 2; Comp. L. 1915, § 13631.

¶ 133. Comp. L. 1897, § 10342, sec. 45, prohibiting the imprisonment of a female on process in any civil action, is limited to writs of capias ad respondendum, ad satisfaciendum, and kindred process, and does not prohibit a court of chancery from enforcing its decrees and orders against female trustees to compel the delivery of securities or other property, or obedience to injunctions, by contempt proceedings.—Carnahan v. Carnahan, 143 Mich. 390.

§ 42. Indemnity and reparation.

Advice of counsel as defense, see ante § 16.
Commitment for noncompliance with terms of reparation, see also ante ¶ 131.
Statutory provisions, see Jud. Act, chap. V, §§ 21, 22; Comp. L. 1915, §§ 12288, 12289.
Assignment of bond to injured person, see Jud. Act, chap. V, 26; Comp. L. 1915, § 12293.

¶ 134. To authorize under How. St., § 7277, the imposition, in lieu of a fine, of the costs and expenses incurred by the party injured by the misconduct complained of, there must be a finding by the court that an actual loss or injury has thereby been sustained.—Holland v. Weed, 87 Mich. 584.

¶ 135. Neither fine nor costs should be imposed for disobeying an injunction that was obtained by a fraud upon the court and where the party appealing for process of contempt has not been injured.—Holland v. Weed, 87 Mich. 584.

¶ 136. If a defendant disregards an injunction, and is adjudged guilty of contempt, the court may ascertain and order paid the damages suffered by complainant from the violation of the injunction.—Chapel v. Hull, 60 Mich. 167.

¶ 137. That one acted under counsel's advice in violating an injunction will not relieve him from paying the actual damage such violation caused.—Chapel v. Hull, 60 Mich. 167.

¶ 138. Where payment to the injured party is ordered a fine also cannot be imposed.—Haines v. Haines, 35 Mich. 138.

¶ 139. In contempt proceedings to enforce civil remedies, respondent cannot be ordered to reimburse the moving party for the loss and injury which he claims to have sustained by respondent's misconduct, except upon a finding that respondent has been guilty of the contempt charged, that his misconduct has caused actual loss or injury, and of the amount of such injury.—Montgomery v. Muskegon Booming Co., 104 Mich. 411.

¶ 140. In contempt proceedings for the violation of an injunction, damages accruing before the injunction was violated cannot be recovered.—Wilkinson v. Dunkley-Williams Co., 150 Mich. 253.

¶ 141. Where a preliminary injunction in a patent case has been violated, the respondents will not be required to pay the patentee royalty where they were acting in an official capacity and derived no benefit from the infringement, and especially where there is reason to believe that they acted in good faith.—Phillips v. Detroit, 2 Flip. 92, Fed. Cas. No. 11101.

§ 43. Denial of relief as punishment.

¶ 142. A party in contempt is entitled to no favor from the court, such as reopening the case for proofs.—McClung v. McClung, 40 Mich. 498.

¶ 143. A defendant in contempt cannot move to set aside proceedings; but where he has simply failed to comply with the requirements of an interlocutory order, he may move to discharge the order for irregularity.—Peltier v. Peltier, H. 19.

§ 44. Review or supervision by Supreme Court.

Certiorari as proper method of review, see Certiorari, § 16.
Appealability of contempt orders, see Appeal, §§ 17, 36, ¶ 144.
Habeas corpus to liberate person committed illegally, see Habeas Corpus.
Declination on mandamus to vacate contempt proceedings of questions of validity of anterior proceedings, see Mandamus, V.

¶ 144. Under Const., art. 6, § 3, and How. St., § 8577, the Supreme Court has supervisory jurisdiction by original writ to inquire into the justice or propriety of proceedings in contempt, whether before or after commitment, only so far as to ascertain whether the court below has jurisdiction, and is proceeding according to law. But the question of jurisdiction necessarily involves an inquiry whether the conduct alleged was in fact a contempt of the court, and committed under circumstances which authorize it to proceed to punishment therefor, and whether the court is proceeding in the manner prescribed by law.—In re Wood, 82 Mich. 75.

¶ 145. The Supreme Court will not review the evidence to determine whether a sentence and fine for contempt should have been less severe.—In re McHugh, 152 Mich. 505.

CONTEST to CONTINGENCY.

Cross-References.

Contest—
Of elections, see Elections, VI-IX.
On executors' or administrators' accountings, see Estates of Decedents, XII, C.
Of claims against estate, see Estates of Decedents, VI, C.
Of will or probate thereof, see Wills, V.
Context—
As aid to construction of writing, see Contracts, VI; Statutes, V; Wills, VI; and see also topics treating specifically of other writings.
Contingent; contingency—
See generally topics treating of the thing described as contingent.
See also cross-references under "Condition"; "Options."
Legislation, see Constitutional Law, § 95.
Claims against estates, see Estates of Decedents, VI.

Estates in land, see Life Estates, Remainders and Reversions; Wills, VI; Deeds, III; Real Property; Perpetuities.

Optional contracts or terms of contract, see Contracts; Sales; Vendors and Purchasers.

Affecting mutuality or consideration, see Contracts, I, V.

Contracts for attorneys' fees, see Attorneys, II, E; Champerty.

Securities for contingent liability or obligation, see Mortgages; Chattel Mortgages; Pledges.

Contracts of guaranty, indemnity or suretyship, see Guaranty; Indemnity; Insurance; Suretyship.

Interest affecting qualification of officers, etc., see Judges, III; Jury, III; Estates of Decedents, III (fitness for letters); Receivers, II, A.

CONTINUANCES.

TREATS of postponements of civil trials to a later day in term or to another term.

Analysis.

I. **Nature, Grounds and Occasions.**

§ 1. In general.
§ 2. Power and discretion of the court.
§ 3. Grounds and occasions in general.
§ 4. ——Amendment of pleadings or issues.
§ 5. ——Absence of party or counsel.
§ 6. ——Sickness or disability.
§ 7. ——Absence of witnesses or imperfection of evidence.

II. **Motion, Affidavits and Order.**

§ 8. Time or stage of action.
§ 9. Application and showing and opposition.
§ 10. Order.
§ 11. Conditions and terms.

I. NATURE, GROUNDS AND OCCASIONS.

§ 1. In general.

In criminal cases, see Indictment, VI.

Continuance or stay in garnishment proceedings, see Garnishment, VIII.

Stay of proceedings, either generally or incident to appeal or error, see Stay of Proceedings.

On appeal or error, see Appeal, § 140.

Adjournments by arbitrators, see Arbitration, § 9.

Striking cause from calendar, see Calendar, § 6.

Adjournments and continuances of preliminary examination of prisoner, see Arrest, § 30.

Discontinuance of the cause, see Discontinuance.

Continuance by operation of law at end of term leaving case untried, see Jud. Act. chap. VII, § 6; Comp. L. 1915, § 12308.

¶ 1. Adjournments of the circuit court from day to day during the same term are not continuances which are required to be stated in the record.—The Milwaukee v. Hale, 1 D. 306.

§ 2. Power and discretion of the court.

In condemnation proceedings, see Eminent Domain, V.

General rules for review of discretionary orders, see Appeal, XII, D.

¶ 2. The right to continue is incident to the power to hear and determine causes.—Caswell v. Ward, 2 D. 374.

¶ 3. The matter of the continuance of causes is one resting in the sound discretion of the court, which is not reviewable except where there is the clearest evidence of wilful or wanton disregard of justice or a mistake of law.—McNaughton v. Evert, 116 Mich. 141.

¶ 4. The denial of a request for a postponement of trial is within the discretion of the trial court, and such discretion is not reviewable unless abused.—Winklemeir v. Daiber, 92 Mich. 621.

¶ 5. A court may deny a continuance or other discretionary relief sought by a plaintiff guilty of laches.—Sayre v. Detroit, G. H. & M. Ry. Co., 199 Mich. 414.

§ 3. Grounds and occasions in general.

Various specific grounds, see post §§ 4-7.

¶ 6. The denial of a continuance on the ground that the case was not in condition for lack of pleadings to be noticed for the then term of court, was not error where defendant failed to comply with Cir. Ct. Rule No. 10, providing that when a declaration is amended after plea or demurrer, such plea or demurrer shall stand to the amended declaration unless defendant shall within 10 days after receiving such amendment, file another plea or demurrer, but where such defendant filed his plea 35 days after the amendment and not until the case was called for trial.—Marvin v. Bowlby, 135 Mich. 640.

¶ 7. In a suit for money had and received, where credits are sought to be shown in order to rescue the claim from the operation of the statute of limitations, and where the defendant is surprised and unable to go forward for want of preparation, application can be made by the defendant to the trial court for time in which to prepare to meet the unexpected claim.—Cairbre v. McQuillen, 162 Mich. 679.

¶ 8. A husband and wife were killed in the same accident. The husband left a will making his wife his beneficiary therein. The probate court entered an order distributing the husband's estate upon a petition filed by his administrator. The complainant appealed from this order to the circuit court. The wife's administrator did not appear in either court to raise the question of survivorship. The husband's administrator appeared to raise this question in the circuit court. Complainant denied his right so to do, and demanded a continuance. Held, the circuit judge properly exercised his discretion in denying the continuance.—In re Parr's Estate, 161 Mich. 244.

§ 4. ——Amendment of pleadings or issues.

Continuance as condition of leave to amend, see Pleading, VI, C.

¶ 9. An amendment, at the trial, of the declaration, materially changing the issue, entitles defendant to a continuance with costs for the term.—Jennings v. Sheldon, 53 Mich. 431.

¶ 10. Where a declaration on an insurance policy is amended to admit evidence of proofs of loss, a continuance should be granted.—Coryeon v. Providence-Washington Ins. Co., 79 Mich. 187.

¶ 11. A formal amendment, such as an allegation of due care, is properly made at the trial, and is no ground for continuance.—Milliken v. City of St. Clair, 136 Mich. 250.

¶ 12. In an action against a city for injuries alleged to have been caused by falling over a loose plank upon the sidewalk, the court properly permitted an amendment without a continuance so as to allege that the plank was part of the walk since the declaration, in fact, needed no amendment.—Brown v. City of Owosso, 130 Mich. 107.

¶ 13. If a certain specific charge of negligence be changed by amendment at the trial to a substantially different charge of negligence, the defendant must be allowed time to make further preparation for defense.—Ruscyk v. Detroit United Ry., 180 Mich. 399.

¶ 14. Where the purchaser from a retailer of a fur coat is poisoned by the dye on the coat and avers in his declaration that defendant who sold the coat to the retailer was a manufacturer, and an amendment is permitted at the close of all the evidence to obviate a variance from proof that defendant was a jobber and wholesaler, defendant's motion for a continuance, after a postponement of two days, properly supported by affidavits of surprise, inability to immediately procure witnesses and that plaintiff had notice that defendant was not a manufacturer, should be granted even though admissions were made to prevent continuance.—Gerkin v. Brown & Sehler Co., 177 Mich. 45.

¶ 15. A continuance should be granted in an action by a brakeman against a railroad company for damages for personal injuries sustained while cars are being shunted upon a switch where an amended declaration sets up an entirely different set of facts from that set up in the original declaration, and counsel state that they are not prepared to meet the new situation presented by such amended declaration.—Anderson v. Ann Arbor Railroad Co., 187 Mich. 211.

¶ 16. Where leave is granted to amend a declaration as of a certain day, and the purport of the amendment is fully stated and consented to by the defendant, the fact that the written amendment was not served on the latter until a few days before the case came on for trial at a subsequent term, does not entitle him to a further continuance.—Paskvan v. Allouez Min. Co., 185 Mich. 329.

§ 5. ——Absence of party or counsel.

Sickness or disability, see post § 6.
Absence of witnesses or evidence, see post § 7.
Showing to obtain continuance, see post § 9.

¶ 17. Where counsel for one party entered upon the trial of a case knowing that their client, who was not a witness, was absent from the city, held that the court did not abuse its discretion in refusing to hold the case open until the party arrived when there

was no absolute assurance by counsel that he would arrive at the time stated.—Bennett v. Denton, 194 Mich. 610.

§ 6. ——Sickness or disability.

Affidavit of illness, see post § 9.

¶ 18. After complainant tendered an issue to defendant he was afflicted with paralysis and his condition gradually grew worse. The case was continued from time to time for several years until finally upon refusal of complainant's counsel to suggest a guardian, or to try the case without the appointment of a guardian, or to dismiss the suit, the court refused a further continuance. Held, that the court did not abuse its discretion in refusing a further continuance.—Lamoreaux v. Eggleston, 171 Mich. 201.

§ 7. ——Absence of witnesses or imperfection of evidence.

Illness of witness, see also post ¶ 28.
Sufficiency of showing, see post § 9.
Admission to avoid continuance, see 1916 C. C. Rule 41, § 1.

¶ 19. An adjournment of the trial until the following day should have been granted so that a witness who had gone from Detroit to Windsor, Canada, could be produced in order to contradict another witness on a very material fact.—McAllister v. Detroit Free Press Co., 76 Mich. 338.

¶ 20. Refusing to continue a case where the defendants have entered into trial believing a witness is available and afterward found that he is out of town, is not an abuse of discretion.—Leach v. Detroit Elec. Ry., 125 Mich. 373.

¶ 21. The probability that a party will attend court during the trial of his own cause may excuse a failure to exercise the diligence usually required in securing attendance of witnesses in order to obtain a continuance.—Bauer v. Bauer, 177 Mich. 169.

¶ 22. Where a case was called for trial one day earlier than it was set down for and the defendant, in the exercise of diligence, was unable to procure the attendance of a material witness who had left the state, held that the refusal of the trial court to grant a brief adjournment so that such witness could be produced was reversible error.—Dering v. Detroit United Ry., 193 Mich. 238.

¶ 23. In an action on a life insurance policy, held that it was an abuse of discretion on part of the trial court in refusing a continuance to allow defendant an opportunity to perfect the certification of depositions necessary for its defense.—Christophersen v. Metropolitan Life Ins. Co., 199 Mich. 634 (Moore, J., dissenting).

¶ 24. Where a plaintiff in asking to withdraw a juror on the ground of the absence of a witness gives no excuse except that he did not suppose the witness would be needed so soon, the trial court properly refuses the request.—Howcroft v. Detroit United Ry., 163 Mich. 608.

¶ 25. It is not error to refuse continuance for the purpose of procuring the attendance of a medical witness whose testimony would have been incompetent except as to facts admitted by the other party.—Meyer v. Knott, 137 Mich. 714.

II. MOTION, AFFIDAVITS AND ORDER.

§ 8. Time or stage of action.

Case not yet at issue or ready for calendar, see also ante ¶ 6.
At trial to meet unexpected evidence, see also ante ¶ 7.
Showing of excuse for tardy application, see post § 9.
First day of term, see 1916 C. C. Rule 41, § 1.

¶ 26. Where a cause has been noticed for inquest under Circuit Court Rule 99, though no affidavit of merits be filed, the defendant may produce winesses on the inquest, not, of course, to make out any substantial defense to the cause of action, but to show the correct amount due or quantum of recovery; and he may therefore move for a continuance of the cause.—People ex rel. Begole v. Ionia Circuit Judge, 32 Mich. 61.

¶ 27. Defendant's motion for a continuance in an action for conversion, made after the plaintiff's proof is all in and without any showing, is properly overruled, although the court has in effect allowed plaintiff to amend his declaration with reference to the time of the conversion.—Crane Lumber Co. v. Bellows, 116 Mich. 304.

§ 9. Application and showing and opposition.

Delay as ground for denial, see also ante ¶ 5.
Refusal to appoint guardian ad litem as reason for denial of further continuances, see ante ¶ 18.
Incompetency of testimony of absent witness as ground for denial, see also ante ¶ 25.
In criminal cases, see Indictment, VI.
Seeking continuance as general appearance, see Appearance, § 8 ¶ 26.
Showing required, see 1916 C. C. Rule 41, § 1.
Showing and admission to avoid continuance, see 1916 C. C. Rule 41, § 1.

¶ 28. The fact that an application for a

continuance is supported by an affidavit setting forth the serious illness of a witness whose testimony is alleged to be material does not render its denial an abuse of discretion where two continuances have already been granted the affiant, and no showing is made by him, aside from his statement, that the testimony of the absent witness is material, and the circumstances surrounding the case are such as to cast doubt upon the good faith of the application.—McNaughton v. Evert, 116 Mich. 141.

¶ 29. The denial of a continuance was not error, where the motion was not made till the second week of the term, and no excuse was shown for delay in making the motion the first day of the term, under C. C. Rule 22.—Schurtz v. Kelley, 119 Mich. 383.

¶ 30. Where in a suit for commissions a witness subpoenaed for plaintiff fails to appear, it is not error for the trial court to refuse to postpone the trial or to grant a new trial upon such ground, where it is not made to appear that the witness would or could give any testimony concerning a material disputed issue of fact, and where the trial court in the midst of the trial learns for the first time that such witness was subpoenaed or expected to be at court for either party.—Roney v. Healy, 170 Mich. 46. (Moore, C. J., and Steere and Brooke, JJ., dissenting.)

¶ 31. An application for a continuance on the ground of the absence of a material witness cannot be successfully opposed where the affidavit in opposition to the continuance sets up that the absent witness is the husband of affiant who will not consent to his testifying, but does not make it appear upon what subject the witness will testify, nor show such a statement of facts as to take the case out of Comp. Laws 1897, § 10213, How. 2nd Ed., § 12857, which restricts married persons from testifying for or against each other.—Snyder v. Berrien Circuit Judge, 176 Mich. 546.

§ 10. Order.

Recording, see also ante ¶ 1.
Conditions and terms, see post § 11.
Review of grant or denial of continuance, see Appeal, § 396.
Presumption on appeal as to continuances, see Appeal, § 367.

¶ 32. In the absence of a prompt waiver by the moving party of a continuance of a case, the order therefor must be regarded as absolute, and the clause respecting the payment of costs as indicating the terms upon which the continuance is granted. The words used must be treated as words of agreement, rather than of condition.—Barney v. Love, 101 Mich. 543.

§ 11. Conditions and terms.

Refusal of continuance on any terms as inviting subsequent error or as making prior errors harmless, see Saving Questions for Review; Harmless Error.
Continuance as condition of leave to amend, see Pleading, VI, C.
Vacation or attachment for nonpayment of costs imposed, see 1916 C. C. Rule 41, § 2.

¶ 33. Execution does not lie to enforce an order imposing costs as a condition to a continuance, when the continuance has been waived.—People ex rel. Henderson v. Wayne Circuit Judge, 40 Mich. 244.

CONTINUING to CONTINUITY.

Cross-References.

Continuing—
- Facts or conditions, presumption of continuance, see Evidence, II; Indictment, VIII, A.
- Agencies, see generally Agency.
- Business, power of executor, see Estates of Decedents, V, E, X; Wills, VI, F; of partnership business or affairs, see Partnership; by receivers, see Receivers, IV; Corporations, XXIII.
- Contracts, see Contracts, VI, VII; Sales, II.
- Guaranties, see Guaranty.
- Nuisances, see Nuisances.
- Partnerships, see Partnership.
- Trespasses, right to injunction, see Injunctions, II, G.
- Trusts, see Trusts.

Continuity—
- Of adverse possession or prescription, see Adverse Possession, III, C; Easements; Highways, II, A.
- Of tenancy by holding over, see Landlord and Tenant, II.
- Of possession of property as badge of fraud or as notice, see Chattel Mortgages, I, D; Fraudulent Conveyances, I, F; Notice and Record of Title.

E. E. B.
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